1-03

ERIC P. BROTHERS AND WILLS, O'NEILL & MELLK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, an English, journalism and drama teacher, and his law firm sought payment from respondent Board for legal fees incurred by the teacher defending himself against a criminal harassment charge brought by a student. The Board contended the acts underlying the criminal charge did not arise out of and in the course of the performance of teaching duties.

The ALJ found that petitioner's behavior was not professionally appropriate. The ALJ concluded that the criminal charges specified in the complaint did not arise out of and in the course of the performance of petitioner's duties as a teacher. The ALJ concluded that petitioner was not entitled to reimbursement from respondent Board for the course of defending against the criminal proceedings subsequent to the complaint.

The Commissioner noted that petitioner had not satisfied the requisite legal standard which would entitle him to indemnification of his legal fees and expenses pursuant to *N.J.S.A.* 18A:16-6.1. The Commissioner adopted the findings and determination in the Initial Decision as his own.

January 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8515-01

AGENCY REF. NO. 446-10/01

ERIC P. BROTHERS and WILLS, O'NEILL & MELLK,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,

Respondent.

G. Robert Wills, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

John E. Collins, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: October 1, 2002 Decided: November 15, 2002

BEFORE **ANTHONY T. BRUNO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners seek payment from respondent ("Board") for legal fees incurred by a teacher defending himself against a criminal harassment brought by a student. The Board rejected

payment alleging that the acts underlying the criminal charge did not arise out of and in the course of the performance of teaching duties.

On November 20, 2001, this matter was transmitted to the Office of Administrative Law as a contested cause pursuant to *N.J.S.A.* 52:14B to –15 and *N.J.S.A.* 52:14F-1 to –13. Prehearing conferences were scheduled for May 17 and May 24, but adjourned because of scheduling conflicts. The prehearing was conducted on June 3 and a Prehearing Order entered on June 5. The Prehearing Order provided a briefing schedule in anticipation of cross-motions for summary decision. Oral argument relative to the motions was heard on October 1, 2002.

The hearing record closed October 1, 2002.

FACTUAL CONSIDERATIONS

The parties are in virtual agreement that the material facts in this matter are:

Eric Brothers ("Brothers") was an English, journalism and drama teacher at Bound Brook High School during the 1999-2000 school year. In addition to teaching structured classes Brothers also was the Director of the school's Drama Club.

C.B. was a sophomore at Bound Brook High School during the 1999-2000 school year. C.B. was a member of the Drama Club that year, participating in the Club's first semester production of the play "Every Man." C.B. was to also play a role in the Club's second semester play, "Carousel."

In early February 2000, Brothers informed members of the Drama Club that he would be leaving Bound Brook High School in March for a job in another school district. On February 14, 2000, Brothers and C.B. exchanged e-mail addresses and began e-mail correspondence on February 16. E-mail continued on a regular basis through the weekend of February 26 and 27.

Brothers sent C.B. the following e-mail on February 26 at 10:51 p.m.:

> Hey pretty girl! Wouldn't it be nice if I could pop out of your computer screen right now? How would you explain that to your mother? I bet you have cute PJs. I guess I should stop right there, right? Why do I get nervous when I see your name on my e-mail list? Why do I get nervous when I don't see your name on my e-mail list? Do you know what I saying" (I know I don't)

The next school day was Monday, February 28. Brothers met C.B. at noon in the hall of the school near Brother's classroom and C.B.'s locker. Brothers asked C.B. into his classroom. No one else was in the room. Brothers told C.B. that he was developing strong feelings for her and Brothers believed she had feelings for Brothers. C.B. replied that she did not, that her feelings for Brothers were not on that level, and they were only friends. As C.B. was leaving the room Brothers apologized.

After that school day and after play practice Brothers again apologized to C.B. and asked C.B. to keep the matter between them.

The next day C.B. and her mother went to the Bound Brook Police Department to report the incidents. Based upon the information provided by C.B. a complaint was prepared by the police charging Brothers with harassment, in violation of *N.J.A.C.* 2C:33-4(a).

> The text of the complaint is:
>
> within the jurisdiction of this Court, with purpose to harass another, make or cause to be made a communication of communications in a manner likely to cause annoyance or alarm by sending electronics mail to victim C.B. over a two week period suggestive of a teacher-student physical relationship between them and by having two conversations in school on 2/28/200 with the victim wherein he expressed his personal feelings for the victim and that he wanted their conversation kept secret from other people which caused the victim to feel scared, hurt and distrustful of him in violation of *N.J.S.A.* 2C-33-4a.

A trial held in Bound Brook Municipal Court on November 16 and 20, 2000. At the conclusion of the trial the municipal court judge found Brothers "guilty to the harassment charge." On appeal to the Superior Court, Law Division, the conviction of Brothers was reversed.

Petitioner, Wills, O'Neill & Mellk submitted its bill for legal services rendered to Brothers in defending Brothers against the criminal complaint. The invoice details 94.70 hours of professional services at $175 per hour ($16,572.50) and disbursements of $1,237 for a total legal fee and disbursements of $17,809.50.

ANALYSIS AND CONCLUSION

Although Wills, O'Neill & Mellk directed its bill to the Bound Brook Board of Education the statute addresses reimbursement to any person holding an office, position or employment for the cost of defending against criminal action "instituted against any such person for any such act or omission [arising out of and in the course of the performance of the duties of such office, position, employment]" when the criminal action is "dismissed or result in a final disposition in favor of such person . . .". *N.J.S.A.* 18A:16-6.1. The cost of defending the criminal action includes reasonable counsel fees and expenses of the original trial and all appeals.

The issue in this matter is, "Did the charged acts of harassment against Brothers arise out of and in the course of the performance of his duties as teacher in Bound Brook High School?"

Counsel for the respective parties suggest that this matter is controlled by the decisions in *Bower v. Board of Education of the City of East Orange,* 149 *N.J.* 416 (1997) and *Board of Education of Florham Park v. Utica Mutual Insurance Company, et al.* 172 *N.J.* 300 (2002). The Court in the *Board of Education of Florham Park* case, *Id.* at p. 309, mention the two-part standard for determining whether board of education employees are entitled to indemnification of counsel fees as explained in *Bower.* The Court did not address the question of whether the charged acts arose out of and in the course of the performance of the duties of the position. The majority opinion addressed the final disposition of charges in favor of the Board's employee as the trigger of the board's liability and the liability of the 2 insurance companies insuring the board.

In *Bower v. Board of Education of the City East Orange, supra,* the question of whether the charged act on omission or which the criminal charges were based "arose out of and in the

favor of the employee **and** 2) any act or omission upon which the criminal charge is based must arise out of and during the course of the employee's performance of the duties and responsibilities of his position.

Here, there is no dispute that the first prong of the requisite test was satisfied by the Superior Court's reversal of petitioner's Municipal Court conviction. Thus, the remaining issue is whether the underlying criminal charges arose within the legitimate scope of petitioner's teaching duties. A reasoned reading of the record here, including the transcript of the Municipal Court hearing,[1] which provides evidence with respect to the specific conduct of petitioner which formed the basis of the criminal charges brought against him,[2] compels the Commissioner to conclude that it cannot credibly be argued that such actions of petitioner *arose out of* the performance of the duties and responsibilities of his employment as a high school English, journalism and drama teacher. *See Scirrotto v. Warren Hills Board of Education*, 272 *N.J. Super.* 391 (App. Div. 1994). Consequently, petitioner has not satisfied the requisite legal standard which would serve to entitle him to indemnification of his legal fees and expenses pursuant to *N.J.S.A.* 18A:16-6.1.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1|03|03

Date of Mailing: 1|03|03

[1] Hearing was conducted on November 16, 2000 and November 20, 2000 in Bound Brook Municipal Court, Somerset County.

[2] Contrast *Bower, supra.*

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

2-03

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

January 3, 2003

OAL DKT. NO. EDU 9273-01
AGENCY DKT. NO. 338-8/01

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

The record of this matter, including the advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and a copy of a notification sent to petitioner by OAL on November 23, 2002, providing 13 days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 1|03|03

Date of Mailing: 1|03|03

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

5-03

3-03

A.R., on behalf of minor child, R.L.Q.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

January 3, 2003

OAL DKT. NO. EDU 1466-02
AGENCY DKT. NO. 481-11/01

A.R., on behalf of minor child, R.L.Q.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and a copy of a notification sent to petitioner by OAL on August 20, 2002, providing 13 days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 1|03|03

Date of Mailing: 1|03|03

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

4-03

4-03

C.E.E., on behalf of minor child, T.J.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 3, 2003

OAL DKT. NO. EDU 9274-01
AGENCY DKT. NO. 343-9/01

C.E.E., on behalf of minor child, T.J.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on October 16, 2002, providing petitioner 13 days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1|03|03

Date of Mailing: 1|03|03

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

5-03

5-03

FRANKLIN LAKES EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Education Association alleged that the Board assigned the duties of a certified school nurse to an unqualified and uncertified person, now acting in the position of a certified school nurse.

The ALJ determined that the Association conceded that the school health aide was not performing the duties specifically reserved to the certified school nurse. The Association, however, alleged that the Board did not provide adequate school nursing services to the school in question. The ALJ determined that that was not an issue raised in the verified petition and no amended petition was submitted. Therefore, based on the Association's concession that the school health aide was not performing the duties of a school nurse and, further, based on statement of a supervisor that the health aide was supervised by a certified school nurse and himself, the ALJ found that there were no genuine issues of material fact to be resolved. The ALJ granted summary decision to the Board. The petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

January 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 1596-02

AGENCY DKT. NO. 498-12/01

FRANKLIN LAKES EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., appearing for Petitioner
(Zazzali, Fagella & Nowak, attorneys)

Maria A. Giammona, Esq., appearing for Respondent
(Fogarty & Hara, attorneys)

Record Closed: August 20, 2002 Decided: November 18, 2002

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

This matter was opened for consideration by counsel for Respondent, Board of Education of Franklin Lakes, (Respondent or Board), on motion for summary decision

pursuant to *N.J.A.C.* 1:1-12.5. An extension of time in which to file an initial decision was sought by the undersigned and was granted.

This application is predicated on two legal issues which, Respondent asserts, are dispositive of the matter. Moreover, Respondent contends that the facts relating to the two issues are undisputed. Those issues are:

a) that the Board is not required to have a certified school nurse physically present when a non-certified school nurse performs services supplemental to those provided by the certified school nurse; and

b) the school health aide is neither performing the duties of a certified school nurse nor performing duties that are required to be supervised by a certified school nurse.

In its opposition to the application for summary decision, Petitioner concedes that the school health aide is not performing the duties specifically reserved to the certified school nurse but goes on to assert that there remains a significant dispute over whether the Board provides adequate school nursing services to the students assigned to the specific school in question, an issue not raised in the verified petition.

Petitioner also raises the issue of the adequacy of the services to be provided by the school health aide, also an issue which was not asserted in the verified pleading. Moreover, Petitioner asserts ". . . it is anticipated that many more of Respondent's special education students and those with specific medical needs will be assigned to space outside of the school buildings to which . . . certified school nurses are assigned for the 2002-03 school year in violation of *N.J.S.A.* 18A:40-3.3. Once again, this issue was not raised in the pleadings.

Petitioner did, however, allege violation of the following statutes:

> *N.J.S.A.* 18A:6-38, which gives the state board the authority to issue certificates and direct or supervise, among other

things, the rendering of nursing services to students in public schools operated by boards of education:

N.J.S.A. 18A:27-2, which prohibits employment without a certificate; and

N.J.S.A. 18A:40-1 *et seq.*, which deals with the promotion of health and prevention of disease.

None of these statutes deals with the adequacy of services rendered by school nurses or school health aides. In addition, Petitioner has conceded that the school health aide is not performing duties required to be performed or supervised by a certified school nurse.

Petitioner alleges violations of the following regulations in the pleadings:

N.J.A.C. 6:11-3.1, which states that certification is required for any employee who is performing duties regulated through certification rules;

N.J.A.C. 6:11-4.6, which governs paraprofessional approval;

N.J.A.C. 6:11-11.7, which set forth the requirements to obtain a certificate as a school nurse in elementary, secondary and vocational schools; and

N.J.A.C. 6A:16-2.1, dealing with the appointment and duties of school physicians and nurses, as well as the development of a plan for the provision of nursing services including the circumstances under which non-certified school nurses may be assigned.

The provisions of *N.J.A.C.* 6:11-3.1 require determination of whether a school health aide must be certified. School districts are permitted by regulation to supplement the services provided by the certified school nurse with non-certified registered nurses who are assigned to the same school building or complex as the certified nurse. See also *N.J.S.A.* 18A:40-3.3.

In the case at bar, Pizzolo, the school health aide, is a registered nurse who is supervised by, among others, one of the two certified school nurses employed by the district, according to the affidavit of Dr. John Caliso, Supervisor of Special Services. Pizzolo has been assigned in accordance with her job description and does not perform the duties of a certified school nurse, according to Caliso.

Although *N.J.S.A.* 18A:40-3.3 is implicated in the determination of whether school health aides are required to be certified, it is not one of the statutes of which Petitioner alleged violation in the pleadings. Accordingly, the issue raised in Petitioner's responding papers regarding the "appropriate provider" for medical needs of special education students and students requiring specialized medical care is beyond the four corners of the pleadings.

It is well-established that summary decision is granted when the papers and discovery filed in a case, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

In this case, Petitioner filed a verified petition, which by its very nature is limited to the facts within the personal knowledge of the person signing the petition. These are the facts to which Respondent must reply. Respondent/Movant asserts that, given the nature of a verified petition, certified discovery and the response brief, it is clear that Petitioner seeks to allege a completely new cause of action, in its response to this application, that the services provided by the district were inadequate, which was not contemplated, even remotely in the context of the pleadings as filed. I do so **FIND**.

At this juncture, before any proofs have been taken and before hearing has been begun, the appropriate course would have been to seek leave to amend pleadings. This was not done.

Accordingly, based on Petitioner's concession that the school health aide is not performing the duties of a certified school nurse and further, based on the uncontroverted statement of Caliso that Pizzolo is supervised by a certified school nurse and Caliso himself, I **FIND** that there are no genuine issues of material to be resolved in this matter. I **CONCLUDE**, therefore, that summary decision in favor of Respondent is appropriate.

ORDER

It is, therefore, hereby **ORDERED** that summary decision be and hereby is **GRANTED** in favor of Respondent; it is further **ORDERED** that this petition be and hereby is **DISMISSED.**

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

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

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

November 15 2002
DATE

Maria Mancini La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

November 22 2002
DATE

M. Kathleen Duncan (Ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 22 2002

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 1596-02
AGENCY DKT. NO. 498-12/01

FRANKLIN LAKES EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision of the Administrative Law Judge, for the reasons set forth therein. Accordingly, the Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1|06|03

Date of Mailing: 1|06|03

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

6-05

6-03

BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL-TO-CAREER AND COLLEGE INITIATIVES AND THOMAS A. HENRY,	:	DECISION
RESPONDENTS.	:	

January 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9651-02

AGENCY DKT. NO. 441-10/01

MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL-TO-CAREER AND COLLEGE INITIATIVES; and THOMAS A. HENRY,

Respondents.

John N. Mills, Esq., for petitioner
(Mills & Mills, attorneys)

Kimberly Lake Franklin, Deputy Attorney General, for respondents
(David Samsom, Attorney General of New Jersey, attorney)

Record Closed: November 20, 2002 Decided: November 21, 2002

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 19, 2001, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to settle this matter and have prepared the attached consent order indicating the terms of settlement.

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

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

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

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

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

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

Nov. 21, 2002
DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

11-25-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 2 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

al

DAVID SAMSON
Attorney General of New Jersey
Attorney for Respondents,
Department of Education
R.J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625

By: Kimberley Lake Franklin
Deputy Attorney General
(609) 633-1402

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2002 NOV 20 P 4:06

MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL DOCKET NO. EDUOT 09651-01N
V.	:	Agency Ref. No. 441-10/01
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL-TO-CAREER and COLLEGE INITIATIVES; and THOMAS A. HENRY	:	**CONSENT ORDER OF SETTLEMENT**

Petitioner, Morris County Vocational School District ("Morris County" or "Petitioner"), through its Attorney, John M. Mills III, Esquire of the firm Mills & Mills and Respondent, New Jersey Department of Education, Office of School-to-Career and College Initiatives; and Thomas Henry ("Department" or "Respondent") through its attorney, the Honorable David Samson, Attorney General of the State of New Jersey, Kimberley Lake Franklin, Deputy Attorney General, appearing, hereby stipulate to the following terms of settlement:

1. On or about May 10, 2001 petitioner was advised that an internal review of the Tech-Prep grant program disclosed that the program was eligible for award consideration.

2. On or about June 26, 2001 Dr. Thomas A. Henry advised petitioner that the Office of School-to-Career Initiatives will not be certifying Morris County as eligible for continued funding for FY 2001 and that all costs associated with the FY 2000 Tech Prep award were disallowed. This decision was based on petitioner's failure to submit required reports documenting the progress of program goals for the FY 2000 grant year. Petitioner was further advised to reimburse the Department of Education ("Department") the sum of $96, 231.

3. On or about October 11, 2001 Morris County filed a petition in appeal of this determination. Morris County explained the late filings by detailing personnel problems existing in the district during the relevant time period.

4. The Petition was subsequently transferred to the Office of Administrative Law as a contested case.

6. The parties thereupon entered into discussions to amicably resolve this matter in the public interest.

7. The Department conducted subsequent reviews of the program and determined that, although the petitioner was clearly responsible for the failure to submit required reports in a timely matter and admitted to such, the district has taken significant measures to improve their administration and the grant management

process. In addition, the review revealed that all required reports had ultimately been submitted to the Department and that all proposed activities of the grant had been completed.

8. Based on the settlement discussions and the review of the program, the Department has determined that petitioner shall not be required to reimburse the Department $96, 231 for FY 2000 costs and shall receive certification for FY 2001 Tech-Prep funding. This decision is based on the district's subsequent demonstrated improvement efforts and the related hardship that this would have placed on the district if ordered to return the funds. This decision is based upon the following conditions:

A. The Department shall provide increased monitoring of all related grant programs, including Perkins, at the Morris County Vocational School District.

B. The monitoring shall include on-site visits.

C. All required reports will be made on a timely basis.

9. The parties agree that this Stipulation of Settlement fully resolves all issues between them arising from the Petition filed in this matter under Docket No. EDUOT 09651-01N.

DAVID SAMSON
Attorney General of the State
of New Jersey
Attorney for Respondent,
N.J. Department of Education

Kimberley Lake Franklin, DAG

DATED: 11/18/2002

MILLS & MILLS
John M. Mills
Attorney for Petitioner,
Morris County Vocational
School District

John M. Mills, Esq.

DATED: 11-14-02

SO ORDERED THIS 20th DAY OF Nov 2002

HONORABLE KENNETH R. SPRINGER, A.L.J.

OAL DKT. NO. EDU 9651-02
AGENCY DKT. NO. 441-10/01

BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL-TO-CAREER AND COLLEGE INITIATIVES AND THOMAS A. HENRY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1|06|03

Date of Mailing: 1|06|03

7-03

7-03

T.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

January 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

WITHDRAWAL

OAL DKT. NO. EDU 6708-02

AGENCY DKT. NO. 319-10/02

T.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,

Respondent.

Lee Gingsburg, Esq., for petitioner (Camden Regional Legal Services, Inc.)

Anthony Padovani, Esq., for respondent (Sahli and Padovani, attorneys)

Record Closed: November 15, 2002 Decided: November 20, 2002

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter consists of an appeal by petitioner from the decision to expel by the respondent Board of Education on Sept. 10, 2002 and a request for emergent relief to have the petitioner reinstated to student status.

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (hereinafter "OAL") for determination as a contest the case on October 10, 2002[1]. Thereafter, this Administrative Law Judge conducted a telephone conference call with both attorneys on October 31, 2002, at which time a settlement conference was scheduled for November 15, 2002. However, on November 14, 2002, by letter of his attorney, petitioner, who is now 19 years of age, indicated that he no longer wished to pursue his appeal, requested the settlement conference be canceled and further requested this matter be dismissed. The hearing record closed based on that request.

I, therefore, **CONCLUDE** that this matter is no longer a contested case before the OAL.

I make that **CONCLUSION** after having considered the request of petitioner in this matter. I also **CONCLUDE** that the withdrawal by petitioner is appropriate at this time based upon the foregoing. It is **ORDERED** that the withdrawal of petitioner is granted and this matter is herewith **DISMISSED**.

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

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

[1] The matter was assigned to the Administrative Law Judge by the Acting Director of the OAL pursuant to *N.J.S.A.* 52:14F-5(o).

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

November 20, 2002
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

11-25-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NOV 26 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

lam

CAMDEN REGIONAL LEGAL SERVICES, INC.

745 MARKET STREET
CAMDEN, NEW JERSEY 08102-1117
PHONE (856) 964-2010 FAX (856) 338-9227
TDD (856) 964-1204 (For hearing or speech impaired)

LARRY D. DeCOSTA
EXECUTIVE DIRECTOR

DAVID T. RAMMLER
SUPERVISING ATTORNEY
SONIA BELL, ESQ.
ALAN W. LESSO, ESQ.
GRAYCE E. WIGGINS, ESQ.
LEE GINSBURG, ESQ.
DAVID PODELL, ESQ.

MARIANNE R. BROWN
SUPERVISING ATTORNEY
CYNTHIA L. GEHRING, ESQ.
NICHOLAS A. JONES, ESQ.
LINDA M. GOFF, ESQ.

November 14, 2002

VIA FAX # (609) 588-6536

The Honorable John Schuster
Administrative Law Judge
Office of Administrative Law
9 Quakerbridge Plaza
Post Office Box 049
Trenton, NJ 08625-0049

RECEIVED
2002 NOV 14 P 3:02
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Re: *T.L. v. Borough of Pine Hill Board of Education,*
Docket No. EDUOS-06708-02S
Agency Reference No. 319-10/02

Dear Judge Schuster:

I am writing to inform you that petitioner, T.L., wishes to withdraw his hearing request in the above-referenced matter. The reason for this request is that T.L. has informed me that he no longer wishes to pursue his appeal. While the reason for T.L.'s decision remains unclear to me, it appears that T.L. is extremely depressed as a result of the circumstances surrounding this case and no longer has the will to fight respondent's decision to exclude him from receiving any type of educational services. Therefore, I believe it is appropriate to cancel the settlement conference that is scheduled for November 15, 2002 at 1:00 P.M. and to dismiss the case.

Despite the foregoing, I feel compelled to state that both myself and T.L.'s mother, Sheila Lomax, strongly disagree with T.L. and we are not certain that he fully comprehends the consequences of his decision. We also believe that the reasons behind his decision are not rational or reasonable. However, since T.L. is currently 19 years old and he has not been adjudicated to be incompetent, I am not aware of any authority that

would allow the case to go forward even though T.L.'s mother would be willing to step in as the Petitioner. In fact, since T.L. has informed that he still wants to attend school in Respondent's district, both Ms. Lomax and myself believe that substituting Ms. Lomax as Petitioner would not be a futile gesture. This is because if the decision of the Court were to require Respondent to place T.L. in their district, T.L. has informed me that he would in fact attend.

I apologize for not being able to inform you of this development sooner. However, T.L. did not reach a final decision on this matter until today.

Based on the foregoing, I assume that tomorrow's settlement conference will be canceled and the case dismissed. However, if you believe that it would still be useful or appropriate to meet with you, both myself and Ms. Lomax remain willing and able to attend the conference without T.L.

Thank you for your attention to this matter. I would greatly appreciate it if you or your secretary could get back to me and my adversary (Mr. Padovani) as soon as possible with your response to this letter. My direct telephone number is (856) 964-2010, extension 246.

Sincerely,

Lee Ginsburg, Esquire

Cc: Anthony Padovani, Esquire (Via Fax# 609-561-3056)
Torrance Lomax
Sheila Lomax

OAL DKT. NO. EDU 6708-02
AGENCY DKT. NO. 319-10/02

T.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this emergent matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner affirms the Initial Decision for the reasons set forth therein. Accordingly, the Petition of Appeal and Motion for Emergent Relief are hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1|06|03

Date of Mailing: 1|06|03

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

8-03

C.B., on behalf of minor child, M.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 8, 2002

OAL DKT. NO. EDU 2485-01
AGENCY DKT. NO. 65-3/01

C.B., on behalf of minor child, M.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/6/03

9-05

C.Z., on behalf of minor child, L.C.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 8, 2002

OAL DKT. NO. EDU 4694-01
AGENCY DKT. NO. 153-5/01

C.Z., on behalf of minor child, L.C.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/7/03

10-03

HANNAH EDGE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

AND

HANNAH EDGE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT.

AND

HANNAH EDGE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

RESPONDENT.

November 8, 2002

OAL DKT. NOS. EDU 08396-96; 03821-97 AND 10802-97 (CONSOLIDATED)
AGENCY DKT NOS. 307-7/96; 53-2/97 AND 403-10/97

HANNAH EDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
AND		
HANNAH EDGE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	
AND		
HANNAH EDGE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/7/03

11-03

DAVID ANDERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 8, 2002

OAL DKT. NO. EDU 08024-00
AGENCY DKT. NO. 295-8/00

DAVID ANDERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PLEASANTVILLE, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/8/03

12-03

CHRISTOPHER WANNEMACHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

November 8, 2002

OAL DKT. NO. EDU 9913-00
AGENCY DKT. NO. 383-9/00

CHRISTOPHER WANNEMACHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/8/03

13-03

GEOFFREY BRIGNOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

November 8, 2002

OAL DKT. NO. EDU 676-00
AGENCY DKT. NO. 11-1/99

GEOFFREY BRIGNOLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RED BANK REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 11/8/02

Date of Mailing: 1/8/03

16-03

J.R., on behalf of minor child, C.M.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WESTVILLE, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 9, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2848-02
AGENCY DKT. NO. 121-4/02

J.R., O/B/O C.M.K,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WESTVILLE, GLOUCESTR COUNTY,
Respondent.

Jeffrey H. Pooner, Esq., for petitioner

Russell E. Paul, Esq., for respondent

Record Closed: December 16, 2002 Decided: December 17, 2002

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

This matter was transmitted to the Office of Administrative Law (OAL) on May 17, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

December 17, 2002
DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

December 19, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 20 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

Russell E. Paul, Esquire
39 South Broad Street
Woodbury, NJ 08096
(856) 848-2100
Attorney for Respondent
Westville Board of Education

J.R., On Behalf of Minor, C.M.K.	:	DEPARTMENT OF EDUCATION
	:	BUREAU OF CONTROVERSIES
vs.	:	AND DISPUTES
	:	
Board of Education of the Borough of Westville, Gloucester County	:	AOL DOCKET NO. EDUOS 02848-02S
	:	AGENCY REF. NO. 121-4/02
	:	
	:	CONSENT ORDER

THIS MATTER being scheduled for Administrative Hearing before the Court on Monday, December 16, 2002, and

THE PARTIES having amicably resolved the matters in dispute, in advance of same, desiring to set forth their Agreement for the purpose of entering into a Consent Order,

IT IS AGREED that the Board of Education of the Borough of Westville, County of Gloucester was seeking payment of tuition from Joann Reiber on behalf of a minor, C.M.K., in the amount of $2,450.00, and Joann Reiber on behalf of a minor, C.M.K., has offered to pay tuition to the Board of Education of the Borough of Westville in the amount of $2,000.00 with payments to be made at $200.00 per month, starting on January 1, 2003, until paid in full.

NOW THEN THEREFORE, it is ORDERED this day of December, 2002 as follows:

1. Joann Reiber is Ordered to pay the amount of $2,000.00 in tuition on behalf of the minor, C.M.K., to the Westville Board of Education with payments to be made at $200.00 per month commencing on January 1, 2003, until said amount is paid in full. The Board of Education of the Borough of Westville agrees to accept said lesser amount of tuition and payment of same as aforesaid in full and complete satisfaction of any claim for tuition.

2. This Order shall be effective immediately.

3. In the event the payments are not made pursuant to this Order in a timely fashion, the Board of Education of the Borough of Westville shall be allowed to file this Order with the Superior Court of New Jersey as a Judgment.

DOUGLAS H. HURD, JUDGE AOL

I have read and agree to entry of the above-captioned Consent Order.

JOANN M. REIBER

BARBARA GLASS
Board Secretary

OAL DKT. NO. EDU 2848-02
AGENCY DKT. NO. 121-4/02

J.R., on behalf of minor child, C.M.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WESTVILLE, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/9/03

Date of Mailing: 1/9/03

17-03

ENGLEWOOD TEACHERS' ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, AND JOYCE BAYNES, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	
	:	

December 30, 2002

OAL DKT. NO. EDU 5176-01
AGENCY DKT. NO. 89-4/01

ENGLEWOOD TEACHERS' ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, AND JOYCE BAYNES, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/09/03

18-03

ANN BRAUN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF EAST BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 30, 2002

OAL DKT. NO. EDU 2396-01
AGENCY DKT. NO. 74-3/01

ANN BRAUN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF EAST BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

19-03

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.A.D., on behalf of minor child, C.B.,	:	DECISION
RESPONDENT.	:	
	:	

December 30, 2002

OAL DKT. NO. EDU 8983-00
AGENCY DKT. NO. 360-9/00

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.A.D., on behalf of minor child, C.B.,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Judith Weiss

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

20-03

JOHN HOFFMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

December 30, 2002

OAL DKT. NO. EDU 10343-98
AGENCY DKT. NO. 461-10/98

JOHN HOFFMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

21-03

T.A.M. and D.M.M., on behalf of minor child, M.C.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CHATHAMS, MORRIS COUNTY AND VINCENT D. YANIRO,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

December 30, 2002

OAL DKT. NO. EDU 7056-01
AGENCY DKT. NO. 239-7/01

T.A.M. and D.M.M., on behalf of minor child, M.C.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF CHATHAMS, MORRIS COUNTY AND VINCENT D. YANIRO,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

23-03

B.A., on behalf of minor child, B.A., III,	:	
PETITIONER,	:	
V.		
	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,	:	DECISION
	:	
RESPONDENT.		
	:	

1/13/03

AGENCY DKT. NO. 328-10/02

B.A., on behalf of minor child, B.A., III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

This matter having been opened before the Commissioner of Education by way of a Petition of Appeal, filed on October 18, 2002, claiming that petitioner and his son are domiciled in the Township of Lyndhurst so as to entitle the child to attend school in the Lyndhurst School District free of charge pursuant to *N.J.S.A.* 18A:38-1, and seeking an Order requiring the Board of Education of the Township of Lyndhurst to admit petitioner's son, B.A., III, to Lyndhurst High School; and

The Commissioner having advised petitioner and the Board that *N.J.S.A.* 18A:38-1 requires that no child shall be denied admission to the District's schools during the pendency of proceedings in a residency dispute; and

The Commissioner having directed the Board by notices dated October 21, 2002 and November 22, 2002 to file an Answer to the petition; and

Lucy Erminio having acknowledged receipt of service of the November 22, 2002 notice by signing the certified delivery receipt on behalf of the Board; and

As of this date, the Board not having filed an Answer to the petition, and each count of the petition having therefore been deemed to be admitted; and

Petitioner having averred that he and his son are domiciled in the Township of Lyndhurst at 640 Riverside Avenue, and that his son sometimes sleeps at his grandmother's house, who also resides in Lyndhurst, when petitioner works late; now therefore

IT IS ORDERED on this 10th day of January 2003 that summary decision shall be granted in favor of petitioner. Petitioner's son, B.A., III, is therefore deemed to be domiciled in the Lyndhurst School District so as to entitle him to attend school free of charge in that District, pursuant to *N.J.S.A.* 18A:38-1. *

COMMISSIONER OF EDUCATION

Date of Decision: 1/13/03

Date of Mailing: 1/13/03

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

CHARLIE OUTLAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

January 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU-3868-02
AGENCY DKT. NO. 117-4/02

CHARLIE OUTLAW,
Petitioner,
v.

DEPARTMENT OF EDUCATION,
Respondent.

Anthony Mazza, Esq., for petitioner
(Bendit Weinstock, P.C.)

Kathleen Asher, DAG, for respondent
(David Samson, Attorney General of New Jersey, attorney)

Record Closed: November 21, 2002 Decided: November 22, 2002

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 9, 2002, for determination as a contested case. A settle conference was scheduled for November 22, 2002.

Prior to the settlement conference, the parties agreed to an amicable resolution of the matter and submitted a written Order of Settlement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

November 22, 2002
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

December 3 2002
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 9 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

BENDIT WEINSTOCK
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
80 MAIN STREET
WEST ORANGE, N.J. 07052
(973) 736-9800
Attorneys for Petitioner
File #29050 M

CHARLIE OUTLAW, Petitioner, vs. DEPARTMENT OF EDUCATION, Respondents.	:STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW :OAL DKT. NO.: EDE OA 03868-02N AGENCY REF. NO.: 117-4/02 : : : ORDER OF SETTLEMENT : :

WHEREAS, Petition, Charlie Outlaw ("Petitioner") and Respondent, New Jersey Department of Education ("Department"), have mutually agreed to settle the above-captioned matter, with Anthony Mazza, Esq. Appearing on behalf of Petitioner and David Samson, Attorney General of New Jersey, by Kathleen Asher, Deputy Attorney General, appearing on behalf of Respondent, and;

WHEREAS, this matter arose from the Department of Education,

Office of Criminal History Review's finding that petitioner was disqualified from employment with the Department pursuant to a conviction for a disqualifying offense dating back to July 13, 1964; and;

WHEREAS, the parties to this matter have entered into discussions to amicably resolve this mater in the public interest; and;

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation, and for good cause being shown;

IT IS ON THIS 22nd DAY OF November , 2002

ORDERED THAT:

1. The criminal record of the petitioner Charlie Outlaw was expunged pursuant to a court order of the Honorable Michael L. Ravin, J.S.C., Essex Count, filed on August 23, 2002. KEA

2. The petitioner, is hereby not disqualified from continued employment regarding any employment supervised or governed by the Department only as it pertains to the particular conviction which took place on July 13, 1964;

3. Any further or pending action to disqualify the petitioner from employment supervised or governed by the Department only with regard to the conviction of July 13, 1964 is hereby dismissed.

4. Petitioner will need to re-apply for a criminal history background check with the Department of Education, Criminal History

Review Unit in order to confirm his eligibility for any and all employment with the Department.

SANDRA ANN ROBINSON
Administrative Law Judge

I hereby consent to the
form and entry of this order.

Kathleen Asher, DAG
Attorney for Respondent

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OAL DKT. NO. EDU 3868-02
AGENCY DKT. NO. 117-4/02

CHARLIE OUTLAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/03

Date of Mailing: 1/15/03

27-03

G.B., on behalf of minor child, Y.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 16, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 332-02S
AGENCY REF. NO. 513-12/01

G.B. o/b/o Y.S.,

Petitioner,

v.

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

Respondent.

No appearance by or for Petitioner

John P. Nuttall, Esq., appearing for Respondent (Schwartz Simon Edelstein Celso & Kessler, LLP, attorneys)

Record Closed: October 25, 2002 Decided: November 27, 2002

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner has appealed the determination by Respondent Board of Education of the Borough of South Plainfield (Board) that his cousin, Y.S., was not entitled to a free public education in the district. Petitioner claims that Y.S., who is a citizen of and currently resides in Brazil, should be entitled to attend Respondent's schools because she will be residing with him

in South Plainfield, where he has been paying school taxes for eighteen years. Respondent answered that unless and until he obtained legal guardianship over the child, enrollment in the district's schools would be denied.

On December 16, 2001, Petitioner filed with the Commissioner of Education an appeal from the Board's determination and requested a hearing pursuant to *N.J.S.A.* 18A:6-9. On January 30, 2002, the Department of Education transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On October 16, 2002, Respondent filed a motion asking that the appeal be dismissed for failure to prosecute. Petitioner did not file any responding papers or return telephone messages left by this Administrative Law Judge's secretary. Since Petitioner had filed his appeal *pro se*, rather than decide the motion on the papers, the undersigned scheduled the matter for hearing on October 25, 2002, and it was heard on that date at the Office of Administrative Law, Quakerbridge Road, Mercerville, New Jersey. The record was closed at the conclusion of the hearing.

FACTUAL DISCUSSION

The material facts are essentially undisputed. Therefore, the factual statements contained herein are the **FINDINGS OF FACT** made with respect to this matter.

On October 24, 2001, Petitioner submitted a "Sworn Statement/Affidavit of Applicant/Guardian Domiciliary of South Plainfield" with Respondent Board of Education seeking to enroll his thirteen-year-old cousin, Y.S., in the school district. In support of his application, Petitioner stated that Y.S., a citizen and resident of Brazil, was living with her grandmother because her father was unemployed and could not support her. Since Petitioner and his wife had the financial means to care for her, it was their intention to bring her to the United States and provide her with a more stable life. However, they did not intend to do so until after Respondent approved her admission to the district's schools.

By letter dated November 26, 2001, Petitioner was advised that Respondent had denied Y.S. admission to the school district on the grounds that she did not satisfy the requirements of *N.J.S.A.* 18A:38-1(b)(1). By way of explanation, Respondent pointed out that the affidavit disclosed Y.S.'s mother was employed and had been granted custody of her on September 6, 2001. Additionally, her father had certified that he would be providing all of the support she required. It was also clear that Y.S.'s grandmother had the present ability to raise and care for her in Brazil. Consequently, Petitioner had failed to establish a family or economic hardship that would warrant the girl's enrollment in the district.

Upon receiving the file from the Department of Education, the undersigned scheduled a prehearing telephone conference for March 26, 2002. During that conference, Petitioner stated that he was attempting to obtain legal guardianship over Y.S. He was therefore granted additional time to get his affairs in order and a status conference call was scheduled for May 23, 2002 at 4:00 p.m. However, the status conference could not be conducted because Petitioner was not available to receive the call.

By letter dated May 31, 2002, the undersigned advised Petitioner that given his failure to receive the call or respond to a message left on his answering machine, it had been assumed that he had been unable to adopt or obtain legal guardianship of Y.S. He was therefore asked to withdraw his appeal without prejudice by June 14, 2002, thereby enabling the Court and the Board to devote precious time and energy to other matters.

June 14th came and went without a response from Petitioner and a second status conference call was scheduled for August 13, 2002. Once again, the conference operator was unable to reach the Petitioner at the phone number he had provided. On October 16, 2002, Respondent filed a motion asking that the appeal be dismissed for failure to prosecute. When Petitioner did not file any responding papers or return telephone messages, the matter was set down for a plenary hearing on October 25, 2002.

DISCUSSION OF THE LAW

Absent exigent circumstances, a petitioner's failure to prosecute an appeal should result in its dismissal. *R.J. v. Board of Education of the Lower Camden County Regional School District*, 97 *N.J.A.R.*2d (EDU) 155 (1996); *N.O. v. Board of Education of the Bridgewater-Raritan School District*, 96 *N.J.A.R.*2d (EDU) 746 (Comm. of Ed., 1996). In fact, that is exactly what occurred in *R.J.*, in which the ALJ stated:

> Inasmuch as R.J. made no effort to contact the judge until the time and date of the scheduled hearing despite the fact that she had adequate notice, I **FIND** that R.J. had been dilatory in prosecuting her appeal and unresponsive to communications from the Department of Education and this judge. Accordingly, I **CONCLUDE** that R.J. has abandoned prosecution and has failed to show good cause why that failure should be excused.

The Initial Decision was affirmed by the Commissioner of Education.

The same result is warranted in this matter. Pursuant to *N.J.A.C.* 1:1-14.4,

> If after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may ... direct the Clerk to return the matter to the transmitting agency for appropriate disposition.

As related above, following the prehearing conference call of March 26, 2002, Petitioner missed two consecutive status conference calls without an explanation. Moreover, he failed to appear for the plenary hearing scheduled for and held on October 25, 2002, again without explanation or excuse. Therefore, I **FIND** that Petitioner has for all intents and purposes abandoned his appeal and **CONCLUDE** that Respondent's Motion to Dismiss should be granted.

Yet, even if Petitioner had appeared on that date, he would have been hard-pressed to make his case on the facts presented. The issue in this matter is whether R.B. is entitled to a free education under *N.J.S.A.* 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." *See V.R.*

o/b/o A.R. v. Hamburg Bd. of Educ., 2 *N.J.A.R.* 283, 287 (Educ. 1980), *aff'd*, State Bd., 1981 *S.L.D.* 1533, *rev'd on other grounds, sub nom Rabinowitz v. New Jersey State Bd. of Educ.*, 550 *F. Supp.* 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education). Therefore, a determination of the child's domicile is the crucial element in a case such as this.

In the October 24, 2001 "Sworn Statement/Affidavit of Applicant/Guardian Domiciliary of South Plainfield" Petitioner filed with the Board, he stated that Y.S. was a citizen of and residing in Brazil. In fact, he expressly stated that he did not intend to bring her to the United States to live with him until the Board approved her admission to its schools. He later confirmed her status and his intentions during a prehearing conference call on March 26, 2002. He has not contacted the Board or my chambers, much less submitted proof of legal guardianship over his cousin since that time. Consequently, I **FIND** that Y.S. is not domiciled in South Plainfield and **CONCLUDE** that she is not entitled to a free education under *N.J.S.A.* 18A:38-1.

DECISION AND ORDER

Accordingly, the Borough of South Plainfield Board of Education's Motion to Dismiss is **GRANTED** and it is therefore **ORDERED** that the appeal filed by G.B. on behalf of his cousin, Y.S., be and is hereby **DISMISSED**.

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

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

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

November 27, 2002
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

Dec. 4 2002
DATE

M. Kathleen Leonard (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 5 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

EXHIBITS

For Petitioner:

None.

For Respondent:

R-1 Motion to Dismiss with attached Exhibits "A" through "F"

OAL DKT. NO. EDU 332-02
AGENCY DKT. NO. 513-12/01

G.B., on behalf of minor child, Y.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed as a result of petitioner's failure to prosecute.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/16/03

Date of Mailing: 1/16/03

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

28-03

IN THE MATTER OF THE TENURE	:	
HEARING OF TRACEY ABERNATHY,	:	
A/K/A TRACEY RADEMACHER, MIDDLESEX	:	COMMISSIONER OF EDUCATION
COUNTY VOCATIONAL SCHOOL DISTRICT,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

January 21, 2003

AGENCY DKT. NO. 361-11/02

IN THE MATTER OF THE TENURE :
HEARING OF TRACEY ABERNATHY, :
A/K/A TRACEY RADEMACHER, MIDDLESEX : COMMISSIONER OF EDUCATION
COUNTY VOCATIONAL SCHOOL DISTRICT, : DECISION
MIDDLESEX COUNTY. :
:

This matter was opened before the Commissioner of Education on November 12, 2002 through the certification of tenure charges alleging incapacity to return to work, or unbecoming conduct, against a tenured teacher of the handicapped at the New Brunswick Vocational and Technical High School campus of the Board of Education of the Middlesex County Vocational School District.

The Commissioner directed respondent, via both certified and regular mail on November 12, 2002, to file an Answer to the tenure charges against her.[1] Such communication clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been no submission by the charged employee of a responsive filing indicating that she does not contest the charges, **will** result in the charges being deemed admitted by the charged employee. Because no reply has been received from respondent in response to the

[1] The return receipt indicates that respondent received such notice on December 2, 2002.

Board's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicate that respondent sustained an injury to her left ankle and foot on or about January 2, 2001 resulting in medical treatment, including surgery. Although respondent's doctor recommended in July 2001 that she return to work with light duty, respondent did not return to work in September 2001. Respondent underwent a second surgery on or about October 29, 2001; her physician anticipated a return date of February 14, 2002. On or about that date, however, her doctor performed a follow-up examination and indicated that respondent had sustained a permanent disability which prevented her return to work. Thereafter, by letter dated February 28, 2002, Joseph C. Colombo, the Superintendent, contacted respondent requesting clarification of her work status and offering respondent a barrier-free accommodation as an inducement to return to work. Respondent did not reply to the Superintendent. On or about April 3, 2002, respondent applied for unemployment benefits, certifying that she is unable to return to work. By letter dated April 9, 2002, the Superintendent again contacted respondent to discuss her future employment with the district and her unemployment application. The letter stated, in pertinent part,

> If it is your wish to terminate your employment with us and thereby become eligible for unemployment benefits, please complete the enclosed certification form and return it to my office.
>
> I have tried numerous times during the past two weeks to contact you, without success. If we do not hear from you we will have no choice but to proceed with tenure charges based upon your inability to work. Therefore, please contact me immediately. (Statement of Tenure Charges, Exhibit I, Correspondence of Joseph C. Colombo)

Respondent did not reply to the Superintendent's request. She has been absent from her teaching position since January 4, 2001 with no communication or indication as to when or if she will be able to return to employment.

Deeming such charges to be admitted, and noting that respondent has chosen not to deny the specific allegations contained therein, the Commissioner finds that the Board has demonstrated that respondent is incapable of fulfilling her duties as a teacher, and that respondent's actions constitute unbecoming conduct, warranting her dismissal from her tenured position.

IT IS ORDERED this 21st day of January 2003 that summary decision shall be granted to the Board, and respondent shall be dismissed from her tenured position as a teacher in the Board's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[2]

COMMISSIONER OF EDUCATION

Mailed 1/22/03

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

26-03

JOHN COOKE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, riffed auto body repair teacher, alleged the respondent Board retained less senior individuals in positions for which he was qualified.

The ALJ found that petitioner never acquired any seniority in the areas of culinary arts or industrial arts, which would have obligated respondent to hire him in any of the positions he sought from 1996 through 2001. The ALJ noted that each vocational endorsement is a separate seniority category and petitioner earned seniority only in the area of his endorsement (auto body repair) in which he actually served. *N.J.A.C.* 6:3-5.1(17)(i). Thus, the ALJ found that respondent did not retain teaching staff members in positions for which petitioner was qualified who were less senior than he in violation of petitioner's seniority and tenure rights. The ALJ granted respondent's motion for summary decision and dismissed petitioner's appeal.

The Commissioner adopted the Initial Decision for the reasons expressed therein; the petition was dismissed.

January 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6105-01

AGENCY DKT. NO. 318-8/01

JOHN COOKE,

Petitioner,

v.

BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl and Clarkin, attorneys)

Record Closed: September 4, 2002 Decided: December 5, 2002

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is a teaching staff member at respondent's school district, and was subjected to a reduction in force. Petitioner claims that respondent Board of Education retained staff members in positions for which he was qualified who are less senior than he in violation of his

tenure rights. The matter was transmitted to the Office of Administrative Law (OAL) on September 7, 2001, for hearing as a contested case. The matter was assigned to me on September 28, 2001, and a telephone prehearing conference was scheduled for November 20, 2001. The November 20, 2001 prehearing telephone conference was adjourned at the request of the attorney for petitioner due to his unavailability and was rescheduled for December 6, 2001. As a result of that telephone prehearing conference, the matter was scheduled for hearing on July 17 and 18, 2002.

At a status conference held on April 4, 2002, the attorneys agreed to prepare a Stipulation of Facts within 30 days and to report to me whether the matter was able to be decided by motion or if a hearing would be required. In July 2002, the attorneys reported that the matter should be the subject of a motion for summary decision, and the scheduled hearing dates were adjourned. A motion for summary decision was filed by attorney for respondent on July 24, 2002, and opposition to the motion was filed on September 3, 2002. The record was closed on September 4, 2002. By order of extension, the time limit for filing the initial decision was extended until December 5, 2002.

FACTUAL DISCUSSION

Based upon the certification of Joseph C. Columbo, Superintendent for respondent school district (R-2), and the certification of John W. Cooke, petitioner herein (P-1), it appears that most of the underlying facts in this matter are not disputed. Thus, for the purpose of deciding the within motion, the facts set forth herein are determined to be the facts in this matter.

Petitioner has been a teaching staff member with respondent since September 1988 (P-1 and R-2). At that time, petitioner was hired under an emergency certification because he was in the process of completing courses for permanent certification (P-1). He is certified as a teacher of Auto Body Repair and served full-time in that position through school year 1994-95.

Petitioner was placed on sabbatical for school year 1995-96 (R-2), even though the collective bargaining agreement at the time required at least seven years of teaching before a

sabbatical could be taken (P-1). Petitioner received the sabbatical because of his illness due to exposure in the auto body shop (P-1).

Petitioner's certification asserts that at the time of his sabbatical year he was told by the Superintendent and the Board President that because of his illness due to exposure in the auto body shop, they would try to find him another position (P-1, paragraph 3).

On May 9, 1996, the Board of Education approved petitioner's return from sabbatical leave to resume his position as teacher of auto collision repair technology for the school year 1996 through 1997 (R-2A).

By letter dated April 29, 1996, petitioner applied for the position of Commercial Foods Instructor at respondent's Woodbridge Campus (R-2B). However, at the time he submitted his application, he had not yet obtained his certification as a Commercial Foods Instructor, and did not do so until March 1997 (R-2C). On June 13, 1996, the respondent appointed Mary T. Boychuk to the position of Commercial Foods Instructor at the Woodbridge campus and petitioner was advised of this by letter dated June 18, 1996 (R-2D).

By letter dated October 6, 1997, petitioner applied for the position of Culinary Arts/Commercial Foods Instructor at respondent's New Brunswick campus. By letter dated December 12, 1997, petitioner was advised that Patricia Paustian was appointed to that position. (R-2E)

By letter dated January 10, 2000, petitioner applied for the position of Teacher of Production Manufacturing at the vocational schools. The position required a certificate of Teacher of Industrial Arts, which petitioner did not hold. By letter dated April 13, 2000, petitioner was advised that the position was filled by Christopher Clancy (R-2F).

By letter dated July 31, 2001, petitioner applied for the position of Teacher of Food Services for the 2001-2002 school year. By letter dated September 14, 2001, petitioner was advised by respondent that the position had been filled by another teaching staff member, Enzo Paterno. (R-2G.)

In May 2001, the Board of Education determined that a reduction in force was necessary effective July 2001, and abolished petitioner's position as Teacher of Auto Body Repair. (R-2, paragraph 12.)

Respondent contends that petitioner was employed exclusively in his area of certification as a Teacher of Auto Body Repair during his tenure as a teaching staff member for respondent Vocational Schools, and that petitioner was employed in no other capacity (R-2, paragraph 13). However, petitioner asserts that after his sabbatical leave and his return to auto body repair, he again became ill and was subsequently given other assignments for the balance of the 1999-2000 and 2000-2001 school year, although none were in the area of culinary arts or industrial arts (P-1, paragraph 8).

LEGAL DISCUSSION AND ANALYSIS

The issue in this matter is whether petitioner obtained seniority during his employment with respondent which would have obligated respondent to hire petitioner in one of the other teaching positions for which he applied.

N.J.A.C. 6:3-5.1(17)(i) provides the standards for determining seniority and states:

> Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsements under which he or she has actually served.

In this matter, it is undisputed that petitioner was employed exclusively as a Teacher of Auto Body Repair in the area of auto body repair during his entire tenure as a teaching staff member for respondent. There is nothing in the record before me nor any other proofs or evidence to the effect that petitioner held any other position or served in any other capacity during his tenure as a teaching staff member. Even if petitioner had obtained additional certifications during the course of his employment, if he was never actually employed in any of those subject areas, he could not acquire any seniority with respect to those subject area

endorsements. As a result, I **FIND** that petitioner never acquired any seniority in the areas of culinary arts, or industrial arts which would have obligated respondent to hire him in any of the positions he sought from 1996 through 2001.

I also note that petitioner did not raise any issue concerning respondent's determination to eliminate the auto body repair course of instruction.

It is undisputed that with respect to petitioner's first application for a position as a Commercial Food instructor, which he submitted in April 1996, he was clearly not qualified for the position because he did not obtain his certification as a Commercial Food Instructor until March 1997. As to the three subsequent positions which petitioner sought from 1997 to 2001, and for which he was not hired, petitioner acquired no seniority which would have obligated respondent to hire him for any of these positions.

Petitioner asserts that it was because he became ill based on his continued exposure to exhaust, fumes and dust, and because he repeatedly but unsuccessfully attempted to have respondent correct these problems, that the school district granted him a sabbatical before he was entitled to receive it. He also contends that under these circumstances, he began to take courses toward certification in other areas, particularly Commercial Food Instruction, with the knowledge of blessing of the administration, and based on the presumption that other positions would be made available to him in view of the foregoing circumstances. Despite the fact that he was in the process of obtaining certifications in the areas for which he applied, he was not appointed to these positions in favor of others who usually had no experience in the School District. Thus, it is argued that petitioner has some equitable entitlement to positions which he applied for and was qualified. Petitioner contends that the question in this matter is whether representations made to petitioner by the agents of respondent should bind respondent to provide another position to petitioner for which he applied, was qualified, but was rejected. Therefore, petitioner contends that there is a dispute as to material fact.

However, each vocational endorsement is a separate seniority category and petitioner earned seniority only in the area of his endorsement. See, *Tote v. Mercer County Vocational-Technical School Board of Education*, 87 *S.L.D.* 11. The seniority of a vocational teacher is

limited and cannot be extended to other endorsements. *Hudson County Area Vo-Tech Ed. Assn. v. Hudson County Area Vo-Tech Board of Education*, 86 *S.L.D.* 106. While petitioner now claims some entitlement to positions for which he applied during his tenure as an Auto Body Instructor, I **FIND** that at no time did he ever acquire any seniority in those positions nor did he ever grieve or appeal the denial of his application to fill any other positions. Thus, I **FIND** that petitioner had no legal entitlement to any of these other positions nor to any seniority in any other area of separate employment at the time the positions were filled. I **FIND** that petitioner acquired no seniority in the other assignments given to him in the 1999-2000 and 2000-2001 school years after his return from sabbatical because none of the assignments were in the areas of his certifications.

Based upon the foregoing, I **FIND** that respondent did not retain teaching staff members in positions for which petitioner is qualified who are less senior than he in violation of petitioner's seniority and tenure rights. Therefore, I **CONCLUDE** that respondent's motion for summary decision should be granted and an initial decision should be issued in favor of respondent in this matter.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that the actions of respondent were correct and should be **AFFIRMED,** and petitioner's appeal is hereby **DISMISSED.**

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

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

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

December 5, 2002
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

12/6/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 9 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF WITNESSES:

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS:

For petitioner:

P-1 Certification of John W. Cooke

P-2 Petitioner's Brief in opposition to motion for summary decision

For respondent:

R-1 Notice of Motion for Summary Decision

R-2 Certification of Joseph C. Colombo, with the following attachments:

- A. Letter to petitioner dated May 9, 1996
- B. Petitioner's letter dated April 29, 1996
- C. Petitioner's Teacher of Food Production certificate dated March 1997
- D. Letter to petitioner dated June 18, 1996
- E. Petitioner's letter dated October 6, 1997
- F. Letter to petitioner dated April 13, 2000
- G. Petitioner's letter dated July 31, 2001

R-3 Respondent's Brief in support of Motion

R-4 Respondent letter memorandum dated September 9, 2002

OAL DKT. NO. EDU 6105-01
AGENCY DKT. NO. 318-8/01

JOHN COOKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that the Board's motion for summary decision is properly granted in its favor. Accordingly, the Initial Decision is adopted for the reasons expressed therein; the Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/03

Date of Mailing: 1/15/03

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

22-03

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMSBURY, HUNTERDON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

December 30, 2002

OAL DKT. NO. EDU 6260-00
AGENCY DKT. NO. 131-4/00

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMSBURY, HUNTERDON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 12/30/02

Date of Mailing: 1/10/03

37-03

37-03

BOARD OF EDUCATION OF THE VILLAGE, OF RIDGEWOOD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY; AND Ke.A. AND L.A., parents of K.A., V.A. AND T.A.,	:	DECISION
RESPONDENTS.	:	

January 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1888-00
Agency Dkt. No. 367-12/99

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD,

Petitioner,

v.

BOARD OF EDUCATION OF PARAMUS, BOARD OF EDUCATION OF EAST RUTHERFORD, BERGEN COUNTY AND Ke.A. AND L.A. parents of K.A. AND V.A. AND T.A., BERGEN COUNTY,

Respondents.

Peter P. Kalac, Esq., for petitioner
(Kalac, Newman, Lavender & Campbell, attorneys)

Joanne Butler, Esq., for Paramus Board of Education, respondent
(Schenck, Price, Smith & King, attorneys)
Mitzy Galis-Menendez, Esq., for East Rutherford Board of Education, respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: December 3, 2002 Decided: December 17, 2002

BEFORE **THOMAS E. CLANCY**, ALAJ:

This case was transmitted to the Office of Administrative Law (OAL) on March 8, 2000 for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement, 3 attorneys' letters dated November 21, 2002, November 22, 2002 and December 3, 2002, respectively, and their 3 enclosures, Resolutions by the Boards of Education involved in this case.

Having reviewed the contents of the attached documents, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C.* 1:1-19.1.1, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** compliance with their contents and that these proceedings be and are hereby **TERMINATED**.

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

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

12/17/02
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged

12-20-02
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 31 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

KALAC, NEWMAN, LAVENDER & CAMPBELL
A Professional Corporation
1115 Green Grove Road
Neptune, New Jersey 07753
(732) 922-2005 -
Attorneys for Petitioner

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL Docket No. EDUOS-01888-00N
Agency Ref. No. 367-12/99

BOARD OF EDUCATION OF
THE VILLAGE OF RIDGEWOOD,
Bergen County,

Petitioner,

-vs-

PARAMUS BOARD OF EDUCATION,
Bergen County, and EAST RUTHERFORD
BOARD OF EDUCATION, Bergen
County, and KeA and I.A, parents of
KA, VA and TA,

Respondents

STIPULATION OF SETTLEMENT

WHEREAS, a controversy has arisen between the petitioner, Board of Education of the Village of Ridgewood, and respondents, Paramus Board of Education and East Rutherford Board of Education regarding the district of residence and the educational placement of KA, VA and TA, students determined to be homeless by the Bergen County Superintendent of Schools, and

WHEREAS, the parties have now adjusted their differences, it is agreed between the parties that:

- Paramus Board of Education will assume the educational responsibility for KA, VA and TA for the 2000-01 school year.
- Village of Ridgewood Board of Education will not seek reimbursement for tuition and transportation costs expended for KA, VA and TA to attend Paramus school district for any school year prior to 2000-01.
- Village of Ridgewood Board of Education agrees to the dismissal of its Petition, with prejudice.
- Paramus Board of Education agrees to the dismissal of its Counterclaim and Crossclaim, with prejudice.

This Stipulation shall be subject to ratification by the Boards of Education of Village of Ridgewood, Paramus, and East Rutherford. A form of the Boards' Resolutions are attached hereto as Exhibits "A", "B" and "C", respectively

Attest

By _____
Secretary

Date 8/27/02, 2002

VILLAGE OF RIDGEWOOD BOARD OF EDUCATION

By _____
President

Attest

By _____
Secretary

Date 4/30, 2001

PARAMUS BOARD OF EDUCATION

By _____
President

Attest

By _____
Secretary

Date 9/26, 2002

EAST RUTHERFORD BOARD OF EDUCATION

By _____
President

OAL DKT. NO. EDU 1888-00
AGENCY DKT. NO. 367-12/99

BOARD OF EDUCATION OF THE VILLAGE, OF RIDGEWOOD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY; AND Ke.A. AND L.A., parents of K.A., V.A. AND T.A.,	:	DECISION
RESPONDENTS.	:	

The record,[1] Stipulation of Settlement,[2] and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1|29|03

Date of Mailing: 1|29|03

[1] Petitioner notified the Administrative Law Judge by letter of December 3, 2002 of its rescission of that part of the Verified Petition which identified Ke.A. and L.A. as parties to the instituted action, thereby rendering Ke.A. and L.A. nonparticipants in this matter.

[2]The Commissioner notes that the petitioning Board and each of the two respondent Boards submitted resolutions approving the Stipulation of Settlement.

38-03

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO, AND ALLAN STOPHERD,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
RESPONDENT.	:	

January 29, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11367-95

AGENCY REF. NO. 273-7/95

KEARNY EDUCATION ASSOCIATION, o/b/o SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCALANO, MARY ANN PALO, NANCY DONNELLEY, KATHLEEN PUORRO & ALLAN STOPHERD,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, NEW JERSEY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Fagella & Nowak, Kleinbaum & Friedman, attorneys)

Kenneth J. Lindenfelser, Esq., for respondent

Record Closed: December 11, 2002 Decided: December 17, 2002

BEFORE **THOMAS E. CLANCY,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 5, 1995 for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. It concerns alleged violations of teachers' tenure rights and seniority rights.

During the pendency of this case at the Office of Administrative Law, it was consolidated with four other cases bearing the following OAL Docket Numbers: EDU 11368-95, EDU 11221-96, EDU 7910-97 and EDU 9811-98. These four other cases were terminated at the OAL by way of Initial Decision/Settlements rendered by the undersigned towards the end of April 2000.*

With respect to the substance of this case (EDU 11367-95), the parties have settled their differences as provided in the attached seven documents designated as: (A) Letter dated April 9, 2000 and its companion Partial Stipulation of Settlement; (B) Stipulation of Settlement as to Sandra Siino and Sally Ann Roessler; (C) Stipulation of Settlement as to Nancy Donnelley; (D) Stipulation of Settlement as to Allan Stopherd; (E) Letter dated March 22, 2002 (with two attachments) from petitioners' attorney; (F) Notification of Withdrawal dated March 22, 2002 executed by petitioner's attorney on behalf of Mary Ann Palo (with two attachments); (G) Letter from respondent's attorney dated July 23, 2002 with two certified Resolutions by the Kearny Board of Education concerning petitioners Nancy Donnelley and Allan Stopherd; and (H) Addendum to previous Stipulation of Settlement dated March 22, 2002.

Having carefully scrutinized the contents of the above-referenced documents, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached documents meet the requirements of *N.J.A.C.* 1:1-19.1 and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be and are hereby **TERMINATED**.

*Attached please find document labeled (A) resolving the four other cases.

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

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

12/17/02
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

12-20-02
DATE

M. Kathleen Duncan /CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 31 2002
DATE

ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

(A)

KENNETH J. LINDENFELSER
ATTORNEY AT LAW
570 Kearny Avenue
KEARNY, NEW JERSEY 07032
Tel. (201) 998-9500
Fax (201) 997-4557

April 09, 2000

Hon. Thomas E. Clancy, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **KEA (Siino; Roessler; Iuculano; Palo; Donnelly; Puorro & Stopherd) v. KBOE**
OAL Docket No. EDU 11367-95;
White and Van Oostendorp v. KBOE
OAL Docket No. EDU 11368-895;
Siino v. KBOE
OAL Docket Nos. EDU 11221-96;
EDU 07910-97 and
EDU 09811-98

Dear Judge Clancy:

The above matters all stem from a RIF by the KBOE in April of 1995 and have been consolidated. Enclosed please find a Partial Stipulation of Settlement which fully resolves OAL Docket Nos. EDU 11368-95; EDU 11221-96; EDU 07910-97 and EDU 09811-98. It also partially resolves the one remaining docket No. EDU 11367-95.

The parties are continuing to narrow the issues and to negotiate a possible resolution regarding the remaining claims. It is the hope of both counsel to have this matter concluded without the need for a hearing within the next several weeks.

I wish to acknowledge and thank Your Honor for the patience you have shown in this matter. Please contact my office in the event you have any concerns or require anything additional at this time.

Yours very truly

Kenneth J. Lindenfelser
Attorney for the KBOE

KJL:kat
Enc.
cc: Kathleen A. Naprstek, Esq.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMNISTRATIVE LAW AGENCY REF. NO. 273-7/95 OAL DKT NO. EDU 11367-95
PATRICIA L. WHITE and JUDITH VAN OOSTENDORP, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 310-7/95 OAL DKT NO. EDU 11368-95
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 229-6/96 OAL DKT NO. EDU 11221-96
SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 227-6/97 OAL DKT NO. EDU 07910-97

SANDRA SIINO, Petitioner, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 335-7/98 OAL DKT NO. EDU 09811-98 PARTIAL STIPULATION OF SETTLEMENT

The above-captioned matter having been brought before the Commissioner of Education upon Petitions of Appeal, petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve the disputes between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

2. Petitioner Siino holds an instructional certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

3. Petitioner Siino has been employed by the Board in a tenurable position since September 16, 1987. Pursuant to her service with the Board under her elementary endorsement, Siino had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

4. As of June 30, 1995, Siino had also acquired 3.98 years

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FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

of seniority as an elementary teacher.

5. Siino has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 3.5 years of seniority as an elementary teacher. Thus, as of June 30, 1999, Siino has acquired 7.48 years of seniority as an elementary teacher.

6. Petitioner White holds an instructional certificate with endorsements as a Teacher of Social Studies (K-12), Elementary School Teacher (K-8), Nursery School Teacher and Reading Teacher/Specialist.

7. Petitioner White has been employed by the Board in a tenurable position since September 1, 1988. Pursuant to her service with the Board under her elementary and reading teacher endorsements, White had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

8. As of June 30, 1995, White had also acquired 5.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

9. White has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, White has acquired 9.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

10. Petitioner Van Oostendorp holds an instructional

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certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

11. Petitioner Van Oostendorp has been employed by the Board in a tenurable position since September 1, 1986. Pursuant to her service with the Board under her elementary and reading teacher endorsements, Van Oostendorp had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

12. As of June 30, 1995, Van Oostendorp had also acquired 6.0 years of seniority as an elementary teacher and 3.0 years of seniority as a reading teacher.

13. Van Oostendorp has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 4.0 years of seniority as an elementary teacher and as a reading teacher. Thus, as of June 30, 1999, Van Oostendorp has acquired 10.0 years of seniority as an elementary teacher and 7.0 years of seniority as a reading teacher.

14. Petitioner Roessler holds an instructional certificate with endorsements as an Elementary School Teacher (K-8).

15. Petitioner Roessler has been employed by the Board in a tenurable position since September 1, 1989. Pursuant to her service with the Board under her elementary endorsement, Roessler had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

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ATTORNEYS AT LAW

16. As of June 30, 1995, Roessler had also acquired 3.0 years of seniority as an elementary teacher.

17. During the past four school years (1995-96, 1996-97, 1997-98 and 1998-99), and as a result of a reduction in force effectuated by the Board, Roessler has been employed outside the district as a full-time associate media specialist.

18. Roessler shall be reappointed to a full-time 10 month position as an elementary teacher in the Kearny School District for the 1999-2000 school year commencing September 1, 1999, subject to any 60 day notice which she may be contractually required to give to her current employer.

19. Roessler shall be credited with 4.0 additional years of seniority as an elementary teacher. Thus, as of June 30, 1999, Roessler has acquired 7.0 years of seniority as an elementary teacher.

20. Roessler sustained a significant salary loss as a result of her reduction in force and her subsequent employment outside the district.

21. In lieu of a cash settlement, the Board agrees to award Roessler 100 sick days and to place her on Step 15*/Equivalency 6 of the Salary Guide for the 1999-2000 school year, which shall be deemed to constitute back pay.

22. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.

23. These petitioners shall withdraw the Petitions of

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the following Docket Numbers: Agency Ref. No. 310-7/95 and OAL Dkt. No. EDU 11368-95; Agency Ref. No. 229-6/96 and OAL Dkt. No. EDU 11221-96; Agency Ref. No. 227-6/97 and OAL Dkt. No. EDU 07910-97; and Agency Ref. No. 335-7/98 and OAL Dkt. No. EDU 09811-98.

24. This Settlement Agreement resolves those claims by petitioners Sandra Siino, Sally Ann Roessler, Patricia L. White and Judith Van Oostendorp arising from the Board's failure to recognize their tenure rights in effectuating reductions in force effective June 30, 1995 and thereafter.

25. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

ZAZZALI, ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioners, Sandra Siino,
Sally Ann Roessler, Patricia L. White
and Judith Van Oostendorp

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/17/00
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

4/7/00
Dated:

ZAZZALI, ZAZZALI,
FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

(B)

ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMNISTRATIVE LAW
	:	AGENCY REF. NO. 273-7/95
	:	OAL DKT NO. EDU 11367-95
Petitioners,	:	
v.	:	
	:	STIPULATION OF SETTLEMENT AS TO PETITIONERS SANDRA SIINO AND SALLY ANN ROESSLER
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
Respondent.	:	

The above-captioned matter having been brought before the Commissioner of Education upon a Petition of Appeal, petitioners Sandra Siino and Sally Ann Roessler and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve this dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

2. Petitioner Siino holds an instructional certificate with endorsements as an Elementary School Teacher (K-8) and Nursery School Teacher.

3. Petitioner Siino has been employed by the Board in a tenurable position since September 16, 1987. Pursuant to her service with the Board under her elementary endorsement, Siino had acquired tenure status prior to June 30, 1995, which tenure

status extends to all subjects that she is authorized to teach under all her endorsements to her instructional certificate.

4. As of June 30, 1995, Siino had also acquired 3.98 years of seniority as an elementary teacher.

5. Siino has been employed by the Board during the past four school years (1995-96, 1996-97, 1997-98 and 1998-99) and has acquired an additional 3.5 years of seniority as an elementary teacher. Thus, as of June 30, 1999, Siino has acquired 7.48 years of seniority as an elementary teacher.

6. Petitioner Roessler holds an instructional certificate with endorsements as an Elementary School Teacher (K-8).

7. Petitioner Roessler has been employed by the Board in a tenurable position since September 1, 1989. Pursuant to her service with the Board under her elementary endorsement, Roessler had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

8. As of June 30, 1995, Roessler had also acquired 3.0 years of seniority as an elementary teacher.

9. As of June 30, 1995, Roessler had also accumulated 30.5 days of unused sick leave pursuant to her employment with respondent.

10. During the past four school years (1995-96, 1996-97, 1997-98 and 1998-99), and as a result of a reduction in force effectuated by the Board, Roessler has been employed outside the district as a full-time associate media specialist.

11. Roessler shall be reappointed to a full-time 10 month

position as an elementary teacher in the Kearny School District for the 1999-2000 school year commencing September 1, 1999, subject to any 60 day notice which she may be contractually required to give to her current employer. She shall be placed on Step 15*/Equivalency 6 of the Salary Guide for the 1999-2000 school year.

12. Roessler shall be credited with 4.0 additional years of seniority as an elementary teacher for the past four (4) school years (1995-96 through 1998-99 school years). Thus, as of June 30, 1999, Roessler has acquired 7.0 years of seniority as an elementary teacher.

13. Roessler shall also be credited with 15 days of paid sick leave time for each of the past four (4) school years (1995-96 through 1998-99 school years), consistent with N.J.S.A. 18A:30-7.

14. The Board shall also credit Roessler with an additional 5 paid sick days for the 1999-00 school year and an additional 5 paid sick days for the 2000-01 school year.

15. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioners' filing or pursuit of this litigation.

16. These petitioners shall withdraw this Petition of Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the above-captioned docket and agency numbers.

17. This Settlement Agreement resolves those claims by

petitioners Sandra Siino and Sally Ann Roessler arising from the Board's failure to recognize their tenure rights in effectuating reductions in force effective June 30, 1995.

18. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioners
Sandra Siino and Sally Ann Roessler

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

12/28/00
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

12/28/00
Dated:

(c)

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 273-7/95 OAL Dkt No. EDU 11367-95 STIPULATION OF SETTLEMENT AS TO PETITIONER NANCY DONNELLY

The above-captioned matter having been brought before the Commissioner of Education upon a Petition of Appeal, petitioner Nancy Donnelly and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve this dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

3K

2. Petitioner Donnelly holds an instructional certificate with an endorsement as a Teacher of Home Economics.

3. Petitioner Donnelly has been employed by the Board in a tenurable position since on or about September 1, 1983. Pursuant to her service with the Board under the aforementioned teaching certification and endorsement, Donnelly had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that she is authorized to teach under her endorsements to her instructional certificate.

4. As of June 30, 1995, Donnelly had also acquired 11.81 years of seniority as a teacher.

5. During these past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-2002), and as a result of a reduction in force effectuated by the Board, Donnelly has been employed outside the district as a full-time home economics teacher.

6. The parties agree that Donnelly should have been retained in a full-time 10 month position as a teacher in the Kearny School District for these past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-2002), and the Board offered to reinstate her to a newly created home economics position, effective February 4, 2002, which position Donnelly declined.

7. Taking into account the mitigation of damages by Donnelly's employment in another position during these past seven (7) school years, the parties agree that the Board shall pay Donnelly the gross amount of $35,000.00, subject to ~~stadard~~ standard and ordinary payroll deductions, which shall be deemed to constitute the gross back pay award less mitigation of damages for the past seven (7) school years.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

8. The parties agree that neither party is responsible for the payment of the other party's attorneys fees in connection with this matter.

9. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioner's filing or pursuit of this litigation.

10. This Settlement Agreement resolves any and all claims, including civil rights claims, by petitioner Nancy Donnelly arising from the Board's termination of her employment, which took effect June 30, 1995, and regarding the petitioner's allegation that the Board acted unlawfully in terminating her employment and in failing to retain petitioner instead of any other employee in a full-time position.

11. The parties agree that this Settlement Agreement is contingent upon its approval by the Commissioner of Education.

12. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing. In the event, however, that this Agreement requires some modification to facilitate its approval by the Commissioner of Education, the parties agree to make such modification in a timely fashion in order to effectuate the intent of the parties as to this agreement.

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Attorneys for Petitioner, Nancy Donnelly

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/22/02
Dated:

3m

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

Dated: 3/22/02

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

(D)

ZAZZALI, FAGELLA, NOWAK,
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One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 273-7/95 OAL Dkt No. EDU 11367-95 STIPULATION OF SETTLEMENT AS TO PETITIONER ALLAN STOPHERD

The above-captioned matter having been brought before the Commissioner of Education upon a Petition of Appeal, petitioner Allan Stopherd and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve this dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Town of Kearny shall hereinafter be referred to as the Board.

3N

2. Petitioner Stopherd holds an instructional certificate with an endorsement as a Teacher of Machine Shop.

3. Petitioner Stopherd has been employed by the Board in a tenurable position since September 5, 1973. Pursuant to his service with the Board under the aforementioned teaching certification and endorsement, Stopherd had acquired tenure status prior to June 30, 1995, which tenure status extends to all subjects that he is authorized to teach under his endorsements to his instructional certificate.

4. As of June 30, 1995, Stopherd had also acquired 22.0 years of seniority as a teacher.

5. As of June 30, 1995, Stopherd had also accumulated 172 ½ days of unused sick leave pursuant to his employment with respondent.

6. During the past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-2002), and as a result of a reduction in force effectuated by the Board, Stopherd has been employed outside the district in positions not related to education.

7. The parties agree that Stopherd should have been retained in a full-time 10 month position as a teacher in the Kearny School District for the past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-2002). The Board thus agrees to reinstate Stopherd to the position of teacher for the past seven (7) school years (1995-96, 1996-97, 1997-98, 1998-99, 1999-2000, 2000-2001 and 2001-02) at the following annual salaries:

1995/96	$55,112.00
1996/97	$56,112.00

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ATTORNEYS AT LAW

1997/98	$58,496.00
1998/99	$61,145.00
1999/00	$63,095.00
2000/01	$65,195.00
2001/02	$67,295.00

8. Taking into account the mitigation of damages by Stopherd's employment in other positions during these past seven (7) school years, the parties agree that the Board shall pay Stopherd the gross amount of $25,000.00, which shall be deemed to constitute the gross back pay award of $426,450.00 less mitigation of damages and deductions for Stopherd's share of his pension contributions for the past seven (7) school years as set forth in paragraph 11 below.

9. The Board agrees to recognize and credit Stopherd with 7.0 additional years of seniority as a teacher for the past seven (7) school years (1995-96 through 2001-02 school years). Thus, as of June 30, 2002, Stopherd will have acquired 29.0 years of seniority as a teacher.

10. Stopherd shall also be credited with 15 days of paid sick leave time for each of the past seven (7) school years (the 1995-96 through 2001-02 school years), consistent with N.J.S.A. 18A:30-7. Thus, as of June 30, 2002, Stopherd shall have accumulated 277 ½ days of unused sick leave pursuant to his employment with respondent.

11. The parties agree that Stopherd shall pay his share of any contributions to the Teachers' Pension and Annuity Fund for the past seven (7) school years (the 1995-96 through 2001-02 school years) and that the monies for said payment shall be

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

deducted from his gross back pay award of $424,150.00 less mitigation of damages, as set forth in paragraph 8 above. The parties agree that the Board shall not be liable for Stopherd's share thereof, that Stopherd shall not be liable for the Board's share thereof, that the State will contribute the Board's share of pension contributions if it agrees to do so, and that if the State does not contribute the Board's share of pension contributions, the Board shall contribute its share of such contributions.

12. The parties agree that neither party is responsible for the payment of the other party's attorneys fees in connection with this matter.

13. Neither the Board nor any agents, officers, representatives, or employees of the Board shall retaliate or take adverse action based upon the petitioner's filing or pursuit of this litigation.

14. This Settlement Agreement resolves any and all claims, including civil rights claims, by petitioner Allan Stopherd arising from the Board's termination of his employment, which took effect June 30, 1995, and regarding the petitioner's allegation that the Board acted unlawfully in terminating his employment and in failing to retain petitioner instead of any other employee in a full-time position.

15. The parties agree that this Settlement Agreement is contingent upon its ~~acceptance by the Teachers' Pension and Annuity Fund and its~~ approval by the Commissioner of Education.

16. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing. In the event, however, that this Agreement requires some modification to facilitate its acceptance by the Teachers' Pension and Annuity Fund and its approval by the Commissioner of in any separate and future application for pension benefits

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Education, the parties agree to make such modification in a timely fashion in order to effectuate the intent of the parties as to this agreement.

17. Petitioner shall retire from employment with the Board, effective at the conclusion of the 2001-02 school year.

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Attorneys for Petitioner, Allan Stopherd

Kathleen A. Naprstek
By: Kathleen A. Naprstek, Esq.

3/22/02
Dated:

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

3/22/02
Dated:

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

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ATTORNEYS AT LAW

ONE RIVERFRONT PLAZA
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PLEASE REPLY TO NEWARK

ANDREW F. ZAZZALI (1925-1969)

ANDREW F. ZAZZALI, JR.
ROBERT A. FAGELLA**
KENNETH I. NOWAK***
RICHARD A. FRIEDMAN
PAUL L. KLEINBAUM*
EDWARD H. O'HARE*

SPECIAL COUNSEL
WILLIAM A. PASCARELL ◊

KATHLEEN A. NAPRSTEK*
JASON E. SOKOLOWSKI
COLIN M. LYNCH
VINCENT J. NOLAN, III
KIMBERLY SCURTI LOWE**

OF COUNSEL
EDWARD M. SUAREZ, JR.

* (N.J. & PA. BAR)
** (N.J. & N.Y. BAR)
*** (N.J., N.Y. & D.C. BAR)
◊ (N.Y. BAR ONLY)

January 22, 2002

Mary Ann Palo
96 Harrison Road
Wayne, NJ 07470

Re: Kearny Educ. Assoc., et al v. Kearny Bd. of Ed.
OAL Dkt No. EDU-11367-95
Our File No. 21326.127

Dear Ms. Palo:

By letters dated May 4, 2001, June 13, 2001 and August 28, 2001 (copies of which are enclosed) I had contacted you to advise that after the long and arduous discovery phase of this case, I had reached the conclusion that you do not have a viable claim to any position with the Kearny Board of Education following the Spring 1995 RIF and that it would be appropriate to effectuate your withdrawal from this action. I thus requested that you contact me immediately if you had any information which was contrary to this conclusion, or, in the alternative, acknowledge your agreement to withdraw from this case.

Unfortunately, I have never received a response to my letters. At the direction of Administrative Law Judge Thomas Clancy, I am thus advising you that if I do not hear from you to the contrary by February 5, 2002, I will assume that you do not contest your withdrawal from this litigation and will so notify the Court.

Should you have any questions, please feel

Very tru

Kathleer

KAN:kn
enclosures
via certified mail/RRR (7000 1670 0004 6051 0902
cc: Barbara Gray Kratt, NJEA
Fran Davis, KEA

7000 1670 0004 6051 0902

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PS Form 3800, May 2000 See Reverse for Instructions

(E)

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KIMBERLY SCURTI LOWE**
NICOLE M. SCARMATO**

OF COUNSEL
EDWARD M. SUAREZ, JR.

* (N.J. & PA. BAR)
** (N.J. & N.Y. BAR)
*** (N.J., N.Y. & D.C. BAR)
◊ (N.Y. BAR ONLY)

March 22, 2002

Honorable Thomas Clancy
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: Kearny Educ. Assoc., et al v. Kearny Bd. of Ed.
OAL Dkt No. EDU-11367-95
Our File No. 20954.000

Dear Judge Clancy:

Please be advised that petitioners Russell Iuculano and Kathleen Puorro hereby request their withdrawal from the above-captioned matter. Enclosed please find copies of correspondence between myself and those individuals on which they have indicated their desire for withdrawal.

I have forwarded several letters to petitioner Mary Ann Palo with regard to my determination that she does not have a viable claim against the Kearny Board of Education in this matter, and requesting her consent to a withdrawal from the action; I have received no response. Upon your advice, I sent my most recent correspondence via certified mail to her last known address. That correspondence was returned "unclaimed." A copy is enclosed. Kindly advise whether you would require any additional efforts to effectuate her withdrawal from this action.

Thank you for your continued cooperation.

Very truly yours,

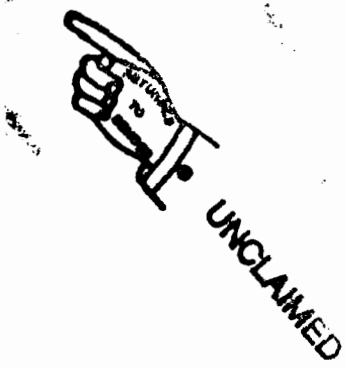
Kathleen A. Naprstek

KAN:kn
enclosures
cc: Kenneth J. Lindenfelser, Esq.

CERTIFIED MAIL

ZAZZALI, FAGELLA NOWAK, KLEINBAUM, &
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
ONE RIVERFRONT PLAZA
NEWARK, N.J. 07102-5410

7000 1670 0004 6051 0902



Mary Ann Palo
Harrison Road
Wayne, NJ 07470

L-N-a 1/23/02
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ZAZZALI, FAGELLA & NOWAK
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SPECIAL COUNSEL
WILLIAM A. PASCARELL****

* (N.J. & PA. BAR)
** (N.J. & N.Y. BAR)
*** (N.J., N.Y. & D.C. BAR)
**** (N.Y. BAR ONLY)

June 13, 2001

Russell Iuculano
32 Rutgers Lane
Parsippany, NJ 07054

Re: Kearny Educ. Assoc., et al v. Kearny Bd. of Ed.
OAL Dkt No. EDU-11367-95
Our File No. 21326.127

Dear Mr. Iuculano:

By letter dated May 4, 2001, I advised you that after the long and arduous discovery phase of this case, I had reached the conclusion that you do not have a viable claim to any position with the Kearny Board of Education following the Spring 1995 RIF and that it would be appropriate to effectuate your withdrawal from this action. I also requested that you contact me immediately if you had any information which was contrary to this conclusion.

To date, you have not indicated that you possess any contradictory information and I therefore assume that you are amenable, albeit somewhat reluctantly, to withdrawing from this case. Toward that end, I am respectfully requesting that you kindly acknowledge your agreement to withdraw from this case, based upon the information set forth in my May 4th letter, on the enclosed copy of this letter, and return same to me in the addressed stamped envelope which I have enclosed for your convenience.

Thank you for your continued cooperation. Should you have any questions, please feel free to call me.

Very truly yours,
ZAZZALI, FAGELLA & NOWAK

By: _____
Kathleen A. Naprstek

KAN:kn
enclosures
cc: Barbara Gray Kratt, NJEA
Fran Davis, KEA

I hereby request my withdrawal from the above-captioned matter currently pending before the Commissioner of Education/Office of Administrative Law.

_____
Russell Iuculano

(F)

NOTIFICATION OF WITHDRAWAL

OAL DKT. # EDU 11367-95

I, Kathleen A. Napratek, attorney for Mary Ann Palo, do hereby withdraw my client's request for a hearing in the above matter without prejudice. In so doing, I have advised Administrative Law Judge Thomas E. CLANCY that I have been unsuccessful throughout the duration of this case in having Ms. Palo participate in the substance of this case, as pointed out in my attached letter dated January 22, 2002

Kathleen A. Napratek

Kathleen A. Napratek

3/22/02

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AILEEN M. O'DRISCOLL*
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COLIN M. LYNCH
VINCENT J. NOLAN, III

SPECIAL COUNSEL
WILLIAM A. PASCARELL****

* (N.J. & PA. BAR)
** (N.J. & N.Y. BAR)
*** (N.J., N.Y. & D.C. BAR)
**** (N.Y. BAR ONLY)

June 13, 2001

Kathleen Puorro
10 Donna Drive
Fairfield, NJ 07004

Re: Kearny Educ. Assoc., et al v. Kearny Bd. of Ed.
OAL Dkt No. EDU-11367-95
Our File No. 21326.127

Dear Ms. Puorro:

By letter dated May 4, 2001, I advised you that after the long and arduous discovery phase of this case, I had reached the conclusion that you do not have a viable claim to any position with the Kearny Board of Education following the Spring 1995 RIF and that it would be appropriate to effectuate your withdrawal from this action. I also requested that you contact me immediately if you had any information which was contrary to this conclusion.

To date, you have not indicated that you possess any contradictory information and I therefore assume that you are amenable, albeit somewhat reluctantly, to withdrawing from this case. Toward that end, I am respectfully requesting that you kindly acknowledge your agreement to withdraw from this case, based upon the information set forth in my May 4th letter, on the enclosed copy of this letter, and return same to me in the addressed stamped envelope which I have enclosed for your convenience.

Thank you for your continued cooperation. Should you have any questions, please feel free to call me.

Very truly yours,
ZAZZALI, FAGELLA & NOWAK

By: Kathleen A. Naprstek
Kathleen A. Naprstek

KAN:kn
enclosures
cc: Barbara Gray Kratt, NJEA
Fran Davis, KEA

I hereby request my withdrawal from the above-captioned matter currently pending before the Commissioner of Education/Office of Administrative Law.

Kathleen Puorro
Kathleen Puorro

3W

(G)

KENNETH J. LINDENFELSER
ATTORNEY AT LAW
570 Kearny Avenue
KEARNY, NEW JERSEY 07032
Tel. (201) 998-9500
Fax (201) 997-4557

July 23, 2002

Rec'd - 7/26/02 by fax

Hon. Thomas E. Clancy, A.L.J.
State of New Jersey
Office of Administrative Law
185 Washington Street
Newark, NJ 07102

Re: **KEA (Donnelly & Stopherd) v. KBOE**
OAL Docket No. EDU 11367-95;

Dear Judge Clancy:

Enclosed please find certified copies of the Board Minutes with raised seals approving the settlements on the above cases. Please contact my office if these items are not sufficient or in the event the Court requires anything additional.

Thank you for assistance in this matter.

Yours very truly

Kenneth J. Lindenfelser
Attorney for the KBOE

KJL:kat
Encs.
cc: Kathleen A. Naprstek, Esq.

CERTIFIED TO BE A TRUE COPY OF THE RESOLUTION AS IT APPEARS IN THE MINUTES OF THE MARCH 18, 2002 REGULAR MEETING OF THE KEARNY BOARD OF EDUCATION

BY: Leslie J. Lawton
Business Administrator/Board Secretary

MOTION RE: APPROVAL OF SETTLEMENT OFFER

It was moved by Mrs. Torres, seconded by Mr. Stevenson and unanimously carried that the Kearny Board of Education hereby approves the settlement offer of a one-time payment of $35,000 for former teaching staff member Nancy Donnelly.

CERTIFIED TO BE A TRUE COPY OF THE RESOLUTION AS IT APPEARS IN THE MINUTES OF THE MARCH 18, 2002 REGULAR MEETING OF THE KEARNY BOARD OF EDUCATION

BY: Leslie J. Gaueton
Business Administrator/Board Secretary

MOTION RE: APPROVAL OF SETTLEMENT OFFER

It was moved by Mrs. Torres, seconded by Mr. Stevenson and unanimously carried that the Kearny Board of Education hereby approves the following settlement offer to former teaching staff member Alan Stopherd:

- *One-time payment of $25,000*
- *Sick leave converted to one-year's salary, payable at 20% per year for a period of five (5) years*
- *Kearny Board of Education to provide pension contribution*
- *No attorney fees will be reimbursed by the Kearny Board of Education*

(H)

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
One Riverfront Plaza
Newark, New Jersey 07102-5410
(973) 623-1822
Attorneys for Petitioners

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO and ALLAN STOPHERD, Petitioners, v. BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON OF KEARNY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 273-7/95 OAL Dkt No. EDU 11367-95 ADDENDUM TO STIPULATION OF SETTLEMENT AS TO PETITIONER ALLAN STOPHERD DATED 3/22/02

The above-captioned matter having been brought before the Commissioner of Education upon a Petition of Appeal, petitioner Allan Stopherd and respondent Board of Education of the Town of Kearny hereby agree to amicably resolve this dispute between them, now pending before this court, subject to the additional terms and conditions set forth below:

1. As previously set forth in paragraph 5 of the Stipulation of Settlement in this matter, as of June 30, 1995, petitioner Stopherd had accumulated 172 ½ days of unused sick leave pursuant to his employment with respondent.

2. As previously set forth in paragraph 10 of the Stipulation of Settlement in this matter, petitioner Stopherd shall be credited with 15 days of paid sick leave time for

each of the past seven (7) school years (the 1995-96 through 2001-02 school years), consistent with N.J.S.A. 18A:30-7. Thus, as of June 30, 2002, Stopherd shall have accumulated 277 ½ days of unused sick leave pursuant to his employment with respondent.

3. Petitioner Stopherd has determined to terminate his employment with the Board as June 30, 2002. As per Article 10 of the collective bargaining agreement between the Board and the Kearny Education Association addressing Termination Leave, a copy of which is attached hereto, petitioner Stopherd is permitted, and has determined, to convert his accumulated sick leave to the payment of one year's salary, or $67,295.00, which shall be payable in five (5) annual payments of 20% each, beginning on July 1, 2003. In the event petitioner Stopherd not survive to collect the total funds of $67,295.00 due him over a five (5) year period, the balance of any monies due shall be paid to his estate as per this payment schedule.

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Attorneys for Petitioner, Allan Stopherd

By: Kathleen A. Naprstek, Esq.

Dated: September 17, 2002

KENNETH J. LINDENFELSER, ESQ.
Attorney for Respondent, Board of
Education of the Town of Kearny

By: Kenneth J. Lindenfelser, Esq.

Dated: 12/5/02

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

(c) The Association and the Board agree that any teachers utilizing no sick days from September 1, 2001 to June 30, 2002 shall receive a $624.00 one time bonus. The Board and the Association further agree that any teacher utilizing one sick day from September 1, 2001 to June 30, 2002 shall receive a $572.00 one time bonus. Any teacher utilizing only two sick days from September 1, 2001 to June 30, 2002 shall receive a $520.00 one time bonus. Any teacher utilizing only three sick days from September 1, 2001 to June 30, 2002 shall receive a $468.00 one time bonus. Any of the aforesaid teachers who use more than three sick days shall not be entitled to any bonus under the above captioned sick leave incentive program.

Effective July 1, 1999 the per day incentive shall be $50. The bonus shall be $600.00 and the other payments shall be proportionately increased. All other terms and conditions of said paragraph B-8 shall remain in full force and effect.

Effective July 1, 2000 the per day incentive shall be increased from $50 to $52. The $600.00 bonus shall be increased to $624.00 and the other payments shall be proportionately increased. All other terms and conditions of said paragraph B-8 shall remain in full force and effect.

In no event in any year shall a teacher be eligible for any incentive bonus if more than three sick days are used. The above sick leave bonuses shall be payable in July 2000, July 2001 or July 2002 as the case may be.

9. The incentive bonus shall not be available to teachers, who are part time or do not work the entire year. Teachers who take a maternity or other kind of leave during the year do not qualify for the bonus.

10. Termination Leave

(a) An employee who elects to leave the District after a minimum of 20 years of service in the District will be granted payment for accumulated personal illness days based on the following schedule:

1. (1/200 of base salary* + longevity*) X (the number of accumulated sick leave days) up to a limit of one year's salary + longevity based on the first 200 days.

* Individual's salary and longevity at the time of termination.

2. Accumulated sick leave days beyond 200 days will receive additional payment based on the following schedule:

250-299 days	$ 5,000.00
300-349 days	$10,000.00
350-399 days	$15,000.00
400-449 days	$20,000.00

(b) All monies will be paid in 5 equal installments beginning July 1 of the termination year and in each of the four years that follow.

(c) Should the employee not survive to collect the total funds due him/her, said funds will be paid to his/her estate on the same schedule as provided for in part (b) of this Article.

(d) Notification of termination must he made to the District no later than February 1 in order to begin payment on July 1 of the same year as stipulated in part (b). If notification is made after February 1, the first payment will be made on July 1 of the following year and will then be paid in the four years that follow that year as stipulated in part (b).

(e) The annual sick day incentive monies will not be paid the last year of a teacher's employment in District only when termination leave monies are paid to that teacher.

C. — If a teacher comes to work in the morning and is sent home ill before noon in the elementary or 11:35 a.m. in the high school, he or she is charged only one-half day absence. If an elementary teacher is sent home after 12:00 noon or high school teacher after 11:35 a.m., he or she is not charged any time off.

OAL DKT. NO. EDU 11367-95
AGENCY DKT. NO. 273-7/95

KEARNY EDUCATION ASSOCIATION, on behalf of itself and the members named herein, SANDRA SIINO, SALLY ANN ROESSLER, RUSSELL IUCULANO, MARY ANN PALO, NANCY DONNELLY, KATHLEEN PUORRO, AND ALLAN STOPHERD,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record, seven settlement and withdrawal documents comprising the Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1|29|03

Date of Mailing: 1|29|03

GEORGE MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY, AND JOHN O'KANE,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parent contested the Board's refusal to certify tenure charges against a teacher/coach.

The ALJ found and concluded that petitioner could not establish that the Board was arbitrary, capricious or unreasonable when it determined that petitioner had not shown probable cause to believe that respondent conducted himself in a manner requiring his termination from employment as a teacher or requiring a reduction of his teaching salary. Petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

January 31, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION TO DISMISS
OAL DKT. NO. EDU 6084-02
AGENCY DKT. NO. 158-5/02

GEORGE MILLER,
Appellant,

v.
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY AND JOHN O'KANE,
Respondent.

Joseph A. Levin, Esq., appearing for petitioner (Jacobs and Barbone, P.A., attorneys)

Joseph R. Dougherty, Esq., appearing for respondent, Board of Education

Steven Cohen, Esq. and **Keith Waldman,** Esq., appearing for respondent, (Selikoff and Cohen, P.A., attorneys) John O'Kane respondent

Record Closed: December 18, 2002 Decided: December 18, 2002

BEFORE **EDGAR R. HOLMES**, ALJ

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

The petitioner filed a "school law action complaint" with the Atlantic City Board of Education on January 24, 2002, seeking tenure charges against John O'Kane and other unknown persons. The Atlantic City Board of Education considered the charges on February 26, 2002, and by a vote of 6 to 3 with one abstention determined that there was "... no probable cause to credit the evidence in support of the charges and that if the charge were credited, it is not sufficient to warrant a dismissal or reduction in salary."

Petitioner appealed the rejection of the charges to the Commissioner of Education on May 28, 2002. On August 21, 2002, the matter was transmitted to the Office of Administrative Law (hereinafter) OAL to be heard as a contested case pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Respondents filed motions to dismiss in lieu of answers to the school law complaint and petitioner responded.

RELEVANT FACTS AND LAW

The legal standard to be applied in considering whether the BOE decision should be set-aside is whether that decision was arbitrary, capricious or unreasonable. *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288, 296-297 (App. Div. 1960).

The employment of coaches is a managerial decision of the BOE and not subject to tenure law. *Mainland Teachers Association v. Mainland High School,* 176 *N.J. Super.* 476 (App. Div. 1980). *Certif denied* 87 *N.J.* 312 (1981). This complaint seeks to remove O'Kane from his teaching position for action taken by him as a coach of the softball team.

The petitioner is the father of two players on the Atlantic City girl's softball team. John O'Kane is the girl's softball team coach. It is evident from the petition and other filings in this matter that there is enmity between them.

The main thrust of petitioner's complaint is an incident that occurred over four years ago. Petitioner alleges that O'Kane would not take a pitcher out of a game even though she complained that her arm hurt. As a consequence the pitcher and her father now claim that this incident ruined her arm and she was never again an effective softball pitcher. They, however, did not bring this action. The petitioner and the pitcher are unrelated except that the petitioner's children and the pitcher were teammates.

The allegation does not indicate that any medical report or examination was done contemporaneously with the event complained of or subsequently, neither is there any indication

that petitioner actually suffers from an injury which is the direct result of this incident. After this much time, whether or not the events of that day harmed the girls arm is mere speculation.

The most that could be shown is that O'Kane left a pitcher in a game too long.

Based on other allegations; that O'Kane ignored or violated the school manual for coaches and has alienated parents of other players, one may surmise, if these allegations are credited, that O'Kane should not be a coach. This is a long way from saying he should be removed as a teacher after 29 years.

It would be unreasonable not to certify tenure days where the coach assaulted a player, a referee, an umpire or a fan. It would be unreasonable not to certify tenure charges where a coach played a student against medical advice such as immediately after a concussion or when the student had been diagnosed with epilepsy or congestive heart failure. But it is not reasonable to certify tenure charges against a coach when a player receives an injury and it is not apparent that an injury occurred until four years have elapsed. This is all the more apparent when there is no medical documentation that there was an injury.

The anonymous letter sent to the Board in support of O'Kane which petitioner claims O'Kane wrote did not influence the Athletic Director who is O'Kane's supervisor in his capacity as a coach. The Athletic Director said he does not credit anonymous letters. Neither did the Board. Even if it can be proven by a preponderance of the credible evidence that O'Kane did write the letter, that is not a sufficient basis upon which to remove him as a teacher or reduce his salary.

I **FIND** and **CONCLUDE** that the petitioner cannot establish that the BOE was arbitrary, capricious and unreasonable when it determined that the petitioner had not shown probable cause to believe that the respondent O'Kane conducted himself in a manner requiring his termination from employment as a teacher.

I also **FIND** and **CONCLUDE** that the petitioner cannot establish that the BOE was arbitrary, capricious and unreasonable when it determined that the petitioner had not shown

probable cause to believe that the respondent O'Kane conducted himself in a manner requiring a reduction of his teaching salary.

ORDER

I **ORDER** that the petition filed herein be **DISMISSED**.

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

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

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

December 18, 2002
DATE

Edgar R. Holmes by Designation, ACT
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

12-23-02
DATE

M. Kathleen Duncan /cp
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 24 2002
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ERH/mamf

OAL DKT. NO. EDU. 6084-02
AGENCY DKT. NO. 158-5/02

GEORGE MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF ATLANTIC CITY, ATLANTIC COUNTY, AND JOHN O'KANE,	:	DECISION
RESPONDENTS.	:	

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

Upon his full and independent review, the Commissioner agrees with the Administrative Law Judge's conclusion that the within petitioner has failed to sustain his burden of demonstrating that the Board's action declining to certify tenure charges against Respondent O'Kane was arbitrary, capricious, unreasonable or an abuse of its discretion and, consequently, such action must be upheld.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/03

Date of Mailing: 1/31/03

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

43-05

J.P. AND M.P., on behalf of their minor children, M.P. AND J.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents challenged the Board's redistricting plan to accommodate the building of a new elementary school as arbitrary, capricious, unreasonable and violative of school law. Under this plan petitioners' children and other children in the neighborhood, who currently walk to school, would be bussed to another school.

The ALJ noted that since a board of education's actions are entitled to a presumption of lawfulness and good faith, petitioner bears the burden of proving such actions unlawful. In this case, petitioners did not prove bad faith or wrongdoing as the motive for the Board's action. Moreover, the ALJ determined that there was no issue as to material fact and that the Board's action in adopting the redistricting plan was not arbitrary, capricious or unreasonable. The Board's motion for summary decision was granted and petitioner's motion for summary decision was denied.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

February 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING RESPONDENT'S MOTION AND DENYING PETITIONER'S MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 4969-01

AGENCY DKT. NO. 302-7/01

J.P. AND M.P. ON BEHALF OF THEIR MINOR CHILDREN M.P. AND J.P.,

Petitioners,

v.

BOARD OF EDUCATION OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

George M. Holland, Esq., for petitioners (Lentz and Gengaro, attorneys)

James F. Schwerin, Esq., for respondent (Parker, McCay & Criscuolo, P.A., attorneys)

Record Closed: December 13, 2002 Decided: December 17, 2002

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, Joan and Mark Puchalski, on behalf of their children, M.P and J.P., challenge the redistricting plan adopted by Respondent, South Brunswick Board of Education, to accommodate the building of a new elementary school. The original petition was filed on July 20, 2001, and Petitioners filed an amended petition on July 26, 2001, claiming that Respondent's adoption of the redistricting plan was (1) arbitrary, capricious or unreasonable; (2) in violation of the Rehabilitation Act of 1973, 29 *U.S.C.A.* § 794; (3) in violation of the New Jersey Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 et seq.; (4) in violation of Article I, ¶ 5 of the New Jersey Constitution; and (5) in violation of its authority under the school law. The crux of Petitioners' concerns center around the fact that Respondent, in accordance with the redistricting plan, made the decision to bus Petitioners' children and other children in their neighborhood, known as the "Reserve," who are currently walkers to their present school, to another school. Respondent filed its answer on August 3, 2001, and the case was transmitted to the Office of Administrative Law on August 28, 2001. The parties subsequently exchanged interrogatories. Respondent filed this motion for summary decision on June 12, 2002, claiming that the redistricting plan as adopted by Respondent could not be found arbitrary, capricious or unreasonable, even with all evidentiary materials viewed in the light most favorable to Petitioners and that there are no allegations which would support the other causes of action. Petitioners filed their opposition to Respondent's motion for summary decision and their "Cross-Motion for Summary Judgment" on July 24, 2002, arguing that there are genuine issues as to material fact, which show that the Respondent acted arbitrarily, capriciously or unreasonably in adopting the redistricting plan. However, Petitioners do not address Respondent's contention regarding the other causes of action. Respondent filed its reply on September 19, 2002, which

emphasizes that there are no genuine issues of material fact and that the Petitioners' proffers, if true, do no more than show that the redistricting plan may not be the best of all possible plans, which is not enough to avoid summary decision.

After receiving the motion papers, I directed a letter to counsel, dated October 30, 2002, in which I indicated the following:

> I am in receipt of your letter of October 25, 2002 concerning the issue of whether I'm going to assess petitioners' "standing" in arriving at a decision on the motion before me.
>
> It's an interesting question. It is my view that, similar to issues concerning subject matter jurisdiction, the judge has an affirmative obligation to determine whether there is jurisdiction or there is not, irrespective of whether the parties themselves raise that question. I believe that in respect to the issue of standing in this matter, that may also be the case. In addition, there seems to be some overlapping questions which relate both to standing and jurisdiction; by jurisdiction, I mean whether the assertions that are being made before the Commissioner of Education are those which should be made elsewhere in that the Commissioner may not have jurisdiction to address those questions. I need not obtain briefs from either you or Mr. Schwerin; however, if you wish to submit argument on those questions, that will be fine and please call me to advise me when those arguments are going to be submitted. If you do not submit, no inference of any kind will be drawn, and I will independently assess the questions before me. Thank you for your cooperation.

Following the submission of that letter, I received various written responses from counsel, and eventually a question was presented which resulted in a request by the parties or parties (it was unclear during the conference exactly who had requested the telephone conference call), and as a result the matter was conferenced on December 13, 2002. Following the conference, it appeared that all of the ancillary issues raised by me in my previous correspondence had been resolved informally by the parties, and as a consequence the record closed on the latter date, December 13, 2002.

THE FACTS

Based upon the motion papers and affidavits submitted by the parties, I have arrived at what I believe to be an uncontradicted narrative of the operative facts in these proceedings for purposes of addressing the respective motions.

Accordingly, I **FIND**:

During the 2000-2001 school year, the school district had eight lower elementary school, grades K through 4.[1] The Upper Elementary School included Grade 5. Due to overcrowding and population growth, Respondent decided to integrate a new elementary school into the system and return the fifth grade from the Upper elementary school to the lower elementary schools. These changes are due to occur during the 2002-2003 school year, which has made it necessary to redistrict the attendance structure within the school district. Respondent formed the Redistricting Committee ("Committee"), which consisted of some members of the respondent board, some administrative personnel and representatives of the community.

The Committee engaged in a process to investigate redistricting alternatives. The Committee developed the following guidelines for the lower elementary schools:

-All schools must be K-5
-School enrollments should be balanced
-Keep neighborhoods together where possible
-Maximize the number of walkers
-Comply with the State Office of Equal Education Opportunity ("OEEO") requirements
-Minimize time students spend on the bus
-Allow for "grandfathering" of 2001/2002fourth graders by open enrollment
-Keep special education students in the same school for a minimum of two years
-Cambridge Elementary and the new school should be designated schools for preschool handicap
-Continue the Board of Education's goals of high academic performance and achievement in a safe and caring environment

[1]The elementary schools within the school district are Brunswick Acres, Cambridge, Constable, Dayton, Deans, Greenbrook, Indian Fields and Monmouth Junction. The name of the new elementary school is Brooks Crossing.

The committee held three open public meetings on April 30, May 15 and May 16, 2001, in an effort to gather input from the public. Almost all of the South Brunswick residents who participated in these meetings expressed a desire to have their children remain in their current elementary schools. A list of comments from each meeting was attached to the Committee's report to Respondent, dated June 4, 2001. The committee was relying on transportation data, making it difficult for it to conduct redistricting. The Committee developed some "what if" scenarios to ensure that neighborhoods in changing districts would still be contiguous to the other neighborhoods in its new district and decided which neighborhoods would be changed to new districts. The Committee tried to make sure that neighborhoods being moved were not too big and that there were no natural barriers between sending districts. Over twenty possible plans were developed by the Committee, however, only two plans, 18A and 20A, were recommended to Respondent because the Committee felt that they were the only plans in compliance with the OEEO requirements. Respondent adopted plan 18A, intending to implement it for the 2002-2003 school year. In the spring of 2002, projections were made to assess the impact of recently updated data, which revealed that the new school would be overcrowded. The plan was modified, to avoid that problem, by having a number of students stay put at their current school.

Under the redistricting plan, both as originally adopted and as modified, Petitioners' children, as well as other children from "the Reserve" neighborhood will be moving from Monmouth Junction Elementary School to Indian Fields Elementary School.

Additionally, Petitioners allege the following, which are to be taken as true for the purposes of summary decision in favor of Respondent: Statements of Committee members were published in a state-wide newspaper which incorrectly alleged that the children in Petitioners' community were in danger of walking to school and that they hardly ever walk to school and are usually driven to school. A member of the Committee admitted that, in deciding how to redistrict neighborhoods, the Committee gave priority to established neighborhoods. This statement was printed in a local newspaper. The Committee Chair, Carole O'Brien, who is also a member of Respondent, sarcastically ridiculed the concerns of parents in an e-mail message sent to members of the respondent board and the Committee, which was published in the North/South Brunswick Sentinel newspaper. The findings of Petitioners' expert, Donald M. Scurry, Ph.D., assuming validity and qualification, reveal that adoption of plan 18A will cause the most

disruption when compared to Plans 20A, 15 and 14. Plan 18A would require a movement of 1,923 students or 52.9% of the student base, while Plan 20A would require a movement of 1,877 students or 51.6% of the student base, Plan 15 would require a movement of 1,539 students or 42.2% of the student base, and Plan 14 would require a movement of 1,729 students or 47.5% of the student base. Thus, Respondent's adoption of Plan 18A will cause the most disruption relative to three of the other plans considered. The findings of Dr. Scurry also reveal, using a "goodness of fit" statistical test, that Plan 14, with a measurement of .512 and Plan 15, with a measurement of .358, better represent the racial composition of Respondent's school district than Plan 18A, with a measurement of .521 or plan 20A, which has a grossly disproportionate amount of Asian children in some of the elementary schools. A representative of the OEEO advised respondent that it should not be concerned about minor deviations from the requirements of the OEEO guidelines so long as its numbers were in the "ballpark." A representative of the Middlesex County Department of Education advised the petitioner, Mrs. Puchalski, that South Brunswick did not have a racial problem and should not be concerned about exact compliance. Respondent and the Committee used pre-school age children attending the federally funded "Head-Start" program in its calculations. A representative of the Middlesex County Department of Education advised the petitioner, Mrs. Puchalski, that Respondent should have not used pre-school age children to obtain compliance with OEEO.

DISCUSSION

1. Arbitrary, Capricious and Unreasonable

Petitioners claim that Respondent's adoption of the redistricting plan was arbitrary, capricious and unreasonable, while Respondent denies this allegation. Respondent's action to adopt the redistricting plan, like that of any administrative agency, must be upheld unless it is deemed "arbitrary, capricious and unreasonable." *Non-Profit Affordable Housing v. COAH*, 265 *N.J. Super.* 475, 479 (App. Div. 1993); *Shuster v. Bd. of Ed. of Montgomery Twp.*, 96 *N.J.A.R.*2d (EDU) 670, 676, *adopted* Comm'r. 96 *N.J.A.R.*2d (EDU) 677. A board of education's actions "are entitled to a presumption of lawfulness and good faith." Accordingly, where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, or

arbitrary, capricious and unreasonable.[2] *Shuster*, 96 *N.J.A.R.*2d at 676 (citing *Schinck v. Westwood Bd. of Ed.*, 60 *N.J. Super.* 448 (App. Div. 1960), and *Quinlan v. North Bergen Bd. of Ed.*, 73 *N.J. Super.* 40, 46 (App. Div. 1962)).

Under this standard, three factors must be considered: (1) whether Respondent's actions violated the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings on which the action was based; and (3) whether, in applying the legislative policies to the facts, Respondent clearly erred by reaching a conclusion that could not reasonably have been made on a showing of the relevant facts. *Matter of Warren,* 117 *N.J.* 295, 296-7 (1989)(citing *Campbell v. Dep't. of Civil Service*, 39 *N.J.* 556, 562 (1963)); *Edison Twp. Bd. of Ed. v. Edison Twp. Princ. Ass'n.*, 304 *N.J. Super.* 459, 463 (App. Div. 1997)(citing *In re Musick*, 143 *N.J.* 206, 216-17 (1996)).

Notably, however, the "arbitrary, capricious and unreasonable" standard of review is narrow in its scope, and consequently imposes a heavy burden on the challengers of board actions. The New Jersey courts have defined this standard as follows:

> In the law, 'arbitrary' and 'capricious' means having no rational basis....Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. *Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached....* Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling.
>
> [*Bayshore Sewage Co. v. Dept. of Envt'l. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd.* 131 *N.J. Super.* 37 (App. Div. 1974) (internal citations omitted)(emphasis added).]

As such, "absent a *clear showing of abuse of discretion*," the Commissioner will not "substitute his judgment for that of the Board of Education." *Massaro v. Bd. of Ed. of the Borough of*

[2]In order to overcome the "presumption of correctness," a challenger of a board action must prove by a *preponderance of the credible evidence* that such action was arbitrary, capricious and unreasonable. *South Mountain Civic Ass'n. v. Bd. of Ed. of Millburn Twp.*, OAL DKT EDU 0589-83 (July 13, 1983) *adopted* Comm'r. (Aug. 29, 1983) (emphasis added).

Bergenfield, 1965 *S.L.D.* 84, 85. In *Kopera v. Bd. of Ed. of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960), the Appellate Division discussed the "well established rule that action of the local board [of education] which lies within the area of its discretionary powers may *not* be upset *unless patently arbitrary without rational basis or induced by improper motives.*" *Id.* at 94 (emphasis added). In this regard, in a similar challenge to board action, an ALJ has stated:

> It is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education *absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis.*
>
> [*G.M. v. Roselle Park Borough Bd. of Ed.*, 95 *N.J.A.R.*2d (EDU) 107, 109, *adopted* Comm'r. 95 *N.J.A.R.*2d (EDU) 110 (citing *Paddock v. Bd. of Ed. of the Borough of Demarest*, 1974 *S.L.D.* 435) (emphasis added).]

Additionally, in *Brodie v. Bd. of Ed. of Saddle Brook Twp.*, 93 *N.J.A.R.*2d (EDU) 694, 700, *adopted* Comm'r. 93 *N.J.A.R.*2d 700, Chief ALJ LaVecchia quoted from the Commissioner's recitation of the law on this point as follows:

> [A]s long as...a board of education...acts within the authority conferred on...it by law the courts are without power to, or will not, interfere with, control, or review...its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof or error; nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed.
>
> [*Brodie*, 93 *N.J.A.R.*2d (EDU) at 700 (quoting *Barnes v. Bd. of Ed. of Jersey City*, 1961-62 *S.L.D.* 122, 125, *aff'd* State Bd., 1963 *S.L.D.* 240).]

Although the New Jersey courts have handled numerous challenges to actions by boards of education under this "arbitrary, capricious and unreasonable" standard, the challengers have been generally unsuccessful in their efforts to reverse such actions. In most cases, as long as the record reflected a rational basis for the action, as well as the absence of bad faith, the courts were likely to uphold the boards' actions. For example, in *Red Bank Teachers Ass'n. v. Bd. of Ed. of Red Bank*, OAL DKT EDU 5328-80 (Apr. 30, 1981), *adopted.* Comm'r. (June 15, 1981), the ALJ upheld the board's approval of a new "Mastery Learning" curriculum as a "valid exercise of its managerial prerogative" that was rationally arrived at. Likewise, in *G.M.*, *supra*, the ALJ found that the board's decision to change geographic boundaries for kindergarten pupil

placement, with a goal of evenly distributing the pupils at different schools within the district, was a reasonable exercise of its authority. Additionally, in *Shuster*, *supra*, the ALJ determined that it was within a board's discretion to make a change from a two-story plan for construction of a new school, to a one-story plan. There, the record reflected that notwithstanding the approval of the two-story plan in a referendum, the board had a reasonable basis to believe that a one-story plan, at a substantially similar cost, would be educationally superior to a two-story plan. Accordingly, its decision was not disturbed.

Even more relevant to the instant matter are cases concerning redistricting and/or reorganization of schools, in which such actions by boards of education have been upheld as valid exercises of their authority under *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:33-1. The fairly recent *Piccoli* case is on point. *See Piccoli v. Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed.*, EDU 1839-98, Initial Decision, (January 22, 1999), *adopted* Comm'r. (March 10, 1999) <http://lawlibrary.Rutgers.edu/oal/search.html>. In *Piccoli*, three municipalities[3] sent students to the school district's two high schools. Because Ramapo High School became overcrowded and Indian Hills High School was underutilized, the board of education adopted a plan that allowed students to choose the high school of lesser enrollment. The plan, taking the overcrowding problem and the curriculum into account, was based upon population projections a study of the physical plants that was conducted by an architect. When the plan was challenged, the ALJ granted summary decision and dismissed the petition. Thereafter, the Commissioner adopted the ALJ's decision as his own, finding that he "could not substitute his judgment for that of the Ramapo-Indian Hills Board of Education, *even if he believed an erroneous conclusion had been reached* by respondent because the record establishe[d] that respondent did not take willful or unreasoning action, without consideration and in disregard to the circumstances" and that *the fact that some constituencies disagreed with the plan the respondent adopted did not make its actions arbitrary, capricious, unreasonable or discriminatory. Ibid.* (emphasis added).

In *Marcewicz v. Bd. of Ed. of Pascack Valley Regional High School Dist.*, 1972 *S.L.D.* 619, the regional high school district contained two high schools: the "Hills School" and the "Valley School." The board approved a high school redistricting plan after concluding, through various studies, that the Hills School had reached an "intolerable" level of "over capacity," which

was projected to worsen in the upcoming school years. When the board's passage of the plan was challenged, the Commissioner determined that the plan was not arbitrary, capricious and unreasonable, and upheld the board's action as a valid exercise of its authority. The Commissioner stated that "the Board acted in a reasonable, deliberate and thorough manner to examine the enrollment projections over a period of weeks prior to the time of its final action." *Marcewicz*, 1972 *S.L.D.* at 625. The Commissioner noted that the board, although not required to, invited public comment and discussion on the redistricting issue prior to taking its final action. In this regard, the Commissioner stated: "It is the Board alone which is empowered by *N.J.S.A.* 18A:11-1 to make rules for its own 'government' and the 'government' of the public schools entrusted to its supervision." *Ibid.*

A similar situation occurred in *Parents United for Better Learning in the Community v. Hamilton Twp. Bd. of Ed.*, OAL DKT EDU 3503-85 (July 12, 1985), *adopted* Comm'r. (Aug. 13, 1985), where the challenged board action consisted of a plan to change school attendance/boundary areas for the upcoming school year, in an effort to alleviate severe overcrowding at the middle school level. All parties conceded that overcrowding existed at the township's two middle schools. After a referendum to construct a new middle school was defeated, the board proposed boundary changes to address the overcrowding issue. Over the course of the following month, the board held various meetings and accepted public comments on the issue; thereafter, it passed the proposal. Finding that there was no affirmative showing that the action was arbitrary, capricious or unreasonable, the ALJ upheld the board's action, and the Commissioner affirmed. The ALJ noted that while emotions ran rampant when such board action was proposed, the challengers nonetheless had to meet the "arbitrary, capricious and unreasonable" standard in order to have the action overturned. In this regard, he stated: "[T]here are certain questions which arise in the life of a community which generate high feelings. No matter how emotional the question, however, as the petitioner correctly observes, it still must meet the [arbitrary, capricious and unreasonable] standard." *Ibid.*

Similarly, *Fullen v. Middletown Twp. Bd. of Ed.*, 1986 *S.L.D.* 582, *adopted* Comm'r. 1986 *S.L.D.* 603, and *Hussnatter v. Bd. of Ed. of Newton*, 1986 *S.L.D.* 2667, *adopted.* Comm'r. 1986 *S.L.D.* 2688, both dealt with the issues of school overcrowding and redistricting plans. The

[3]Oakland, Wyckoff and Franklin Lakes

boards' actions in approving the plans were upheld for substantially the same reasons as in the aforementioned cases. Additionally, the ALJ in *Fullen* stated the following:

> Lines for attendance at a particular school must always be drawn somewhere and whenever lines are drawn, there must always be those who fall immediately outside a desired attendance boundary line. But the existence of a difference of opinion as between petitioners and the Board does not equate with an unreasonable action of the Board in its adoption of the plan. A policy or rule of a board of education is reasonable if it is designed to achieve a legitimate goal.... While pupils have a constitutional right to receive a thorough and efficient program of education, there is no corollary right to receive such education in a specific schoolhouse in the district.
>
> [*Fullen*, 1985 *S.L.D.* at 598, 601.]

In the instant matter, as in *Piccoli*, the evidence and all inferences therein reflect that Respondent's adoption of the redistricting plan was not arbitrary, capricious or unreasonable. The determinations of school attendance areas and boundaries for pupil placement are well within the province of Respondent's authority as a board of education under *N.J.S.A.* 18A:11-1 and 18A:33-1. All the cases involving similar actions by other boards of education have been upheld as being within their delegated authority under these provisions. The only distinction between these cases and the case at bar is that there are allegations of bad faith and wrongdoing on the part of Respondent. However, Petitioners here fail to produce any affirmative evidence of any specific wrongdoing or deviation from lawful board of education activity.

Here, the record reflects that Respondent formed the Committee, which engaged in an analysis of various alternatives for redistricting. The Committee established guidelines, worked systematically at developing maps showing various configurations of neighborhoods and streets. Each map was sent to the Administration ... to get relative statistical information, such as school enrollments, ethnic and racial breakdowns and movement from current schools to redistricted schools. These statistics were compared to the optimum capacities, and the OEEO allowable range. More than 20 potential plans were developed. The Committee received letters and e-mails from parents and held three open meetings to receive input from the public. A list of

individuals' comments at these meetings was created and attached to the report of final recommendations, which is dated June 4, 2001.[4]

Petitioners have no knowledge of how the Respondents deviated from authorized Board activity and attempt to state their claim by asserting that statements allegedly made by members of the Committee were misleading and that the chairperson of the Committee, who is also a member of the respondent board, had sarcastically ridiculed the concerns of some parents in an e-mail. The statements by the members of the Committee that were printed in a newspaper, if true and admissible, at best lend support to the argument that Respondent reached an erroneous conclusion, which is not enough to show the action was arbitrary, capricious or unreasonable. The e-mail from Ms. O'Brien, even if accurate and admissible, shows inappropriate and unprofessional conduct, as well as poor judgment on the part of one member of the respondent board in her response to parents' concerns, and may even have been the indignity that led Petitioners' to file their petition. However, this does not equate to the whole respondent board acting in an arbitrary, capricious or unreasonable manner in adopting the redistricting plan, as there is a lack of any evidence that would permit the finding of such a connection.

The report of Dr. Scurry, putting aside the fact that he only conducted an analysis on 4 of the more than 20 plans considered by the committee and assuming that his analysis is valid and that he qualifies as an expert, concludes that Plan 15 is more reflective of the ethnic/racial characteristics of the district than Plan 18A (which Respondent adopted). His findings also indicate that there is little to distinguish the competing plans from each other in this respect. Even if there were more of a distinction and even if all the considered plans were evaluated, the fact that the redistricting plan adopted by Respondent was not the best plan does not amount to Respondent's decision being arbitrary capricious or unreasonable. Also, Dr. Scurry's analysis concludes that Plan 15 is better than Plan 18A because it moves 1539 students as opposed to moving 1923 students, but indicates that it is difficult to choose among the four plans on this basis. Again, because Respondent may not have adopted the best plan with regard to this statistic, does not mean that its decision was arbitrary capricious or unreasonable.

[4] *See South Brunswick Redistricting Committee Report to the South Brunswick Board of Education* (June 4, 2001).

Petitioners also make contradictory statements with respect to the OEEO guidelines. One the one hand they argue that the OEEO guidelines are not mandatory and can be flexible, therefore they should not have been a concern of the Committee and Respondent in adopting the redistricting plan, while on the other hand, they assert that Respondent's redistricting plan is not in strict compliance with the OEEO guidelines and should not have been adopted for this reason. Respondent agrees that compliance with the OEEO guidelines is not mandatory, but the evidence shows that Committee chose to follow them. Their conclusion that Plans 18A and 20A met the guidelines is based upon their comparison of permitted ranges to their projections. The record reflects that they relied on data, which determined that the percentages in each school for each racial group, except for one school, are strictly within guideline ranges. [5]

Additionally, Petitioners acknowledge that open public meetings were held and the evidence shows that notes were taken of the public's comments and sent to Respondent as part of the Committee's report. It is not enough to show that a plan is not the best of all plans. There must be some proof of some bad faith motive or irrational action. There is simply no evidence in the record that Respondent's actions were made in "bad faith" or were otherwise "arbitrary, capricious or unreasonable." Instead, a thorough reading of the record reflects that the basis of Petitioners' arguments is upon their emotion, as they have no factual or legal bases. Petitioners' arguments, while highly charged and emotionally laden, cannot stand absent a definitive showing that Respondent's action was arbitrary, capricious or unreasonable. Accordingly, summary decision on this point will be granted in favor of Respondent.

Claims that the Respondent's redistricting plan violates the Rehabilitation Act of 1973, the New Jersey Law Against Discrimination ("LAD"), Article 1, §5 of the New Jersey Constitution, and school laws.[6]

Petitioners also claim violations of the Rehabilitation Act of 1973, the New Jersey Law Against Discrimination ("LAD"), Article 1, §5 of the New Jersey Constitution, and school laws,

[5]The findings indicate that the only exception is the Black population at Cambridge, where the percentage is marginally below the permitted range. However, the Black population at that school is within the permitted range if the Head Start preschool program, which is located there, is used.

specifically *N.J.S.A.* 18A:11-1, 33-1 and 7F-1-14. Respondent argues in its motion for summary decision that these claims have no basis and should be dismissed. Petitioners do not respond nor set forth any evidence that would lead to a contrary finding on any of these claims.

First, to state a claim under § 504 of the Rehabilitation Act of 1973, 29 *U.S.C.* § 794(a), an individual must demonstrate that she is an individual with a disability who was denied benefits of a federally funded public entity because of her disability. *Calloway v. Boro of Glassboro Department of Police*, 89 *F.Supp.*2d 543, 551 (D.N.J. 2000). Here, there is no allegation of any disability by Petitioners. Therefore, Petitioners do not state a claim for relief under § 504 of the Rehabilitation Act of 1973.

Second, the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 through 10:5-49, which provides broad protections on the basis of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, or nationality, as well as handicap. To state a claim under the LAD, Petitioners must claim discrimination on the basis of one of these protected classes. Petitioners fail to make such a claim by merely alleging discrimination in favor of older, wealthier, or more established neighborhoods and against families living in certain types of housing, which do not meet the standard of protected classes as contemplated by the LAD. Thus, Petitioners fail to state a claim upon which relief can be granted under the LAD.

Third, Article I, ¶ 5 of the New Jersey Constitution states that:

> No person shall be denied the enjoyment of any civil or military right, nor shall be discriminated against in the exercise of any civil military right, nor be segregated in the militia or in the public schools, *because of religious principals, race, color, ancestry or national origin.*
>
> [NJ Const. Article I, ¶ 5 (emphasis added).]

[6]During the phone conference conducted on December 13, 2002, both counsel acknowledged that all claims other than petitioner's "arbitrary and capricious" claims are not justiceable. I have, however, included the analysis for purposes of completeness.

Similar to the LAD, there are no allegations of discrimination on the basis of any of the enumerated categories, precluding such a claim. Even if such an allegation were present, "[m]ere inequality or difference in treatment does not suffice to support a charge of unconstitutional discrimination. *Kenny v. Byrne*, 144 *N.J. Super.* 243, 257 (App. Div. 1976), *affirmed* 75 *N.J.* 458 (1978). A "classification must be upheld under any reasonable set of facts unless there is a showing of invidious discrimination." *Ibid.* There is the presumption of constitutionality and Petitioners have "the burden of showing that it is arbitrary and without reasonable basis to support it." *Ibid.* Thus, even if Petitioners claimed discrimination on the basis of a protected classification, they have not met their burden. Nowhere is there evidence of such invidious discrimination and this claim is at most a restatement of Petitioners' arbitrary, capricious and unreasonable claim.

Moreover, the type of alleged "discrimination" raised by Petitioners (i.e., discrimination on the basis of geographic location or type of neighborhood) is not contemplated in any of the anti-discrimination statutes.

Finally, with regard to the school laws[7], the assignment of pupils and other attendance/boundary issues fall within the discretionary authority granted Respondent by the Legislature under *N.J.S.A.* 18A:11-1. Also, the provision of suitable facilities, access to same and courses of study are required under *N.J.S.A.* 18A:33-1. This claim challenging Respondent's exercises of its authority to redistrict and/or reorganize its schools under *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:33-1 is a restatement of Petitioners' arbitrary, capricious and unreasonable claim using different terms and can be dismissed or consolidated with the latter. Furthermore, there is no claim or affirmative evidence of any disparities in resource allocation or course offerings between the schools.

In the case at bar, Petitioners' do not even allege a prima facie case on any of these various claims. Therefore, these claims, which amount to allegations that Respondent's action in adopting the redistricting plan was discriminatory, must fail. Accordingly summary decision on these claims is **GRANTED** in favor of Respondent.

[7]Petitioners also claim that Respondent violated *N.J.S.A.* 18A:7F-1-14. There can be no finding that Respondent violated this statute, as there is no *N.J.S.A.* 18A:7F-1-14.

CONCLUSION

The standard of review for Respondent's adoption of the redistricting plan is extremely deferential to respondent. Petitioners have not met their burden to overcome the presumption of reasonableness on the part of Respondent in their attempts to prove that Respondent's action was arbitrary, capricious or unreasonable. It is not enough for Petitioners to show that Respondent erroneously chose a plan that was not the best plan when compared to a few other possible plans. There must be some evidence showing bad faith or wrongdoing as the motive for Respondent's action. Plaintiffs fail to make such a showing. Thus, there is no issue as to material fact and it can be determined that Respondent's action, in adopting the redistricting plan, was not arbitrary, capricious or unreasonable. Therefore, summary decision should be granted in favor of Respondent and Plaintiffs' amended complaint dismissed.

Additionally, Plaintiffs do not even state allegations that would create a prima facie case in support of their other claims. Therefore, summary decision should be granted and Plaintiffs' amended complaint dismissed.

Accordingly, and based upon the foregoing, I **CONCUDE** that the respondent has demonstrated by a preponderance of the relevant credible evidence that there are no genuine fact issues presented in these proceedings and that the respondents are entitled to prevail as a matter of law. Accordingly, respondent's motion for summary decision is **GRANTED**. Petitioner's motion for summary decision is **DENIED**. It is **ORDERED** that the matter be and is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

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

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

12/17/02
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

December 19, 2002
DATE

M. Kathleen Duncan Esq
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 20 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cmo

J.P. AND M.P., on behalf of their minor children, M.P. AND J.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on December 20, 2002 and the exceptions were filed on January 6, 2003, outside the 13-day period prescribed by regulation. Accordingly, neither the exceptions nor the reply thereto is considered in the Commissioner's determination of this matter.

Upon careful and independent review of the record in this matter, the Commissioner initially notes that pursuant to a motion for summary decision, in order to prevail, the adverse party "must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." *N.J.A.C.* 1:1-12.5. Thus, "petitioners must raise factual issues which are sufficient to lead a rational factfinder to rule in their favor if a trial were held." *Piccoli, supra,* slip opinion at 6. Here, even accepting petitioners' allegations as true, they cannot, for the reasons set forth in the Initial Decision, meet their considerable burden of demonstrating that the Board's actions were arbitrary, capricious,

unreasonable, or otherwise contrary to law.[1] There being no disputed issues of *material* fact, therefore, the Commissioner finds that summary decision is properly granted in the Board's favor.

Accordingly, the Initial Decision is adopted and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/3/03

Date of Mailing: 2/3/03

[1] The Initial Decision at page 15, footnote 7, indicates that, despite petitioners' claim, there can be no finding that the Board violated "*N.J.S.A.* 18A:7F-1-14" because the statute does not exist. Presumably, however, petitioners' argument at Count V in the Petition of Appeal refers to *N.J.S.A.* 18A:7F-1 *through* 18A:7F-14. In any event, petitioners' Brief in Support of Petitioners' Opposition to Respondent's Motion for Summary Judgment and In Support of Petitioners' Cross-Motion for Summary Judgment makes no argument with respect to this statute.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

44-03

#44-03

ERNEST L. HARPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2321-95
AGENCY REF. NO. 6-1/95

ERNEST L. HARPER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

James Swift, Esq., for Petitioner

Eric Martin Bernstein, Esq., for Respondent (Eric M. Bernstein & Associates, LLC)

Record Closed: November 15, 2002 Decided: December 18, 2002

BEFORE: **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 3, 1995 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement and General Release indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

12-18-02
DATE

Lillard E. Law BY RFW ALJ
LILLARD E. LAW, ALJ

Receipt Acknowledged:

12-20-02
DATE

M. Kathleen Dunn /CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/jck

LIST OF WITNESSES

For Petitioner:

James Swift

Ernest Harper

For Respondent:

None

LIST OF EXHIBITS

Jointly filed:

J-1 Settlement Agreement and General Release

SETTLEMENT AGREEMENT AND GENERAL RELEASE

CONFIDENTIAL

This Release, dated September 9th, 2002, is given

BY: The releasor(s): ERNEST HARPER

TO: ATLANTIC CITY BOARD OF EDUCATION, ITS SUBSIDIARIES, AFFILIATES, PREDESESSORS, SUCCESSORS AND ASSIGNS OF ANY AND ALL OF THEM, THEIR PRESENT AND FORMER DIRECTOR, OFFICIALS, OFFICERS, REPRESENTATIVES, ASSOCIATES, PARTNERS, SERVANTS, EMPLOYEES, AGENTS, ATTORNEYS, SUCCESSORS, HEIRS, EXECUTORS AND ADMINISTRATORS WHETHER IN THEIR INDIVIDUAL OR OFFICIAL CAPACITIES AND ALL OTHER PERSONS, FIRMS, CORPORATIONS, ASSOCIATIONS, PARTNERSHIPS OR ANY OTHER ENTITIY CONNECTED THEREWITH.

If more more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. All parties mentioned above release and give up any and all claims and rights which they may have against each other. This release applies to claims resulting from anything which has happened up to now. I specifically release all claims relating to or arising out of Mr. Harper's employment with the Board Of Education deriving from the incidents related to the matter known as Ernest Harper V. Atlantic City Board Of Education, Docket No: EDUOA-02321-95S. Harper and the Board expressly understand and agree that said payments include any and all amounts that may be claimed by Harper or on his behalf, or by his Attorney's, Heirs, Successors or Assigns, against the Board. The payment mentioned above is in complete and full settlement of any and all claims that Harper has or could be owed by the Board in connection with anything that happened in reference to the above referenced matter. Further, Harper and the Board agree that the Settlement Agreement and General Release is contingent on and subject to approval and ratification by the Board.

Within thirty (30) working days of the Board's receipt of this settlement agreement and general release, the Board shall pay to Harper the sum of $9,000.00 (Nine Thousand Dollars).

2. Payment. This Settlement is intended as a resolution for any and all possible claims, actual or implicit and Harper hereby waives any and all claims for lost wages, income or future earnings and any other benefits potentially available arising out of the matter known as Ernest Harper V. Atlantic City Board Of Education, Docket NO: EDUOA-02321-95S. Harper also understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibilities.

3. Who is Bound. This Settlement Agreement and General Release shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between Harper and the Board as set forth herein or to enforce the terms of the Settlement Agreement and General Release.

4. Signatures. Harper releases, acquits, gives up, forever discharges any and all claims and rights which he may have had against the Board for anything that happened arising from or in any way relating to the matter known as Ernest Harper V. Atlantic City Board Of Education EDUOA-02321-95S.

5. Harper and his Attorney agree and promise they will not disclose, either directly or indirectly, in any manner whatsoever, any information, regarding either: a). the substance or existence of his complaints, claims, charges and / or actions against the Board; or b). the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including but not limited to any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the Board and other members of the public, except the Office of the United States Attorney / Department of Justice for New Jersey or if applicable, the New Jersey State Attorney General. This paragraph shall not preclude Harper or his Attorney from disclosing the existence or terms of the settlement agreement and general release to: a). governmental authority which require such information; and b). Harper's Attorney who shall be also obligated to keep this information confidential Harper may only state, without elaboration, as follows: "the situation has been resolved to the mutual satisfaction of Harper and the Board." In the event Harper or his attorney violates this paragraph, Harper shall be obligated forthwith to the Board all monies paid to Harper by the Board pursuant to this agreement.

6. The Board and its attorneys agree and promise they will not disclose, either directly or indirectly, in any manner whatsoever, any information regarding either: a). the substance or existence of Harpers complaints, claims, charges and / or actions against the Board; or b). the existence, terms or contents of this settlement agreement and general release, to any person or organization, including but not limited to any governmental agency, members of the press and media, present or former officers, employees and agents of the board and other members of the public except the office of the United States Attorney, Department Of Justice for New Jersey or if applicable the New Jersey State Attorney General .This paragraph shall not preclude the Board or its attorneys from disclosing the existence or terms of this settlement agreement and general release to a) governmental authorities which require this information; b). the Boards attorneys who shall also be obligated to keep this information confidential. The board may only state, without elaboration, as follows, "the situation has been resolved to the mutual satisfaction of Harper and the Board." In the event the Board or its attorneys violate this paragraph, the board shall be obligated to pay forthwith to Harper all attorney's and costs incurred by Harper in obtaining this agreement attempting to recover the amount referred to above.

7. This settlement and general release contains the full agreement of Harper and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Harper and the Board, which consent must be signed by Harper and the Board or their duly authorized agents;

8. Harper represents and warrants that no other person or entity have any interest in the claims, demands, obligations, or causative action referred to in this settlement agreement and general release; that Harper is not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands. Obligations or causative action referred to in the verbal complaint and / or in this settlement agreement and general release.

9. This settlement agreement and general release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

10. Harper and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the settlement agreement and general release. As further consideration for the settlement agreement and general release, Harper and his attorney agree that this sum represents all the money the Board has agreed to pay Mr. Harper and his attorney and any additional fees which may arise from the actions of Harper's attorney in connection with any matter arising from Harper's employment with the Board are to be born by Harper.

11. This settlement agreement and general release contains the entire agreement between Harper and the Board with regard to the matter set forth in Ernest Harper V. Atlantic City Board of Education, Docket No: EDUOA-02321-95S.
12. In entering into the settlement agreement and general release, Harper has relied upon the legal advise of his attorney who is the attorney of his own choice, as to the terms of the settlement agreement and general release which have been completely read and explained by his attorney and has been fully understood and voluntarily accepted.

IN WITNESS WHEREOF, Harper and the Board have hereunto set their hands

JAMES P. SWIFT, ESQUIRE

ERNEST HARPER

BUSINESS ADMINISTRATOR, BOARD SECRETARY

BOARD PRESIDENT

STATE OF NEW JERSEY)
) ss.
COUNTY OF Atlantic)

I, Jennifer Swift, a Notary Public, do hereby certify that Ernest Harper, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 9th day of September, 2002.

Jennifer Swift
Notary Public

JENNIFER SWIFT
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Feb. 2, 2006

4d

ERNEST L. HARPER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner is compelled to reject the proposed settlement agreement as presently written in that Items #5 and #6 do not appear to contemplate that the settlement document will become a matter of public record. Although parties may agree between themselves to keep specific terms of a settlement agreement confidential, they must also be aware that, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions and the underlying proceedings are a matter of public record. Moreover, it is unclear whether the following statement in Item #5 is a typographical error or whether this agreement seeks to impermissibly prohibit disclosure of the existence and terms of this settlement to the general Board membership:[1]

> Harper and his Attorney agree and promise *they will not disclose*, either directly or indirectly, in any manner whatsoever, any information, regarding either: a) the substance or existence of his complaints, claims, charges and/or actions against the Board; or b) *the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including* but

[1]The proposed settlement is signed by the Board president, the District's Business Administrator/Board Secretary, petitioner and his attorney.

> not limited to any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and *other members of the Board****. (emphasis added) (Settlement Agreement at 2)

The Commissioner also observes that Item #1 of the proposed settlement states that the Board shall pay petitioner the sum of $9000.00 within 30 working days of the Board's receipt of the settlement agreement. It therefore appears that the settlement may authorize payment prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. In that parties are precluded from effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner, the language in Item #1 requires clarification.

Finally, Item #1 of the Settlement Agreement and General Release also specifies that the proposed settlement is contingent on approval and ratification by the Atlantic City Board of Education. Since neither the file nor the settlement agreement contains a copy of the Board's resolution approving the proposed settlement, and the agreement is not signed by the Board attorney who is respondent's duly authorized representative in litigation, the parties were provided an opportunity to submit such ratification. In response, counsel for the Board submitted the following, signed by Interim Business Administrator/Board Secretary Lesley Motz:

> At the regular session of the Atlantic City Board of Education, held on Tuesday, June 23, 2002, the following resolution was approved:[2]
>
> > **Resolution No. 02 06B 31:** On a motion made by Mr. Gallagher and seconded by Ms. Nunez, the Atlantic City Board of Education unanimously agreed to authorize a settlement with Principal Ernest Harper in a sum not to exceed $9000.00. (Letter of January 23, 2002)

[2] The Commissioner notes that the Settlement Agreement and General Release is dated September 9, 2002.

Although the above resolution clearly authorizes settlement negotiations with petitioner within certain parameters, this resolution cannot be construed as approval and ratification of the 12 items comprising the within proposed settlement agreement.

Accordingly, this matter is remanded to the Office of Administrative Law for revision and clarification of the settlement terms to address the deficiencies set forth above or other appropriate action.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/03/03

Date of Mailing: 2/03/03

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

45-03

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

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, MEMORIAL HIGH SCHOOL AND WILLIAM DUTTON, PRINCIPAL,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

February 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8563-02
AGENCY DKT. NO. 398-12/02

C.L. ON BEHALF OF MINOR CHILD, C.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, MEMORIAL HIGH SCHOOL AND WILLIAM DUTTON, PRINCIPAL,
Respondent.

Philip D. Tobolsky, Esq., appearing for petitioner

Scott Thompson, Esq., appearing for respondent

Record Closed: December 19, 2002 Decided: December 20, 2002

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

This matter was transmitted to the Office of Administrative Law on December 18, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

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

December 20, 2002
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

December 24, 2002
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

C.L. Sr. on behalf of C.L. Jr. vs Bruck BOE EDU 8563-02

Stipulation of Settlement:

1. Petitioner shall withdraw the above captioned petition, without prejudice

2. Respondent, Bruck BOE, shall conduct a manifest determination hearing for C.L. Jr. on December 20th 2002, and provide petitioner with a determination ~~within 48 hours of hearing~~ by 5 P.M. Monday Dec. 23, 2002

3. If C.L. Jr's absences + tardiness are a result of his handicapping condition, Respondent shall restore the 2½ credits lost during the school year 2001/2002, thereby restoring C.L. Jr. to the wrestling team.

SCOTT D. THOMPSON, ESQ
ATTY FOR RESPONDENT
BRUCK BOE

PHILIP B. TOBOLSKY, ESQ
ATTY FOR PETITIONER
CHARLES LOBELLO

OAL DKT. NO. EDU 8563-02
AGENCY DKT. NO. 398-12/02

C.L., on behalf of minor child, C.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, MEMORIAL HIGH SCHOOL AND WILLIAM DUTTON, PRINCIPAL,	:	DECISION
RESPONDENTS.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/5/03

Date of Mailing: 2/5/03

46-03

DOUGLAS WICKS, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning taxpayer alleged the Board failed to comply with state law and regulations in carrying out its roofing projects.

The ALJ concluded that the allegations raised by petitioner were already addressed by forums of competent jurisdiction and must be dismissed on the basis of *res judicata* and under the doctrine of *collateral estoppel*. The ALJ concluded that under the facts of this case, petitioner failed to have the proofs necessary to proceed to plenary hearing. The Petition was dismissed.

The Commissioner dismissed the matter as moot since it was undisputed that the roof replacement project at Ridge High School was completed and approved by the necessary authorities and there was "simply no *meaningful* relief to be obtained in this forum."

February 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6161-01

AGENCY DKT. NO. 260-7/01

DOUGLAS E. WICKS,

Petitioner,

v.

BERNARDS TOWNSHIP BOARD OF EDUCATION,

Respondent.

Douglas E. Wicks, petitioner *pro se*

Philip E. Stern, Esq., for respondent (Sills Cummis Radin Tischman Epstein & Gross, attorneys)

Record Closed: September 25, 2002 Decided: December 23, 2002

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

HISTORY

Douglas E. Wicks, (petitioner), is a resident of Bernards Township who alleges in a Petition of Appeal filed before the Commissioner of Education that the Board violated various provisions of Title 18A, Education Law, regarding the roof replacement on its high school facility and that it failed to provide him certain documents regarding the matter. Petitioner also alleges the Board improperly made payments to its roofing contractor on its earlier Cedar Hill school roof replacement, and that its conduct was sufficient for the Bernards Township Code

Officer to issue notices of code violations. (Petition of Appeal, sub para. (e)) The Board denies that its actions regarding roof replacements on any one of its school buildings is, or was, in any way improper. The Board also asserts petitioner's present complaint related to the Cedar Hill School and Annin School is barred by the statute of limitations, res judicata, and collateral estoppel based on earlier litigation between the parties on those very same allegations. See, *Wicks v. Board of Education of Bernards Township, Somerset County*, Initial Decision, October 3, 2000, aff'd. Commissioner of Education, Nov. 20, 2000, aff'd. St. Bd. of Ed, April 4, 2001

After the Commissioner of Education transferred the matter September 18, 2001 to the Office of Administrative Law as a contested case under the provisions of *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13, a hearing was scheduled for November 29 and 30, 2001. The hearing was adjourned at petitioner's request for the asserted failure of the Board to provide him requested discovery. A telephone conference call was conducted November 29, 2001 during which the Board agreed to provide petitioner the discovery he requested related to the Ridge High School project. In addition, an in-person prehearing was scheduled for January 8, 2002 to refine the issues to be adjudicated including the Board's position that prior roofing projects in which it engaged, the Cedar Hill and Annin School projects, that were the subject matter of prior litigation between the parties should not be considered in this case.

During December 2001, the Board did submit to petitioner discovery related to the Ridge High School roof project and petitioner reviewed the material during the same month. On December 17, 2001 petitioner served the Board with another discovery demand relating solely to the Ridge High School project. The Board was directed to file a letter motion by January 25, 2002 setting out its arguments why certain discovery requests made by petitioner need not be honored. Petitioner was to respond by February 14, 2002. During the conference, the issue was discussed of whether the Cedar Hill and Annin School roofing projects, or any part thereof, should be barred from this case. The parties were advised that this issue would be addressed at the commencement of the hearing then scheduled to be conducted March 8 and 9, 2002. But, these dates had to be adjourned because of the hospitalization of this judge.

On or about January 10. 2002 petitioner filed a "complaint in lieu of prerogative writ" in New Jersey Superior Court, Law Division, before the Honorable Rosemarie Ruggerio Williams, J.S.C., seeking the same documents he sought through discovery regarding the Chapel Hill and Annin school roofing projects under *N.J.S.A.* 47:1-1, *et seq.,* the New Jersey Right to Know Law. Judge Williams, in view of the fact petitioner had the matter pending as a contested case, declined jurisdiction and transferred that issue to this proceeding.

In the earlier litigation between the parties before the Commissioner and already referenced in this decision, petitioner alleged the Board acted contrary to the Public School Contracts Law, *N.J.S.A.* 18A: 18A-1, *et seq.*, with respect to roofing projects at the Cedar Hill and Annin Schools. After a plenary hearing, the conclusion was reached petitioner failed to carry his burden of proof to prove the truth of the allegations he made against the Board regarding either the Cedar Hill or Annin school roof projects. The petition was dismissed. (See *Wicks v. Board of Education of Bernards Township, Somerset County*, Initial Decision, October 3, 2000, aff'd. Commissioner of Education, Nov. 20, 2000, aff'd. St. Bd. of Ed, April 4, 2001)

On or about July 24, 2001 petitioner filed this petition with the Commissioner of Education in which he alleges the Board "[a]dvertised, bid and awarded the 2001 contract for the replacement of the Ridge High School roof before obtaining construction code approval as mandated by *N.J.A.C.* 6:22-1.7." (Para. 5(a) of petition) This is the essence of the petition; that the Board violated *N.J.A.C.* 6:22-1.7 regarding the Ridge High School. However, the remaining allegations raised by petitioner in subparagraphs (b) through (j) provide the framework for the present dispute between the parties regarding the issues to be adjudicated in the matter and petitioner's discovery requests. Petitioner's remaining allegations are paraphrased here, except as otherwise noted through the use of direct quotation marks:

> (b) that the Board failed to provide him copies of "ledger payments for legal services as required by 18A:19-15;"
> (c) that the Board paid its architect in October 2000 for work not completed "under his contract dated November 23, 1999 for professional services encompassing the year 2000 Ridge High roofing project thus violating 18A:19-2 . . ."

(d) that the Board failed to adopt until July 2000 a resolution approving the architect's November 1999 contract, a time after the projects under the contract were advertised, bid and awarded in violation of 18A:18A-3(a);
(e) that the Board "failed to conduct required construction code inspections during and upon completion of the roofing projects for Cedar Hill and Annin School reproofing projects resulting in code violation notices by the Bernards Township Code Officer."
(f) that the Board "[p]aid in full for . . . Cedar Hill roofing project which failed to comply with the specifications and building code . . ."
(g) "Commenced work on the Ridge High School roof project without a building permit as required by 18A:18A-49 . . . "
(h) that the Board "[i]ssued plans and specifications for all the roofing projects {Cedar Hill, Annin, and Ridge High] which contain false and misleading information . . . "
(i) that the Board paid its architect $100 an hour, not the $90 an hour set out in the 1999 contract;
(j) that the Board "[r]atified two separate professional contracts, in the same fiscal year, both to [its architect] for the same exact Ridge High School reproofing project . . . "

A fair reading of subparagraphs (b) through (j) shows petitioner seeks to either continue the litigation of, or to relitigate, issues he raised in the earlier petition that was dismissed following a plenary hearing surrounding the Cedar Hill and Annin Schools roof projects.

In an Order issued May 16, 2002 this administrative law judge entered a recommended Order granting the Board's motion to dismiss any and all allegations surrounding the Cedar Hill and Anin school projects; that the sole issue in this case is the Board's conduct relating to the Ridge High School roof project; and, that petitioner was barred by the doctrines of res judicata and the entire controversy of relitigating the Cedar Hill and Annin School roof project anew. See, *Wicks v BOE of Bernards Twp., Somerset Co.*, OAL DKT, NO, EDU 6161-01, Order, May 16, 2002.

At the hearing finally conducted in the matter of the Ridge High School roof project on September 24, 2002, and while presenting his opening statement, petitioner asserted there was fraud involved in obtaining permits for the Ridge project because the Board represented certain material was to be used in the project upon which construction permits were issued. Petitioner did not contact the County Prosecutor in his allegations of fraud in the inducement of the issuance of the permit. Petitioner asserts the manufacturer and the architect of the project are behind such fraudulent conduct. Petitioner did complain of the manufacturer to the State

Commission of Investigation which, petitioner says, conducted an exhaustive investigation of the matter. Petitioner says that in order to really understand his complaint, one has to "be in the business" of roof construction. Petitioner acknowledges that all the allegations raised in this petition have been fully investigated by the State Commission of Investigation.

Petitioner then says he is not certain whether the architect knowingly engaged in fraudulent conduct or was duped by the manufacturer. But, at the same time, petitioner complains the architect specified the manufacturer in the specifications and in addenda to specifications made before the bids being opened April 11, 2001. Petitioner complains the addenda was issued April 7, 2001 and changed the slope of the roof which, he says, increased costs. All potential bidders were notified and no bidder complained. Petitioner says *N.J.S.A.* 18A:18A-21 prohibits (c) the issuance of addenda without at least seven days notice, but petitioner has no evidence the subsequent bids were tainted. Petitioner has no evidence the architect engaged in any fraudulent conduct.

Petitioner says the Ridge high school has a roof that does not meet the building code as the result of manufacturer fraud and he, petitioner, is not happy about it. The architect should have known that the roofing materials were not compliant with the code, and as a result, duped the building code officials into issuing certificates of occupancy.

The Board points out that the Somerset County Construction Board of Appeals issued it a Certificate of Approval on April 22, 2002 and that the New Jersey Economic Development Authority that provided full-funding for the project determined that all conditions precedent to the execution of the grant agreement for the roof project had been met. The Authority authorized the disbursement of full funding for the project. The Board also notes that all appropriate agencies at the local, county and state have been involved in this project and each level of government has given its final approval for the project.

Petitioner was advised no testimony would be taken from his witnesses regarding faulty roofing materials or of his witness's review of the Board's compliance with the building code.

Each of those matters has already been exhaustively studied and investigated by bodies with far greater expertise than resides in this forum. Furthermore, if despite the complaints of petitioner, the State Commission of Investigation, the local building officials, the county construction board, and the Economic Development Authority are satisfied with the materials used on the Ridge High School roof and the absence of fraud by anyone for whom the Board is responsible, the conclusion must be reached petitioner seeks to use this forum to continue litigation against the Board in bad faith. Petitioner knows his evidence does not prove his allegations, because he essentially has been told that by the State Commission of Investigation, the local and county construction officials, and the Economic Development Authority. There is nothing new being raised in this petition of appeal that has not already been litigated before.

Petitioner left the hearing room upon being advised that the foregoing testimony would not be allowed. In essence, he abandoned his petition of appeal much in the same manner he abandoned his first petition after he verbalized his allegations against the Board without any proof in support thereof.

CONCLUSION

I **CONCLUDE** that the facts establish the allegations raised by petitioner have already been addressed by forums of competent jurisdiction and must be dismissed on the basis of *res judicata.* I **CONCLUDE** the facts establish the allegations raised by petitioner have already been addressed by forums of competent jurisdiction and must be dismissed under the doctrine of *collateral estoppel.* I **CONCLUDE** that under the facts of this case, petitioner fails to have the proofs necessary to proceed to plenary hearing and the petition must be dismissed.

The Petition of Appeal is **DISMISSED**.

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

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

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

December 23, 2002
DATE

Daniel B. McKeown, ALJ
by: Anthony Bruno, ALJ
DANIEL B. MC KEOWN, ALJ, t/a

Receipt Acknowledged:

December 24, 2002
DATE

M. Kathleen Duncan (CA)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 2002
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

DOUGLAS WICKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner emphatically objects to the Initial Decision issued by the Administrative Law Judge (ALJ) arguing, *inter alia*, that he was improperly denied a hearing and this matter should, therefore, be remanded to the OAL for an "open and full hearing***." (Petitioner's Exceptions at 1) Petitioner argues that the ALJ failed to make any findings of fact or conclusions of law, that he lacked the expertise necessary to hear a case such as this one, and that his statements in the Initial Decision at pages 6 and 7 regarding previous review of this matter by other investigative bodies and agencies are simply unsupported on this record. (*Id.* at 3-5) The Initial Decision, petitioner asserts, failed to properly consider the issues raised in the course of this litigation. (*Id.* at 7-8)

In reply, the Board "objects to Petitioners [sic] use of evidence not presented at the hearing, in violation of the N.J.A.C. 1:1-18.4(c)." (Board's Reply at 1) The Board argues that there is no merit to petitioner's contentions and, therefore, the Initial Decision should be affirmed.

Upon careful and independent review of the record in this matter, including an audio cassette tape of the proceedings that took place on September 24, 2002 at the OAL, the Commissioner determines to grant the Board's Motion for Summary Decision, for the reasons set forth below.[1]

Initially, the Commissioner agrees with the ALJ's view that the essence of petitioner's "complaint" is that the Board violated *N.J.A.C.* 6:22-1.7 by advertising, bidding and awarding the 2001 contract for the replacement of the Ridge High School roof before obtaining construction code approval. (Request for Declaratory Judgment/Petition of Appeal at 2, paragraph 5a; Initial Decision at 4)[2] Thereafter, as enumerated in the Initial Decision at pages 4 and 5, petitioner alleges other violations of administrative code, State school law and specifically, the Public School Contracts Law, *N.J.S.A.* 18A:18-1 *et seq.*, in connection with the Board's roof replacement projects at the Cedar Hill School, the Annin School and Ridge High School. The Board denies each allegation. (Board's Answer)

By Order dated May 16, 2002, and based on earlier litigation brought by petitioner in this matter (*see Wicks v. Board of Education of the Township of Bernards, Somerset*

[1] Although the Board filed a Motion for Summary Decision before the OAL on September 4, 2002, the ALJ did not issue a ruling on the motion.

[2] It is noted that *N.J.A.C.* 6:22-1 *et seq.*, the School Facility Planning Service regulations, were repealed and recodified as *N.J.A.C.* 6A:26-1 *et seq.*, effective October 1, 2001. *See* 33 *N.J.R.* 1809(a), 33 *N.J.R.* 3482(a).

County, Commissioner Decision No. 383-00, November 20, 2000, *aff'd* State Board of Education April 4, 2001), the ALJ determined that the "Petitioner is barred by the doctrine of res judicata and by the entire controversy doctrine [from] relitigating the Cedar Hill and Annin School roof project anew." (ALJ's Order, May 16, 2002 at 8) Thus, the within matter was confined to only those issues relating to the roof replacement project at Ridge High School. The Commissioner herein affirms this interlocutory order, which petitioner did not appeal in accordance with *N.J.A.C.* 1:1-14.10.[3]

With respect to the allegations concerning the roof replacement project at Ridge High School, the Board argues in its Motion for Summary Decision, *inter alia*, that such issues are now moot. Specifically, the Board contends:

> Since initiating this second action, the parties appeared before the Somerset County Construction Board of Appeals. On April 22, 2002, a Certificate of Approval was issued for the Ridge High School.*** On July 29, 2002, the New Jersey Economic Development Authority determined that all conditions precedent to the execution of the grant agreement for the Ridge High School roofing project had been met. *** [4]
>
> ***
>
> Simply stated, inasmuch as the roofing project for the Ridge High School has been completed, the debate concerning the construction of the project [is] academic and moot.*** Further, the previous

[3] Petitioner did, however, submit to the ALJ, by letter dated May 25, 2002, numerous objections to his Order. Petitioner therein argues, *inter alia*, that the issues raised in the within matter regarding the alleged Cedar Hill School violations should *not* be dismissed, since these violations did not arise until after the prior case record was closed. Petitioner argues, "with respect to the claim of *res judicata*, I would advise that the claims in the instant case are all new and based upon subsequent events unknown at the time of the earlier case." (Petitioner's Letter of May 25, 2002 at 3) Petitioner acknowledges, however, that the Cedar Hill School reroofing project has been completed. Therefore, even assuming petitioner accurately states that the issues in the within matter regarding the Cedar Hill School *could not have been* raised in his prior litigation, the Commissioner finds, for the reasons set forth *infra*, that such issues are moot.

[4] The Board attaches a copy of the Economic Development Authority's letter of July 29, 2002 at Exhibit D of its Motion for Summary Decision.

> Petition raising similar claims was forwarded to the Office of Compliance for review and the Board was vindicated.*** (Board's Brief in Support of Motion for Summary Decision at 3, 9)

Thus, even if the requested remand were to be granted *and* petitioner were to prevail on the merits of his claims that the Board acted as he alleged in his petition in carrying out the Ridge High School project, the Commissioner finds that, at this stage, where it is undisputed that the roof replacement project at Ridge High School has been completed and approved by the necessary authorities, there is simply no *meaningful* relief to be obtained in this forum.[5] In this regard, the Commissioner recognizes that:

> An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In other words, the conflict between the parties has become merely hypothetical. *See Black's Law Dictionary* 409 (5th ed. 1979), and *In re Conroy*, 190 *N.J. Super.* 453 458 (App. Div. 1983). Our courts, and the Commissioner as well, ordinarily will refuse to review questions which become academic prior to the issuance of a decision out of reluctance to render a legal decision in the abstract and a desire to conserve judicial or administrative resources.*** (*Barshatky v. Freehold Regional High School District Bd. of Educ.*, 95 *N.J.A.R.*2d (EDU) 71, 73)

[5] Notably, by way of relief, petitioner requested that the Commissioner: (1) direct the Board to provide all requested public documents to him; (2) declare the professional design contract of 2001 between the Board and Thomas Rienzi to be null and void; (3) require that plans and specifications for the reroofing project at Ridge High School be declared null and void as they contain false and misleading material factors, and that the project be redesigned with code compliant specifications, readvertised and rebid in accordance with the law; (4) declare that the Board has violated *N.J.S.A.* 18A:12-22 and *N.J.S.A.* 18A:11-1(d); and (5) direct that the Office of Compliance investigate these matters and confirm these violations. (Request for Declaratory Ruling/Petition of Appeal at 3-4)

Accordingly, summary decision is properly granted in the Board's favor and this matter is dismissed.[6]

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 2|5|03

Date of Mailing: 2|5|03

[6] Notwithstanding this outcome or that there is no relief to be granted herein, the Commissioner notes that it is simply not clear on this record whether, in executing its roof replacement project at the Ridge High School, the Board acted in compliance with *N.J.S.A.* 18A:7G-1 *et seq.*, the Educational Facilities and Construction Act, which became effective July 18, 2000. Indeed, although the Board specifically contends that "the Ridge High School roof was a normal building maintenance requiring review *only* by the local code officials pursuant to *N.J.A.C.* 6:22-1.1(b)***" (Board's Answer at 2, paragraph "a", emphasis added), it also indicates that it received "full approval from the State of New Jersey Department of Education Facilities Review and a full permit from the local code officials" for this project. (*Id.* at paragraph "h") The Commissioner, therefore, herein cautions this and all other boards that failure to act in accordance with the standards established in *N.J.S.A.* 18A:7G-1 *et seq.*, and, now, its implementing regulations, *N.J.A.C.* 6A:26-1 *et seq.*, may result in action to withhold State funds. *N.J.A.C.* 6A:26-14.1.

[7] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

41-03

IN THE MATTER OF THE TENURE	:	
HEARING OF TROY JENKINS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
PEMBERTON, BURLINGTON COUNTY.	:	

February 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6094-00S

AGENCY REF. NO. 237-7/00

IN THE MATTER OF THE TENURE HEARING OF TROY JENKINS, SCHOOL DISTRICT OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY

Jason Sokolowski, Esq., appearing for Petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Dennis M. DeSantis, Esq., appearing for Respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: November 15, 2002 Decided: December 18, 2002

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 29, 2000, the School District of the Township of Pemberton, Burlington County, certified tenure charges against Troy Jenkins, a tenured vocational education teacher, to the Commissioner of the State Department of Education. The charges alleged that respondent Jenkins wrongfully negotiated into his own bank account a check payable to the Pemberton Township School District and, on numerous occasions, submitted vouchers for and received funds from the District to which he was not entitled. Respondent filed an answer to the tenure charges on July 17, 2000 and the Department of Education, Bureau of Controversies and

Disputes, transmitted this matter to the Office of Administrative Law on July 24, 2000, as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was held by Administrative Law Judge Bruce R. Campbell on August 23, 2000. Following a status conference on September 6, 2000, Respondent filed a motion to stay the proceedings pending the resolution of criminal charges that had been against him. Oral argument was held on October 4, 2000 and, by Order dated October 13, 2000, ALJ Campbell denied the motion. However, respondent filed an interlocutory appeal and, on November 13, 2000, the Commissioner of Education set aside the judge's order, stayed the proceedings and directed that the District's 120-day statutorily authorized suspension of respondent be tolled as of September 6, 2000.

On May 9, 2002, this matter was transferred from the soon-to-be-retired ALJ Campbell to ALAJ Beatrice Tylutki. Thereafter, a series of status conferences were held on June 13, July 26, and September 24, 2002. On September 26, 2002, the matter was transferred from the retiring Judge Tylutki to newly appointed Assignment Judge John R. Tassini who, in turn, assigned the matter to this Administrative Law Judge on October 31, 2002.

A status conference was held on November 15, 2002, at which time I learned that respondent had resigned his tenured teaching position with the District as part of a plea agreement whereby he was admitted to and ultimately completed a Pre-Trial Intervention program. Respondent formally submitted his resignation on November 26, 2001 and the District accepted the same on November 29, 2001.

During the telephone conference on November 15, 2002, counsel agreed that the tenure charges had been rendered moot by respondent's resignation and requested that the matter be dismissed. Therefore, the issue is whether the pending tenure charges should be dismissed in light of respondent's resignation.

FACTUAL DISCUSSION

The material facts are essentially undisputed. Therefore, the factual statements contained herein are the **FINDINGS OF FACT** made with respect to this matter.

On June 9, 2000, a criminal complaint was issued by the Pemberton Township Police Department charging respondent with Theft by Deception, *N.J.S.A.* 2C:20-4. The charge alleged that respondent wrongfully negotiated into his own bank account a check made payable to the Pemberton Township School District in the amount of $1,125.00 and, on numerous occasions, submitted vouchers for and received $2,966.76 in funds from the District to which he was not entitled. On June 29, 2000, the District certified tenure charges against respondent based upon the same underlying facts.

In or about November 2001, respondent entered into a plea agreement whereby he was admitted into and ultimately completed a Pre-Trial Intervention program. As part of this plea agreement, on November 26, 2001, respondent formally submitted his resignation as a tenured teacher and the District accepted the same on November 29, 2001.

DISCUSSION OF THE LAW

The determination of controversies and disputes arising under the local school laws is within the exclusive jurisdiction of the Commissioner of the Department of Education. *N.J.S.A.* 18A:6-9. A tenured school teacher cannot be dismissed or have his or her compensation reduced except for inefficiency, incapacity, unbecoming conduct, "or other just cause," and then only after a hearing when written charges of the cause or causes of the complaint, signed by the person or persons making the same, have been preferred against the teacher. *N.J.S.A.* 18A:6-10. The pertinent statutory provisions addressing the filing of tenure charges with the local school district, certification of the charges to the Commissioner, filing of responses by the teacher, a determination of the sufficiency of the charges by the Commissioner, and deadlines applicable to the hearings in such cases are set forth at *N.J.S.A.* 18A:6-11, 6-13, 6-14 & 6-16, as well as *N.J.S.A.* 52:14B-10.1.

Regulations promulgated by the DOE address the "withdrawal, settlement or mooting of tenure charges." *N.J.A.C.* 6A:3-5.6(a). Paragraph (a) provides that "once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval." It then discusses the requirements that must be satisfied in order to secure that approval. *See also In re Cardonick*, State Board decision of April 6, 1983 (1990 *S.L.D.* 842, 846) ("it is proper, therefore, for the Commissioner to review and evaluate, and to approve and disapprove, tenure **settlements**.") (emphasis supplied).

The regulatory scheme also addresses the effect of a resignation or retirement by the teacher in question during the pendency of tenure charges. In those situations "where tenure proceedings are concluded prior to adjudication because the charged party has unilaterally resigned or retired, the Commissioner may refer the matter to the State Board of Examiners for action against the charged party's certificate as it deems appropriate, when such referral is warranted... ." *N.J.A.C.* 6A:3-5.6(d). In fact,

> In cases in which teaching staff members accused of misdemeanors, crimes or conduct unbecoming which might warrant revocation or suspension, resign or retire from their positions, either before tenure proceedings have been brought or prior to the conclusion of such proceedings, it shall be the responsibility of the chief school administrator of that district to notify the State Board of Examiners of the alleged conduct pursuant to *N.J.A.C.* 6:11-3.6(a)2.

[*N.J.A.C.* 6:11-3.5].

In construing regulatory provisions, the plain language must first be considered. *Merin v. Maglaki*, 126 *N.J.* 430 (1992). Pertinent provisions must also be read in *pari materia*. *Alling Street Urban Renewal Co. v. City of Newark*, 204 *N.J. Super.* 185 (App. Div. 1985), *cert. den.* 103 *N.J.* 472 (1986). The fact that *N.J.A.C.* 6A:3-5.6(a) specifically requires that tenure charges may be withdrawn or settled only with the Commissioner's approval, and then only upon consideration of certain factors, but *N.J.A.C.* 6A:3-5.6(d) does not expressly require the Commissioner's review of resignations or retirements during the pendency of tenure proceedings, supports a conclusion that pending tenure charges can and should be dismissed when there is a unilateral resignation or retirement. *Stillwater Board of Education v. Clothier*, OAL Docket No.

EDU 9526-00 (2001). This conclusion is further supported by the requirement in *N.J.A.C.* 6:11-3.5 that the local district must, in some cases, notify the Board of Examiners of the teacher's misconduct. That requirement, on its face, furthers the broader public interest so important in tenure proceedings. *Stillwater Board of Education v. Clothier, supra.*

DECISION AND ORDER

Based upon the foregoing, I **CONCLUDE** that given his unilateral resignation as a tenured vocational education teacher, thereby rendering the charges against him moot, the tenure charges certified by petitioner Pemberton Township School District against respondent Troy Jenkins should be dismissed

Accordingly, it is **ORDERED** that the tenure charges certified by petitioner Pemberton Township School District against respondent Troy Jenkins be and are hereby dismissed. It is further **ORDERED** that if it has not already done so, petitioner should report the misconduct alleged in the tenure charges to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.5.

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

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

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

December 20, 2002
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

December 24, 2002
DATE

M. Kathleen Duncan (Ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

EXHIBITS

For Petitioner:

None.

For Respondent:

None.

WITNESSES

For Petitioner:

None.

For Respondent:

None.

OAL DKT. NO. EDU 6094-00
AGENCY DKT. NO. 237-7/00

IN THE MATTER OF THE TENURE	:	
HEARING OF TROY JENKINS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
PEMBERTON, BURLINGTON COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties filed no exceptions.

Upon his full and independent review of the record, the Commissioner agrees that in light of Mr. Jenkins' unilateral resignation from the District, there is no basis upon which he can order this matter to proceed and it must, therefore, be dismissed as moot. In so concluding, the Commissioner does not find it necessary to reach to the Administrative Law Judge's discussion, on pages 4-5 of the Initial Decision, with respect to the obligation of either the Commissioner or the Board to refer this matter to the State Board of Examiners. Inasmuch as the record indicates that Mr. Jenkins is noncertificated, such referral would serve no purpose.[2]

Accordingly, the recommendation of the OAL that this matter be dismissed as moot is adopted.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/6/03

Date of Mailing: 2/6/03

[1] The Initial Decision identifies Jason Sokolowski, Esq. as petitioner's counsel and Dennis M. DeSantis, Esq. as counsel for respondent. By way of clarification, in this tenure matter, Mr. DeSantis represented the petitioning Board and Mr. Sokolowski represented Respondent Jenkins.

[2] It is specifically noted that Mr. Jenkins' tenure status was uncontroverted by the parties and, thus, was not an issue for review before the Commissioner.

[3] This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

48-03

HELEN MEANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 6, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9652-01

AGENCY DKT. NO. 382-9/01

HELEN MEANS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Marvin L. Comick, Esq., for petitioner
(Love and Randall, attorneys)

Lisa M. Yennella-Granese, Esq. for respondent
(McCarter & English, attorneys)

Record Closed: December 20, 2002 Decided: December 20, 2002

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 14, 2001 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

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

Dec. 20, 2002
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

January 1, 2003
DATE

M. Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 6 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is between Helen Means ("Petitioner") and the State-operated School District of the City of Newark ("School District").

WHEREAS, Petitioner filed a Petition against the School District and the Commissioner of Education of the State of New Jersey entitled Helen Means v. Newark Public Schools, Case No. 382-9/01, asserting certain claims arising out of Petitioner's employment with the School District ("the Action");

WHEREAS, the School District filed an Answer to the Petition, noting that the School District was improperly pleaded as "Newark Public Schools;"

WHEREAS said Action was then transferred to the Office of Administrative Law and was assigned Docket No. EDUOR 09652-01N;

WHEREAS, the parties desire to reach a settlement of Petitioner's claims, subject to the approval of the Commissioner of Education as required by law; and

NOW, THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

1. Settlement Compensation. The School District agrees to pay the amounts in subsections (a), (b), and (c) (collectively "Settlement Compensation") by check within thirty (30) business days after the School District receives approval by the Commissioner of Education of the Agreement:

(a) the sum of $6,944.25 (less applicable withholdings and deductions) payable to "Helen Means," which sum shall be reflected on an IRS Form W-2 representing lost wages, representing a pro-rated amount (from July 1, 2001 through April 1, 2002) of the employment and adjustment increments withheld for the 2001-2002 school year;

(b) the sum of $3,128.20 (less applicable withholdings and deductions) payable to "Helen Means," which sum shall be reflected on an IRS Form W-2 representing retroactive pay from July 1, 2001 through April 1, 2002 minus an overpayment in the amount of $132.20; and

(c) the sum of $5,325.00 (less applicable withholdings and deductions) payable to "Helen Means," which sum shall be reflected on an IRS Form W-2 representing sick pay.

Petitioner agrees that she will not seek anything further from the School District, including any other payment.

Petitioner agrees that she shall be solely responsible for the payment of all federal, state, and local taxes on the Settlement Compensation. Petitioner agrees to defend, indemnify, and hold the School District harmless against any claim or assessment by a government agency (including but not limited to claims or assessments of employment taxes, interest, or penalties) arising from the School District's payment of the Settlement Compensation to Petitioner.

2. Restoration of Employment and Adjustment Increments. The School District agrees to administratively "restore" Petitioner's employment and adjustment increments for the 2001-2002 school year, which had been withheld. The School District agrees to notify, on the date this Agreement becomes effective, the School District's Office of Human Resources and the New Jersey Division of Pensions and Benefits of the restoration of the employment and adjustment increments.

3. June 13, 2001 Annual Evaluation Report. The School District agrees to remove the June 13, 2001 Annual Evaluation Report attached hereto as "Exhibit A" from Petitioner's personnel file.

4. Retirement. Petitioner agrees that she will tender her retirement from her employment with the School District. The retirement will be retroactive to April 1, 2002 (the "Retirement Date") on the date this Agreement becomes effective, provided that Petitioner has complied with all terms and conditions of this Agreement.

5. Explanation of Salary Differentials Appearing in her July 20, 2001 and August 3, 2001 Paycheck Stubs. Petitioner acknowledges that she has been provided with a sufficient explanation for the difference in salary appearing on her July 20, 2001 and August 3, 2001 paycheck stubs.

6. Petitioner's Release and Waiver of Claims. Petitioner acknowledges that the Settlement Compensation set forth in this Agreement contains consideration to which she would not otherwise be entitled. In consideration of such compensation, Petitioner hereby agrees:

(a) "Released Parties" means the School District, its predecessor the Newark Board of Education, the Newark Public Schools, and the School District's current and former officers, employees, agents, contractors, employee pension or welfare benefit plans, and current and former trustees and administrators of these plans.

(b) Petitioner hereby releases the Released Parties from all claims and rights that Petitioner has against any and all Released Parties. This releases all claims, including those of which Petitioner is not aware, those not mentioned in this Agreement, and any claims for attorney's fees, costs, and interest. This release applies to claims and rights resulting from anything that has happened up to now. This release does not apply to claims arising under or after the date of this Agreement.

(c) Petitioner specifically releases all claims asserted in the Action. Petitioner releases the Released Parties from all claims, rights, charges, demands, debts, actions, causes of

action, defenses, rights, grievances, and any other interests, whether known or unknown, which Petitioner ever had, may now have or hereafter shall or may have by reason of any matter, cause or thing which has happened up to the date of this Agreement, including but not limited to any and all claims and rights arising from or related in any way to Petitioner's employment with the School District or other relationship with the Released Parties, any and all claims or rights Petitioner may have under Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Americans with Disabilities Act, the federal Family and Medical Leave Act, Section 1981 of the Civil Rights Act of 1866, the Employee Retirement Income Security Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, any state laws against discrimination, or any other federal, state, or local law relating to employment, wages, hours, or any other terms and conditions of employment. Petitioner releases all claims for wrongful discharge, wrongful suspension, breach of contract or rights under any collective bargaining agreement, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, promissory or equitable estoppel, whistle-blowing, fraud, misrepresentation, defamation, negligent and/or intentional infliction of emotional distress, other intentional torts, negligence, any and all claims for wages or other compensation, including salary, benefits, payment of accumulated sick leave, stipends, and longevity payments, workers compensation benefits, any and all claims of discrimination on the basis of race, creed, color, national origin, sex, marital status, sexual orientation, age or disability, or any other claims in any way related to Petitioner's employment with or resignation from the School District.

(d) Petitioner represents and warrants that all liens, if any, for attorneys', insurers', workers' compensation, hospital or any other liens have been satisfied or will be satisfied out of the Settlement Compensation and that Petitioner will indemnify and hold the Released Parties harmless from any claims asserting or relating to such liens.

(e) Petitioner represents and warrants that, other than the Action, there are no pending or outstanding administrative or judicial proceedings, charges, complaints, claims or actions, against the School District or any of the Released Parties, to which Petitioner is a party or which are maintained on behalf of Petitioner. Petitioner acknowledges that the School District relies upon this representation and warranty in agreeing to enter into this Agreement.

7. Binding Effect. This Agreement is binding upon and shall inure to the benefit of anyone who succeeds to the rights, interests or responsibilities of the parties. Petitioner makes the releases contained in this Agreement for the benefit of the Released Parties and all who succeed to their rights, interests, or responsibilities.

8. Stipulation of Dismissal With Prejudice. Petitioner agrees that her attorney shall provide to the School District's attorney a signed Stipulation of Dismissal With Prejudice of the Action, in the form attached as "Exhibit B," at the time that Petitioner signs the Agreement. The School District's attorney shall file the Stipulation of Dismissal With Prejudice only after the School District has paid the Settlement Compensation.

9. No Future Employment. Petitioner agrees that she shall not apply for, or otherwise seek employment from, the School District or any of the Released Parties.

10. Confidentiality of Agreement. Petitioner shall not directly or indirectly disseminate the terms of this Agreement to any person or entity not a party to this Agreement, except (a) by written agreement of the parties, (b) pursuant to a valid court order or subpoena, (c)

as required by law, or (d) as otherwise provided in this paragraph. Petitioner may disclose the terms of this Agreement to her attorneys, financial advisors and/or spouse, provided she first advises them that the terms must not be further disclosed. Petitioner agrees that it shall be a violation of this Agreement by Petitioner in the event her attorneys, financial advisors and/or spouse disclose the terms of this Agreement.

The School District may disclose the fact that the Action has been settled. The School District may disclose the terms of this Agreement to its attorneys, accountants, and auditors, and to any officer or employee of the School District or the New Jersey Department of Education with a legitimate need for such information. The School District may disclose the terms of this Agreement to any person to whom disclosure is required to comply with this Agreement, to any person to whom disclosure is required by law, or pursuant to a valid subpoena or court order, and as may be required in the ordinary course of business. It shall not be a violation of this Agreement for any party to this Agreement to state that Petitioner "resigned" or "retired" from the School District.

11. Return of Property. Petitioner acknowledges that all products, materials, and information received or generated by her in connection with her employment with the School District (collectively, "School District Property"), are the sole property of the School District. Petitioner shall return all School District Property (including any copies) in Petitioner's possession or control immediately upon signing this Agreement.

12. Request or Subpoena. If Petitioner receives a request or subpoena seeking production or disclosure of the terms of this Agreement, she shall promptly send a letter to that effect, together with a copy of the request or subpoena, to: Perry L. Lattiboudere, General

Counsel, State-operated School District of the City of Newark, 2 Cedar Street, Newark, New Jersey 07102; Phone: (973) 733-7139; Fax: (973) 733-7054.

13. Enforceability. If a court rules that any provision of this Agreement is not enforceable in the manner set forth in this Agreement, that provision should be enforceable to the maximum extent possible under applicable law and should be reformed accordingly. If a court rules that any provision of this Agreement is invalid or unenforceable, that ruling shall not affect the validity or enforceability of the other portions of this Agreement.

14. Non-waiver. In the event any party violates any provision of this Agreement, the failure of the other party to enforce any of its rights at that time shall not constitute a waiver by the other party to enforce any provision of this Agreement at any time.

15. Compromise. This Agreement is the result of a compromise and is made solely to avoid the expenses of litigation. The School District and the Released Parties expressly deny any liability to or wrongdoing against Petitioner. This Agreement shall not be construed as an admission of liability or wrongdoing on the part of the School District or any of the Released Parties.

16. Entire Agreement. This Agreement is the entire agreement between Petitioner and the School District. It supersedes any existing oral or written agreements with respect to Petitioner's employment with the School District. No representations regarding the Released Parties' relationship with Petitioner, or any obligations to Petitioner, have been made, or survive, except as set forth in this Agreement. This Agreement has been jointly drafted and no provision shall be construed against a party because that party or its attorneys drafted that provision.

17. Amendment. This Agreement cannot be amended, except by a written document signed by the party against whom enforcement of any such amendment is sought.

18. Legal Counsel. Petitioner acknowledges that she has consulted with an attorney before signing this Agreement.

19. Full Understanding. Petitioner acknowledges that she has read this Agreement carefully and has been given a reasonable period of time within which to consider it, that she fully understands the meaning of its terms, and is signing this Agreement knowingly and voluntarily.

20. No Assignment. Petitioner may not assign this Agreement or any rights under this Agreement, except by will or by operation of the laws of intestate succession.

21. Breach. In the event that any party breaches any of its/her duties or promises under this Agreement, the aggrieved party shall have the right to all remedies permissible under law, including, but not limited to, damages, legal and equitable relief, and any other relief which a court may order.

22. Governing Law. This Agreement shall be interpreted in accordance with the laws of the State of New Jersey, without regard to its principles of conflicts of law. This Agreement has been jointly drafted and no provision shall be construed against a party because that party or its attorneys drafted that provision. Any action relating to this Agreement shall be filed in New Jersey.

23. Counterparts. The parties may sign this Agreement in separate counterparts.

24. Approval by Commissioner of Education. The parties understand that this Agreement is contingent upon the approval of the Commissioner of Education.

THIS SPACE INTENTIONALLY LEFT BLANK

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The parties signify their entry into this Agreement by signing below.

Dated: 12/12/02, 2002

Helen Means
HELEN MEANS

Subscribed and sworn to before me this
12th day of December, 2002.

Notary Public
MARVIN L. COMICK
Attorney at Law
State of New Jersey

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

Dated: 12/10/02, 2002

By:
Marion A. Bolden
State District Superintendent

NWK3: 686712.04

Newark Public School
Annual Evaluation Report
Certified Administrative Staff

ANNUAL EVALUATION REPORT

Name Helen Means Position Principal Date 6/13/01

School/Dept. Speedway Ave. School Tenured X Nontenured ____

I. PERFORMANCE REVIEW: Review of performance requirements identified in job description.

The following assessment criteria have been established by the district. Within these skill areas, the listed school components have been reviewed and assessed for overall effectiveness.

ASSESSMENT CRITERIA

A. Ability to manage – Needs Improvement
B. Ability to lead curriculum program – Unsatisfactory
C. Ability to supervise instruction – Unsatisfactory
D. Ability to communicate – Unsatisfactory
E. Ability to make decisions – Unsatisfactory
F. Responsiveness to others – Needs Improvement
G. Parent/Community initiatives – Satisfactory
H. Ability to maintain an effective climate – Needs Improvement
I. Implementation of staff development - Unsatisfactory
J. Ability to manage financial resources – Unsatisfactory

SCHOOL COMPONENTS

1. Literacy
2. Mathematics
3. Science
4. Technology
5. Primary Program (if applicable)
6. Middle School Program (if applicable)
7. Special Education
8. PRC
9. Whole School Reform

II. SUMMARY EVALUATION:

Based upon your performance during the 2000-2001 academic year through December 12, 2000, your last date of attendance, the following has been determined.

A. Areas of Strength:

You began the school year with the intention of formulating highly structured parameters within which your Whole School Reform facilitator, a key position, would function. You designed a record-keeping device and announced a schedule of conferences, which would ensure her accountability to you as she performed her duties.

In addition, you initially expressed a keen desire to remain abreast of students' progress through Success for All eight-week assessments.

In the area of Parent/Community Initiatives, you established courses for parents which would help them to better assist their children and become viable forces within the school community. This is an essential component of the operation of an effective school; and you have done this well.

B. Areas Needing Attention or Improvement:

Despite your communicated intentions to improve the achievement of students at Speedway Avenue School, you have been found unsatisfactory in six criteria and minimally satisfactory ("Needs Improvement") in three.

Supervision of Instruction/Curriculum/Program - There remains, throughout the school, an inconsistent quality of program implementation. Your negligence regarding the supervision of instruction is largely responsible for this phenomenon. The district requires a minimum of four formal observations submitted each month. The most important element of the observation process is the post-observation conference, at which time the lessons' contents and, in particular, the teachers' deliveries, are critiqued. It is at this time that you and the teacher are able to review the teachers' behaviors for reinforcement and modification; this is where YOUR skill as an educational leader is essential. And, as you are well aware, considering your vast administrative experience in the district, signatures attesting to the conference are required in a timely fashion. In fact, as in any instructional setting, the more immediate the feedback, the more meaningful it is. Your failure to obtain signatures on the few formal observations you conducted through December 12th has rendered them invalid. As stated in my December observation, my staff was then responsible to conduct evaluations in order to bring the school into compliance.

Recommendations: Design your schedule of observations to include a timeline for conferences – and stick to it. Use conference time as a vehicle for cultivating teachers' skills as well as support and respect. Adhere to conferencing within ten days of

observing. Conduct frequent informal observations and follow up with a brief positive note as appropriate – or with a brief conference as appropriate.

Obtain literature relative to collaborative supervision, which is premised on participation by equals in making instructional decisions. Its outcome is a mutual plan of action and comes as a result of clarifying, listening, reflecting, presenting, problem solving, negotiating, and standardizing. (See Pajak, E. 1993-*Approaches to clinical supervision*; Gordon, T. 1977. *Leader Effectiveness Training, L.E.T.: The no-lose way to release the productive potential of people).*

Staff Development - The absence of a comprehensive, ongoing staff development effort has contributed to the failure of your staff to become proficient in instruction in all areas. They have participated in SFA training, but have not been exposed to professional development in other areas, such as the district writing program, technology, the PRC or science. At the time of your unfortunate accident, there was no staff development plan in place. In fact, as discussed, you had not implemented mentorship activities for any of your new staff. Besides safety, there is little more critical to effective schooling than the quality of the teaching. YOU must have control of that; it is your responsibility to supervise, coach, provide assistance, guide and, if necessary, take appropriate action with teaching staff.

Recommendations: Create a "buddy" system for new teachers. Assign an experienced teacher to a new teacher who will be the new teacher's "lifeline." This can be in addition to the formal mentoring process.

Create a staff development plan and adhere to it. Conduct professional development at EVERY staff meeting; prepare agendas with curricular matters as well as management issues. Ensure that grade level meetings are devoted primarily to academic topics, and that you or your facilitator are present.

Share educational research articles and information with staff on an ongoing basis. Of ten SLT V schools with fourth grades, students at Speedway scored lowest in Language Arts (ESPA) for the past two years, third lowest in math for the past two years, and third and fourth lowest, respectively, in science ('99 and '00, respectively). With such dismal performance, it is expected that quality of instruction would be THE priority of Speedway Avenue School; and that, concomitantly, supervision and professional development would be essential.

Management/Decisions/Finances - School administration requires diligent prioritization; the myriad activities in which principals are engaged demands such for effective school operation. You appear to attend to the smaller details rather than the more important factors of school success. For example, as cited in the December observation, your school experienced a serious shortage of instructional materials due to poor management and fiscal supervision. Failures in the areas of supervision and staff development raise serious questions as to your ability to recognize and address the really important matters of school.

The Developer of SFA expressed serious concerns relative to program implementation; the Implementation Check revealed many areas where strategies were not in place. Certainly, this should be a priority of the entire school; however, it appears that you have not spent the appropriate time observing and assessing the status of program implementation. Remember, SFA has very specific expectations; it is your responsibility to facilitate and ensure their operationalization.

Recommendations – Immediately establish SFA/Whole School Reform as a priority. Be certain that you are intimately familiar with the model's tenets and can articulate them to staff, students and school community.
Obtain the latest Implementation Check and address areas in need. Contact the Developer for assistance; and employ the services of your facilitator for corrective action as needed.

Look at your school in its entirety; then, list issues which are critical to its effectiveness (e.g. – quality of teaching, discipline, management, communications, etc.) Determine priority areas and allocate your time appropriately.

Consider surveying your staff, perhaps anonymously, for areas which they feel are essential for your attention.

Communication - Additionally, as the school administrator, it is your challenge to recognize and capitalize upon the strengths of staff. You have chosen, instead, to focus on the perceived personal conflict between you and your facilitator. You must remember that, in the organization known as school, it is incumbent upon you to value the professional characteristics of individuals and cultivate them so that they maximally impact upon learning. You have to be "bigger than" – and attempt to get beyond your personal feelings.

Recommendations - I strongly suggest that you make a conscious decision to meet frequently with your facilitator; establish a collegial, rather than adversarial, position. Cite her strengths; discuss those areas in which you would like to see improvement. Remember, she is an extension of you; she is knowledgeable of the model. In addition, she is perceived as a colleague by teachers; you may be able to accomplish a lot through her. Utilize her skills for one purpose – that of improving the knowledge base and aptitudes of staff relative to Success for All.

Conduct a self-audit; appraise your professional skills as objectively as possible. Contact a respected colleague whom you trust and request honest feedback relative to your strengths and areas in need of attention.

Schedule a meeting with me so that we may discuss these matters at length.

C. Review of multiple indicators of pupil progress and growth (NJAC6:8-3.4)

Criterion Referenced Tests
ESPA (2000)
Direct Assessment
Attendance

III. PROFESSIONAL IMPROVEMENT PLAN (See attached sheet)

IV. OVERALL RATING: Satisfactory _____ Unsatisfactory X

V. RECOMMENDATIONS FOR NEXT SCHOOL YEAR:

1. Grant Tenure (if applicable) _____
2. Continue Employment _____
3. Other Recommendations Withhold salary increment

VI. EVALUATEE'S COMMENTS:

Signatures: _____ _____ _____
Evaluator/Position Evaluatee/Position Witness/Position

(Use Additional Sheets if Necessary)

Office of Education Services
95/96

McCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
P.O. Box 652
Newark, New Jersey 07101-0652
973-622-4444
Attorneys for Respondent
State-operated School District
of the City of Newark, improperly pleaded
as the "Newark Public Schools"

HELEN MEANS, Petitioner, vs. NEWARK PUBLIC SCHOOLS, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION – STATE OF NEW JERSEY AGENCY DOCKET NO. 382-9/01 AND OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOR 09652-01N **STIPULATION OF DISMISSAL WITH PREJUDICE**

It is hereby stipulated and agreed by the undersigned attorneys for petitioner Helen Means and respondent State-operated School District of the City of Newark, improperly pleaded as the "Newark Public Schools," that the above action be and hereby is dismissed with prejudice

in its entirety and without any costs to either party.

LOVE & RANDALL
Attorneys for Petitioner
Helen Means

By:_____
Marvin L. Comick

Dated: December___, 2002

McCARTER & ENGLISH, LLP
Attorneys for Respondent State-operated School District of the City of Newark, improperly pleaded as "Newark Public Schools"

By:_____
Steven B. Hoskins

Dated: December ___, 2002

SO ORDERED on this _____ day of _____ 2002

_____
, A.L.J.

3 R

OAL DKT. NO. EDU 9652-01
AGENCY DKT. NO. 382-9/01

HELEN MEANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/6/03

Date of Mailing: 2/6/03

* The Commissioner is, however, compelled to comment on Term #10. of this agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions and the underlying proceedings are a matter of public record.

E.R., on behalf of minor child, D.A., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY; BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY; AND BOARD OF EDUCATION OF LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY, : DECISION

RESPONDENTS.

February 7, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9559-02

Agency Dkt. No. 282-9/02

E.R. o/b/o D.A.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
NORTHERN HIGHLANDS REGIONAL
SCHOOL DISTRICT, BERGEN COUNTY,
BOARD OF EDUCATION OF THE BORO
OF HO-HO-KUS, BERGEN COUNTY,
BOARD OF EDUCATION OF THE TOWNSHIP
OF MAHWAH, BERGEN COUNTY, AND
BOARD OF EDUCATION OF LAKELAND REGIONAL
HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

Respondents.

William P. Higgins, Esq., for petitioner
(Higgins & Walker, attorneys)

Linda Ganz Ott, Esq., for Northern Highland Regional School BOE, respondent
(Bucceri and Pincus, attorneys)
John Geppert, Esq., for Ho-Ho-Kus BOE, respondent
(Wiley, Malehorn and Sirota, attorneys)
Nathanya G. Simon, Esq., for Mahwah Township BOE, respondent
(Schwartz, Simon, Edelstein, Celso, & Kessler, attorneys)
Philip Stern, for Lakeland Regional High School District BOE, respondent

Record Closed: December 16, 2002 Decided: December 26, 2002

BEFORE **THOMAS E. CLANCY**, ALAJ:

The matter was transmitted to the Office of Administrative Law (OAL) on November 20, 2002, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement, page 2 of which has been signed in counterparts by the parties and their authorized representatives.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1.1, and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

12/26/02
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged

January 7, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties

JAN 9 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

William P. Higgins, Esq.
Higgins & Walker, P.C.
130 Skyline Drive
Ringwood, New Jersey 07456
(973) 962-7004
Attorney for Petitioner

E.R. on behalf of her minor child D.A., Petitioner	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
v.	DOCKET NO. 282-9/02
NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL BOARD OF EDUCATION, HOHOKUS BOARD OF EDUCATION, LAKELAND REGIONAL HIGH SCHOOL BOARD OF EDUCATION, MAHWAH BOARD OF EDUCATION, Respondents	**STIPULATION OF SETTLEMENT**

EDU 9559-02
addition by Tec ALAJ
12/19/02

In the matter of E.R. on behalf of minor child D.A. v. Northern Highlands Regional High School Board of Education, et al., Agency Docket No. 282-9/02, it has hereby been agreed by and between the parties to settle this matter on the following bases:

1) D.A. will remain a student at the Northern Highlands Regional High School for his senior year.

2) D.A.'s present IEP will remain in place.

3) The Petitioner and her former husband, Frank Altomare, have agreed to pay $4,868.50 tuition directly to the Northern Highlands Regional High School on or by November 1, 2002, the tuition to be divided evenly between Petitioner and her former husband, Frank Altomare, in the amount

of $2,434.25 each.

4) On or by February 1, 2003, the Petitioner and her former husband, Frank Altomare, have agreed to pay the $4,868.50 tuition directly to the Northern Highlands Regional High School, each party to pay $2,434.25 towards the tuition.

5) Based upon the above, the Petitioner agrees with the Respondents as to the following actions: a. Petitioner's claim against Northern Highlands Regional High School Board of Education, HoHoKus Board of Education, Lakeland Regional High School Board of Education, and the Mahwah Board of Education will be withdrawn from both the Commissioner of Education and the Office of Special Education Programs; b. The Respondent HoHoKus Board of Education agrees to withdraw their Counterclaim, Cross-claim and Third-Party Complaint against Petitioner Ellen Ravese, the other named Respondents and Frank Altomare, respectively.

Dated:

By_____
WILLIAM P. HIGGINS
Attorney for Petitioner

By_____
NATHANYA SIMON
Attorney for Respondent Mahwah Board of Education

By_____
PHILIP STERN
Attorney for Lakeland Regional High School Board of Education

By_____
ELLEN RAVESE

By_____
JOHN G. GEPPERT, JR.
Attorney for Respondent HoHoKus Board of Education

By_____
LINDA GANZ OTT
Attorney for Respondent Northern Highlands Regional High School Board of Education

By_____
FRANK ALTOMARE

LAW OFFICES OF

Higgins and Walker

A PROFESSIONAL CORPORATION

WILLIAM P. HIGGINS *
MICHAEL WALKER

MICHAEL J. ANDALAFT

*MEMBER N.J. & N.Y. BARS
MEMBER U.S. TAX COURT

FIELDSTONE PARK CENTER
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www.higginswalker.com
wphiggins@aol.com
mikewalk@aol.com

December 16, 2002

via facsimile 973-648-6124 and regular mail

Office of Administrative Law
33 Washington Street
15th Floor
Newark, NJ 07102-3011
Attn.: The Honorable Thomas Clancy

RE: E.R. on behalf of D.A. v. Northern Highlands Regional Board of Education, et al.
Docket No.: 282-9/02
Agency Ref. No.: 2003-6931

Dear Judge Clancy:

Pursuant to our telephone conference, please find enclosed the Stipulation of Settlement and Notice of Withdrawal that has been signed by all parties. Please be advised that the enclosed document was forwarded to the Office of Administrative Law on October 31, 2002 as per the enclosed fax receipt.

As you can see, the Stipulation of Settlement contains a conformed signature of Ellen Ravese and Frank Altomare. I have enclosed herewith copies of their original signatures which were made under separate cover.

Kindly provide my office with a filed copy of the Stipulation of Settlement in the enclosed envelope. If you should have any questions, please feel free to contact me at my office.

Very truly yours,

WILLIAM P. HIGGINS

WPH/jmp
enc.
cc: Office of Special Education Programs
Attn.: John Worthington, Coordinator

of $2,434.25 each.

4) On or by February 1, 2003, the Petitioner and her former husband, Frank Altomare, have agreed to pay the $4,868.50 tuition directly to the Northern Highlands Regional High School, each party to pay $2,434.25 towards the tuition.

5) Based upon the above, the Petitioner agrees with the Respondents as to the following actions: a. Petitioner's claim against Northern Highlands Regional High School Board of Education, HoHoKus Board of Education, Lakeland Regional High School Board of Education, and the Mahwah Board of Education will be withdrawn from both the Commissioner of Education and the Office of Special Education Programs; b. The Respondent HoHoKus Board of Education agrees to withdraw their Counterclaim, Cross-claim and Third-Party Complaint against Petitioner Ellen Ravese, the other named Respondents and Frank Altomare, respectively.

Dated: 10/24/2002

By _____
WILLIAM P. HIGGINS
Attorney for Petitioner

By _____
JOHN G. GEPPERT, JR.
Attorney for Respondent HoHoKus Board of Education

By _____
NATHANYA SIMON
Attorney for Respondent Mahwah Board of Education

By _____
LINDA GANZ OTT
Attorney for Respondent Northern Highlands Regional High School Board of Education

By _____
PHILIP STERN
Attorney for Lakeland Regional High School Board of Education

By _____
FRANK ALTOMARE

By _____
ELLEN RAVESE

of $2432.75 each. — conformance effected by fax ALAJ 12/17/02

4) On or around February 1, 2003, the Petitioner and her former husband, Frank Altomare, have agreed to pay the $4,865.50 tuition directly to the Northern Highlands Regional High School, each party to pay $2,432.75 towards the tuition.

5) Based upon the above, the Petitioner agrees with the Respondents as to the following actions:

a. Petitioner's claim against Northern Highlands Regional High School Board of Education, HoHoKus Board of Education, Lakeland Regional High School Board of Education, and the Mahwah Board of Education will be withdrawn from both the Commissioner of Education and the Office of Special Education Programs; b. The Respondent HoHoKus Board of Education agrees to withdraw their Counterclaim, Cross-claim and Third-Party Complaint against Petitioner Ellen Ravese, the other named Respondents and Frank Altomare, respectively.

Dated:

By_____
WILLIAM P. HIGGINS
Attorney for Petitioner

By_____
JOHN G. GEPPERT, JR.
Attorney for Respondent HoHoKus Board of Education

By_____
NATHANYA SIMON
Attorney for Respondent Mahwah Board of Education

By_____
JAMES PLOSIA, JR.
Attorney for Respondent Northern Highlands Regional High School Board of Education

By_____
PHILIP STERN
Attorney for Lakeland Regional High School Board of Education

By_____
FRANK ALTOMARE

By Ellen Ravese
ELLEN RAVESE

of $2,432.75 each.

4) On or by February 1, 2003, the Petitioner and her former husband, Frank Altomare, have agreed to pay the $4,865.50 tuition directly to the Northern Highlands Regional High School, each party to pay ~~$2,432.75~~ OR 2434.25 towards the tuition.

5) Based upon the above, the Petitioner agrees with the Respondents as to the following actions: a. Petitioner's claim against Northern Highlands Regional High School Board of Education, HoHoKus Board of Education, Lakeland Regional High School Board of Education, and the Mahwah Board of Education will be withdrawn from both the Commissioner of Education and the Office of Special Education Programs; b. The Respondent HoHoKus Board of Education agrees to withdraw their Counterclaim, Cross-claim and Third-Party Complaint against Petitioner Ellen Ravese, the other named Respondents and Frank Altomare, respectively.

Dated:

By_____
WILLIAM P. HIGGINS
Attorney for Petitioner

By_____
JOHN G. GEPPERT, JR.
Attorney for Respondent HoHoKus Board of Education

By_____
NATHANYA SIMON
Attorney for Respondent Mahwah Board of Education

By_____
LINDA GANZ OTT
Attorney for Respondent Northern Highlands Regional High School Board of Education

By_____
PHILIP STERN
Attorney for Lakeland Regional High School Board of Education

By_____
FRANK ALTOMARE

By_____
ELLEN RAVESE

OAL DKT. NO. EDU 9559-02
AGENCY DKT. NO. 282-9/02

E.R., on behalf of minor child, D.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF HO-HO-KUS, BERGEN COUNTY; BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY; AND BOARD OF EDUCATION OF LAKELAND REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

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

Upon review, the Commissioner approves the settlement terms, with respect to those issues within his jurisdictional purview,* and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/7/03

Date of Mailing: 2/7/03

* The Commissioner specifically does not reach to provision #2. of the parties' agreement as this is a Special Education issue.

S.R.R., on his own behalf and on behalf of minor child, S.R.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged Board's decision to permanently expel his 14-year-old son, S.R., when S.R. made threats against students and brought to school an inoperable BB gun to frighten another student. Petitioner's claims against the State were bifurcated from earlier proceedings. Petitioner asserts that State respondents violated S.R.'s constitutional rights.

In "Part II" of these bifurcated proceedings, the ALJ found that this matter was ripe for summary decision in that no genuine issues of material fact remain to be determined. The ALJ further found that petitioner had not proven that the State respondents violated S.R.'s constitutional rights and, therefore, dismissed Counts Five, Six and Seven.

The Commissioner adopted the Initial Decision, with modification. The Commissioner concurred with the ALJ's findings as to Counts Five, Six and Seven, specifically noting that there was no relief petitioner sought from the State respondents which could be granted. The Commissioner also ordered that the decision in this matter be unsealed, while the record remain sealed.

February 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION AND RECORD SEALED

INITIAL DECISION
SUMMARY DECISION
PART II
OAL DKT. NOS. EDU 1914-02
and EDU 5616-02
AGENCY DKT. NO. 35-2/02

S.R.R. ON HIS OWN BEHALF AND ON BEHALF OF MINOR CHILD, S.R.,

Petitioner,

v.

ROSELLE BOROUGH BOARD OF EDUCATION, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION OF NEW JERSEY, AND NEW JERSEY STATE BOARD OF EDUCATION,

Respondents.

David R. Giles, Esq., and **Anna Maria Tejada**, Esq., for petitioner

Allan C. Roth, Esq., and **Joel G. Scharff**, Esq., for Roselle Borough Board of Education (Ruderman & Glickman, attorneys)

Michael C. Walters, Deputy Attorney General, and **Cynthia A. Phillips**, Deputy Attorney General, for William L. Librera, Commissioner of Education, and the New Jersey State Board of Education

Record Closed: November 12, 2002 Decided: December 23, 2002

BEFORE **RICHARD McGILL**, ALJ:

This is the second part of a bifurcated proceeding concerning a petition by S.R.R. (petitioner) in regard to the expulsion of his fourteen-year-old son, S.R., by the Roselle Borough Board of Education. The expulsion stemmed from events over several days during which S.R. allegedly threatened to kill three students and brought a non-functional BB gun to school.

The petition is set forth in eight counts. Counts One, Two, Three, Four and Eight contain allegations related to the Roselle Borough Board of Education. Counts Five, Six and Seven contain allegations against William L. Librera, Commissioner of Education of New Jersey, and the New Jersey State Board of Education (State respondents). A Partial Initial Decision dated September 12, 2002, addressed the counts against the Roselle Borough Board of Education. The State respondents now move for summary decision dismissing Counts Five, Six and Seven.

Count Five alleges that the State respondents violated S.R.'s right to due process of law under the Fourteenth Amendment to the United States Constitution by failing to take steps, such as issuing regulations, to ensure that no student is expelled in a manner that is fundamentally unfair, arbitrary, capricious and unreasonable, and without demonstrating that expulsion is the narrowest means available. Count Six alleges that the State respondents violated S.R.'s right to a thorough and efficient education under Article VIII, § 4, ¶ 1 of the New Jersey Constitution by failing to take essentially the same steps as set forth in Count Five. Count Seven alleges that the State respondents violated S.R.'s right to a thorough and efficient education under Article VIII, § 4, ¶ 1 of the New Jersey Constitution by failing to ensure that S.R. was provided with an appropriate alternative education program after he was expelled from school.

As relief related to the State respondents, the petition demands the following: (1) a finding that the State respondents violated S.R.'s right to a thorough and efficient education under Article VIII, § 4, ¶ 1 of the New Jersey Constitution, (2) placement of S.R. in an appropriate alternative educational program, (3) an Order directing the State respondents to promulgate regulations to guide school districts on how to administer long-term suspensions and expulsions without violating the substantive and procedural due process rights of pupils protected by the United States and New Jersey constitutions and in a manner that is not fundamentally unfair or that is arbitrary, capricious or unreasonable, and (4) such other relief that

is equitable and just. Petitioner would include in this last category guidance, monitoring and supervision of schools and school districts.

PROCEDURAL HISTORY

This procedural history is supplemental to the Partial Initial Decision dated September 12, 2002, and focuses on procedures in regard to counts related to the State respondents. Petitioner filed his petition of appeal with the Commissioner of Education on February 14, 2002, and on February 19, 2002, petitioner filed a motion for emergent relief. The matter was transmitted to the Office of Administrative Law on February 28, 2002, for determination as a contested case.

An oral argument in regard to the motion for emergent relief was conducted on March 7, 2002, and an Order granting emergent relief in the form of placement of S.R. in an appropriate educational program pending final disposition of this matter was issued on March 13, 2002. On March 22, 2002, the Commissioner issued a Decision on Motion affirming the Order granting emergent relief.

On May 15, 2002, the State respondents filed a motion for summary decision and requested dismissal of Counts Five, Six and Seven. Petitioner submitted a response on May 28, 2002, and a reply by the State respondents was received on June 6, 2002.

By letter dated May 31, 2002, the State respondents filed a motion to bifurcate the proceeding such that all claims against the State respondents would be considered after a determination was made in regard to the claims against the Roselle Borough Board of Education. The motion was unopposed and was granted by Order dated June 7, 2002. A six-day hearing in regard to the claims against the Roselle Borough Board of Education began on June 24, 2002, and a Partial Initial Decision was issued on September 12, 2002. The Commissioner of Education issued a Decision in regard to the first part of this case on November 1, 2002.

By letter dated October 11, 2002, the undersigned requested supplemental briefs in regard to the State respondents' motion for summary decision. The State respondents filed a

supplemental brief on October 29, 2002, and petitioner's response was received on November 12, 2002.

STATE RESPONDENTS' MOTION

a. Positions of the Parties

In support of the motion for summary decision, the State respondents maintain that there are no genuine issues of material fact and that they are entitled to prevail as a matter of law. The pertinent statutes, *N.J.S.A.* 18A:37-1 *et seq.*, reflect a determination by the Legislature that local boards of education are best suited to determine whether good cause exists for expulsion of a student. The statutes enumerate specific examples and provide general standards as to the conduct which will constitute grounds for expulsion. According to the State respondents, the statutory framework provides ample guidance to school boards in determining whether good cause exists for an expulsion. The State respondents maintain that petitioner is attempting to force them to micro-manage disciplinary policies of each school district throughout the State. This task would be not only inefficient but also an egregious waste of resources. More importantly, it would conflict with the statutes that vest the authority to expel students in the local board of education. Because of the statutory guidelines, there is no need for regulations in regard to expulsions.

The State respondents advance two specific legal arguments. First, the State respondents contend that the Office of Administrative Law lacks the authority to invalidate the current statutory and regulatory framework governing pupil discipline. Second, in regard to the merits of petitioner's claims, the State respondents maintain that they have not violated S.R.'s constitutional rights by failing to promulgate regulations governing pupil discipline. In their supplemental brief, the State respondents also argue that Counts Five, Six and Seven should be dismissed for failure to state a cause of action upon which relief may be granted.

Petitioner maintains that the State respondents fundamentally misconstrue the claims set forth in Counts Five, Six and Seven. More specifically, petitioner denies that this case is a general or facial attack on a statute or regulation which might appropriately be brought in the Appellate Division. Rather, this is the type of individual dispute which must be brought first to

the administrative agency charged with enforcing the law in this area and before the appropriate fact finder to hear and weigh the relevant evidence. Further, it is the responsibility of an administrative agency to address such claims not only to ensure that there is an adequate record on appeal but also to provide the agency's insights on a subject that is within its purview. An evidentiary hearing is mandated where the proposed administrative action is based on disputed adjudicative facts.

According to petitioner, the State Board of Education has the "general supervision and control of public education in this state ... and of the state department of education ... which shall formulate plans and make recommendations for the unified, continuous and efficient development of public education ... of people of all ages within the state." *N.J.S.A.* 18A:4-10. Further, the state board must "make and enforce, and may alter and repeal, rules for its own government and for implementing and carrying out the school laws of this state under which it has jurisdiction." *N.J.S.A.* 18A:4-15. The Commissioner of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9.

Petitioner would group the material facts in this matter into four categories. The first category of facts relates to the actual expulsion of S.R. and the procedures related thereto. Findings of fact in regard to this category were made in the Partial Initial Decision. The second category concerns facts related to the services provided to S.R. during the thirteen-month period during which S.R. was excluded from his regular school program and any educational, social or emotional harm to him. Evidence was presented in regard to these facts during the hearing, and findings were made in the Partial Initial Decision. However, no evidence was admitted concerning S.R.'s educational program during the summer or fall. The adequacy of this program is in dispute.

The third category concerns facts related to the question whether the State respondents failed to take necessary steps to protect S.R. from an unwarranted expulsion. The fourth category relates to the question whether the State respondents failed to ensure that S.R. had an appropriate alternative education subsequent to the expulsion by the Roselle Borough Board of Education. According to petitioner, the factual issues with respect to the third and fourth categories relate to

the State's activities in guiding, monitoring and supervising its public schools and school districts.

b. Legal Standard

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.* 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. *Id.*, at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. *Ibid.*

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995).

c. Facts

This case is in an unusual posture in that a motion for summary decision is pending at a point in time when extensive findings of fact have already been made in the Partial Initial Decision. Rather than attempt to address this motion on the basis of the record at the time of

filing in May 2002, the findings as set forth in the Partial Initial Decision dated September 12, 2002, will be treated as the facts in this matter.

In addition, the procedural history and the disposition of the five counts against the Roselle Borough Board of Education are part of the fact pattern with respect to the three counts against the State respondents. In a Decision dated November 1, 2002, the Commissioner of Education overturned the expulsion of S.R. and ordered that S.R. be reinstated to his regular education program, that his school records reflect the substance of the Commissioner's decision and that S.R. be provided with compensatory services in order to help him reach competencies consistent with his appropriate grade level.

Petitioner maintains that findings need to be made as to those facts which he includes his second, third and fourth categories. The State respondents have not asserted that these facts are not in dispute. Rather, the State respondents argue in effect that these facts are immaterial. This issue will be discussed below as a question of law.

d. Law and Analysis

Counts Five, Six and Seven of the petition allege that the State respondents have violated S.R.'s constitutional rights in various respects. Petitioner's filing of these allegations in this forum and the State respondent's arguments in support of the motion for summary decision raise the question of the extent of the authority of an administrative agency to decide constitutional issues.

In *Paterson Redevelopment Agency v. Schulman*, 78 *N.J.* 378 (1979), the role of an agency with respect to a constitutional claim was described as follows:

> We therefore conclude that relocation claims must first be presented to the local agency. Because that agency lacks proper jurisdiction to decide constitutional claims, such issues should merely be noted, as is generally done in the municipal court. Factual presentations relevant to the constitutional issues may be made, however, to ensure an adequate record for determination on appeal. In this way both the integrity of the administrative system and the

> defendant's right to a judicial determination of constitutional issues will be preserved. [*Id.*, at 388.]

More recent cases, however, allow a broader role for administrative agencies in dealing with constitutional issues. In *Hunterdon Central High School Board of Education v. Hunterdon Central High School Teachers' Association,* 174 *N.J. Super.* 468 (App. Div. 1980), aff'd o.b. 86 *N.J.* 43 (1981), the court considered whether the Public Employment Relations Commission (PERC) could dispose of the question stated as "whether public employers and public employees (may) agree to allow certain members of the bargaining unit to take days off from work for the purpose of religious observation without deduction of either a personal day, a vacation day or a day's wage" on the constitutional basis that the agreement violated the constitutional prohibition against the establishment of religion. PERC had concluded that the provision would violate the constitution. In deciding that PERC could make this determination, the court noted that the subject of leaves of absences was certainly within the scope of PERC's jurisdiction. Further, the terms and conditions of employment may be impacted by laws other than those within the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, which is administered by PERC. The court determined that PERC may apply other rules of law including provisions of the constitution to decide a question within its jurisdiction.

A more authoritative statement may be found in *Abbott v. Burke*, 100 *N.J.* 269 (1985), where the court noted that although an agency may base its decision on constitutional considerations, such legal determinations do not receive a presumption of correctness on appellate review. *Id.*, at 298-299. More recently in *Board of Education of the Township of Neptune v. Neptune Township Education Association*, 293 *N.J. Super.* 1 (App. Div. 1996), the court stated as follows:

> Where the broader subject matter of a case is within the purview of an administrative agency's authority, it is valuable to have the insights and policy reflections of that agency, even if the only issue to be decided is one of constitutional dimension, in respect of which the agency is seen to have no particular expertise or authoritative decisional role. In such matters, it is appropriate that a case proceed as an agency adjudication, whether pursuant to *N.J.S.A.* 52:14B-8 or another procedural source, subject, of course, to appellate review without the presumption of correctness that would attend the resolution of less weighty questions. *Id.*, at 9].

A distinction is normally drawn between a facial attack on the constitutionality of a statute and an as-applied challenge. The general rule is that an administrative agency is barred from passing on the constitutionality of a statute. *Hunterdon Central High School Board of Education v. Hunterdon Central High School Teachers' Association*, 174 *N.J. Super.* at 474. The case of *Brunetti v. Borough of New Milford*, 68 *N.J.* 576 (1975) is instructive with respect to an as-applied challenge. There, the determination was that it was proper for a court to rule on the facial constitutionality of an ordinance and then require exhaustion of administrative remedies for other challenges. A challenge that an ordinance is unconstitutional as applied requires detailed findings of fact and therefore exhaustion of administrative remedies. *Id.,* at 590-591; *Roadway Express Inc. v. Kingsley,* 37 *N.J.* 136, 140 (1962).

Counts Five, Six and Seven all involve allegations of violations of S.R.'s constitutional rights. Petitioner maintains that the State respondents' motion for summary decision fundamentally misconstrues the nature of the allegations in Counts Five, Six and Seven. From a review of Counts Five, Six and Seven, it becomes evident that their nature is not readily apparent and that they are susceptible to varying interpretations. Under the circumstances, the allegations will be discussed first as a facial attack on the constitutionality of the pertinent statutes and then as an as-applied challenge.

In their brief in support of the motion for summary decision, the State respondents argue that the Office of Administrative Law lacks the authority to invalidate the current statutory and regulatory framework governing pupil discipline. The State respondents cite the general principle that administrative agencies lack the authority to invalidate statutes or regulations on constitutional grounds. In response, petitioner denies that this case involves a general or facial attack on any statute or regulation. Rather, petitioner maintains that this is the type of individual dispute which must first be brought before the agency as the appropriate fact finder to hear and weigh the relevant evidence.

It is well established that administrative agencies are barred from invalidating a statute on constitutional grounds. *Hunterdon Central High School Board of Education v. Hunterdon Central High School Teachers' Association*, 174 *N.J. Super.* at 474. Petitioner does not oppose

the argument of the State respondents in this regard. Therefore, the facial constitutionality of the statutes related to student discipline will not be considered in this proceeding.

With respect to petitioner's as-applied challenge, the essence of the claims contained in Counts Five and Six is that the State respondents did not take steps to ensure that the local board of education would not expel S.R. in a manner contrary to law. In effect, petitioner maintains that the State respondents should have acted preemptively to control the local board of education by means such as regulations, training, guidance and monitoring to prevent the expulsion from occurring in the first place. According to petitioner, the failure of the State respondents to do so violated S.R.'s right to due process of law under the Fourteenth Amendment to the United States Constitution and the thorough and efficient clause in Article VIII, § 4, ¶ 1 of the New Jersey Constitution.

S.R.'s right to due process of law was discussed at length in the Partial Initial Decision, and those principles will not be repeated here. The thorough and efficient clause of the New Jersey Constitution provides as follows:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years. [*N.J. Const.* (1947) Art. VIII, § 4, para.1.]

This provision has been interpreted to require "equal opportunity for all children ... which must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his [or her] role as a citizen and as a competitor in the labor market." *Id.*, at 280-281. Further, "a constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one which will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities." *Abbott v. Burke*, 149 *N.J.* 145, 166 (1997).

In regard to the pertinent statute, *N.J.S.A.* 18A:37-2, the Legislature has granted the authority to suspend or expel students to the local board of education. This provision recognizes that the local board of education is in the best position to determine whether a particular situation

warrants a suspension or expulsion. Further, the local boards of education do not act without guidance. The statute establishes a standard of good cause for suspensions and expulsions and provides a list of ten types of conduct that would be included therein.

Any action by a local board of education is subject to an appeal process to the Commissioner of Education and then to the State Board of Education. *N.J.S.A.* 18A:6-9; *N.J.A.C.* 6A:3-1.1 *et seq.*, and *N.J.S.A.* 18A:6-27. Over the years, the State respondents have provided guidance to local boards of education through decisions in contested cases. For example, the Commissioner has stated that "termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible." *Scher v. Board of Educ. of West Orange*, 1968 *S.L.D.* 92, 96. Local boards of education have been urged to recognized expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent evaluation and recommendation. *Id.,* at 97. Where the circumstances do not meet these standards, the Commissioner has found an expulsion to be unreasonable. *E.g., C.S. v. Board of Educ. of Township of Piscataway*, 97 *N.J.A.R.*2d (EDU) 573. Finally, the courts have provided guidance as to the procedures required to provide students with due process of law. *E.g., R.R. v. Bd. of Ed., Shore Reg. H.S.*, 109 *N.J. Super.* 337 (Ch. Div. 1970); *Tibbs v. Bd. of Ed. of Tp. of Franklin*, 114 *N.J. Super.* 287 (App. Div. 1971); *aff'd,* 59 *N.J.* 506 (1971). Under the circumstances, local boards of education have received substantial guidance in applying the standards set forth in *N.J.S.A.* 18A:37-2.

One function of an administrative agency in dealing with a constitutional issue is to make findings of fact with respect to an underlying subject matter within its purview. Here, extensive findings were made in the Partial Initial Decision concerning the facts in this matter. Of significance with respect to Counts Five and Six, S.R. engaged in serious misconduct which warranted substantial disciplinary action. S.R. threatened to kill two or three other students and brought a non-functional BB gun to school to lend credence to his threat. While the other students were not in actual danger, they should not have to go to school fearing for their lives. This is not a case in which S.R. was vindicated of the alleged misconduct. There can be no doubt that S.R. was properly removed from the regular education program for some period of time.

In regard to the facts which petitioner includes in his third and fourth categories, the allegations that the State respondents failed to take certain actions are premised on the assumption that they had an obligation to do so. The cases cited by petitioner offer no direct support for this assumption. Moreover, the facts of this case do not point to a need for preemptive action. While the initial expulsion by the local board of education was an overreaction, the decision by the Commissioner corrected the situation. It follows that there is no basis in law or fact for petitioner's assumption. Under the circumstances, the conclusion is warranted that the facts related to any steps, whether taken or not, to control preemptively the local board of education are not material with respect to the outcome of this case. In the absence of any obligation to take preemptive action, the State respondents are entitled to prevail as a matter of law with respect to Counts Five and Six.

Count Seven alleges that the State respondents violated S.R.'s right to a thorough and efficient education by failing to provide or otherwise ensure that S.R. was provided an appropriate alternative education after he was expelled by the local board of education. This count could be viewed as an attack on the alternative education actually received by S.R. or as an allegation that the State respondents should have acted preemptively to cause S.R. to have a program take effect immediately upon his expulsion.

At the factual level, one striking aspect of this case is that S.R. had no educational program whatsoever for a five-month period from approximately mid-November 2001 to mid-April 2002. However, after the expulsion took effect in mid-November 2001, petitioner took three full months until mid-February 2002 to file an appeal. Thus, petitioner's inaction accounted for a large portion of the time when S.R. had no educational program.

Additionally, once made, petitioner's request for emergent relief was promptly considered and granted. The fact that S.R. was placed on home instruction for an extended period of time reflects the view of the court-appointed psychologist who expressed the opinion that placement in an alternative school would not be appropriate for S.R. Thus, the Commissioner of Education ordered that the local board of education provide S.R. with an alternative education program which was appropriate under the circumstances.

Petitioner filed a motion to enforce the Commissioner's order to provide an alternative education program for S.R. This motion was treated as an application for emergent relief and was resolved through a settlement. Thus, petitioner agreed to changes in S.R.'s alternative educational program. Finally, in his Decision dated November 1, 2002, the Commissioner ordered that S.R. receive compensatory services in order to help him reach competencies consistent with his appropriate grade level. In view of these circumstances, the additional facts in petitioner's second category as to which findings were not made in the Partial Initial Decision would not be indicative of a violation of S.R.'s constitutional rights by the State respondents and therefore are not material.

In terms of the standards applicable to a motion for summary decision, petitioner has not demonstrated that there are any genuine issues of material fact with respect to Count Seven. Further, petitioner has cited no case which would require the State respondents to act preemptively to cause S.R. to have a program in effect immediately upon his expulsion. In the absence of any support for petitioner's position, the State respondents are entitled to prevail as a matter of law. Therefore, I **CONCLUDE** that the motion for summary decision should be granted.

Accordingly, it is **ORDERED** that:

1. The State respondents' motion for summary decision is granted.

2. Counts Five, Six and Seven of the petition in this matter are dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

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

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

Dec. 23, 2002
DATE

Richard McGill
RICHARD McGILL, ALJ

Receipt Acknowledged:

January 1, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 6 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

S.R.R., on his own behalf and on behalf of minor child, S.R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION AND NEW JERSEY STATE BOARD OF EDUCATION,	:	
RESPONDENTS.	:	

The record of this bifurcated matter and the Initial Decision of the Office of Administrative Law (OAL), identified as "Part II," have been reviewed.[1] Petitioner's exceptions and the State's reply thereto were filed in accordance with *N.J.A.C.* 1:1-18.4 and considered by the Commissioner in reaching his decision.

UNSEALING THE DECISION

Pursuant to motion filed by counsel for petitioner, on January 8, 2003, the Commissioner of Education issued an Order **unsealing** the decision issued by the Commissioner on November 1, 2002 (No. 384A-02) in the matter entitled *S.R.R., on his own behalf and on behalf of minor child, S.R. v. Board of Education of the Borough of Roselle, Union County, William L. Librera, Commissioner of Education and New Jersey State Board of Education*, OAL

[1] As noted in the Initial Decision at page three, the issues relating to the State respondents were bifurcated from those relating to the Roselle Borough Board of Education.

DKT. NOS. EDU 1914-02 and 5616-02, or "Part I." The record of that matter, however, remains sealed.

By letter dated January 22, 2003, the parties were invited to submit reasons why the Initial and Final Decisions herein, *i.e,* "Part II" of the above-captioned matter, should not be unsealed, as well. Objections, if any, were to be filed by January 30, 2003. No objections were filed. Consequently, the Commissioner determines that this decision is unsealed, while the record remains sealed.[2]

COMMISSIONER'S DETERMINATION, PART II

Upon careful and independent review of the record in this matter, the Commissioner determines that the remaining counts with respect to the State respondents are properly dismissed. As the Administrative Law Judge (ALJ) notes, at this stage of these proceedings, there is a motion for summary decision pending *after* extensive findings of fact have been rendered by the ALJ, then adopted and supplemented by the Commissioner in his November 1, 2002 decision. Moreover, nothing in the exceptions submitted by petitioner suggests that there remains a genuine issue which can be determined only in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(b). Rather, at this point in time, the parties dispute the *significance of the facts* relative to petitioner's allegations in Counts Five, Six and Seven. In this regard, the Commissioner recognizes that "It is well-stablished that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case." *Frank v. Ivy Club*, 120 *N.J.* 73, 98 (1990), *citing Cunningham v. Dept. of Civil Service*, 69 *N.J.* 13, 24-25 (1975). "Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v.*

[2] A copy of this decision, however, will be forwarded to the OAL for appropriate action.

Board of Education of Newark, 96 *N.J.A.R.* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994). *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000. Therefore, the Commissioner finds that this matter is ripe for summary decision.

Having so determined, the Commissioner concurs, for the reasons set forth in the Initial Decision, that Counts Five, Six and Seven are properly dismissed.[3] Furthermore, and significantly in this bifurcated matter, the Commissioner notes that the *only* relief sought by petitioner which remains to be granted *relative to the State respondents* is:

- A finding that the Commissioner and the State Board violated S.R.'s right to a thorough and efficient education under Article VIII, Section IV, paragraph 1 of the New Jersey Constitution; and

- An Order directing the Commissioner and State Board to promulgate regulations to guide school districts on how to administer long-term suspensions and expulsions without

[3] These counts allege as follows: **Count Five:** The Commissioner and State Board violated S.R.'s constitutional right to due process guaranteed by the Fourteenth Amendment to the United States Constitution by failing to take steps necessary and readily available, such as issuing regulations governing pupil expulsions, to ensure that no pupil enrolled in a public school in the State of New Jersey is expelled from such school without due process and in a manner that is fundamentally unfair or arbitrary, capricious and unreasonable, and that pupils are not expelled from school without it first being demonstrated that expulsion is the most narrow means available to achieve the local education agency's interest in maintaining safe and orderly schools.

Count Six: The Commissioner and State Board violated S.R.'s right to a thorough and efficient education established under New Jersey Constitution Article VIII, Section IV, paragraph 1 by failing to take steps necessary and readily available, such as issuing regulations governing pupil expulsions, to ensure that no pupil enrolled in a public school in the State of New Jersey is expelled from such school without due process and in a manner that is fundamentally unfair or arbitrary, capricious and unreasonable, and that pupils are not expelled from school without it first being demonstrated that expulsion is the most narrow means available to achieve the local education agency's interest in maintaining safe and orderly schools.

Count Seven: The Commissioner and State Board violated S.R.'s right to a thorough and efficient education established under New Jersey Constitution Article VIII, Section IV, paragraph 1 by failing to provide S.R. or otherwise failing to ensure that S.R. was provided an appropriate alternative education program after he was expelled from the public schools operated by the Board. (Petition of Appeal at 8, 9)

violating substantive and procedural due process rights of pupils protected by the United States and New Jersey Constitutions and in a manner that is not fundamentally unfair, arbitrary, capricious and unreasonable. (Petition of Appeal at 9, 11)

Consistent with the ALJ's discussion and the decision herein, however, the Commissioner is compelled to deny the remaining relief requested.[4]

Accordingly, there being no cause of action for which relief can be granted, the Commissioner adopts the Initial Decision, with modification as set forth above, and finds that summary decision is properly granted in the Board's favor.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 2/18/03

Date of Mailing: 2/19/03

[4] Indeed, the Commissioner notes that the State Board of Education's decision issued on July 2, 2002 in the matter entitled *P.H. and PH.,. on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield et al.* specifically instructs that "the proper course for seeking the adoption of regulations by an administrative agency is to petition the agency to adopt a new rule according to the procedures prescribed by such agency. *N.J.S.A.* 52:14B-4(f).***" *Bergenfield* at 13.

[5] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

66-03

M.H., on behalf of minor children, M.H. and M.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

2/24/03

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7102-02
AGENCY DKT. NO. 165-5/02

M.H., on behalf of minor children
M.H. and M.H.,
Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

M.H., petitioner, *pro se*

Joanne Butler, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: January 2, 2003 Decided: January 6, 2003

BEFORE **ELINOR R. REINER**, ALJ:

On or about June 5, 2002, petitioner, M.H., filed a petition of appeal with the Commissioner of Education, challenging respondent's residency determination in regard to her children, M.H. and M.H. On July 18, 2002, respondent filed its answer seeking dismissal of the petition and counterclaiming for tuition for the period of ineligible attendance. On August 2, 2002, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law

as a contested case for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on September 4, 2002 and a telephone prehearing conference scheduled for October 1, 2002. Due to the undersigned's inability to contact petitioner at the listed telephone number and address, the prehearing conference was adjourned. Thereafter, the matter was scheduled for hearing on January 2, 2003 at the Office of Administrative Law. As the result of settlement conferences held between the parties on that date, a settlement was reached and the hearing was not held.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement, indicating the terms of settlement.

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

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

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

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

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

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

January 6, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

January 10, 2003
DATE

M. Kathleen Duncan (EJ)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 14 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

M.H. o/b/o M.H. and M.H. : State of New Jersey
: Office of Admin. Law
v. :
: OAL DKT NO. EDU 7103-03
Union Board of Education :

This matter having come before the Court upon the Petition filed by Myrtle Horace, and the parties having agreed to amicably ~~[illegible]~~ resolve the matter, as follows:

1. Petitioner will pay to the Board payments of $100 per month, for fifteen months, as tuition reimbursement, starting February 15, 2003.

2. Petitioner's payments will be made by cash, money order or certified check/bank check, and are due by the 15th day of each month.

3. The total amount to be paid by Petitioner is $1500, except that payment of the entire amount of tuition due, $2500, will be due to the Board if Petitioner defaults on any payment due hereunder.

4. This is the settlement of disputed claims and does not constitute an admission of liability by either party.

2a

5. In consideration of the foregoing, Petitioner shall withdraw her Petition and the Board will withdraw its Counterclaim.

6. The parties agree to waive any and all claims which have been or could have been raised against the other party, except that the Board does not waive its right to seek payment of the entire amount due, $2500, in the event of Petitioner's default.

Myrtle Horace
Petitioner Myrtle Horace

Joanne L. Butler
For the Board
Joanne Butler, Esq

Elinor R. Reiner
HON. ELINOR R. REINER

1/3/05
Date

OAL DKT. NO. EDU 7102-02
AGENCY DKT. NO. 165-5/02

M.H., on behalf of minor children, M.H. and M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/24/03

Date of Mailing: 2/24/03

65-03

JOAN BREVARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7468-99
AGENCY DKT. NO. 108-5/99

JOAN BREVARD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, PC, attorneys

Ma´Lee L. Wing, Esq., for respondent
(Hunt, Hamlin & Ridley, attorneys)

Record Closed: December 27, 2002 Decided: January 3, 2003

BEFORE **DIANA C. SUKOVICH,** ALJ:

Petitioner, a tenured teaching staff member employed by respondent, filed a petition with the State Department of Education (DOE), on or about May 10, 1998, disputing the treatment of certain days pertinent to her leave time. The DOE transmitted the matter to the Office of Administrative Law on July 13, 1999 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Hearing dates were adjourned at the requests of the parties for various reasons, and the matter was placed on the inactive list. A hearing was subsequently scheduled for November 25, 2002. The parties appeared on that date, conferred, and reached a resolution of the matter. An executed Stipulation of Settlement was filed on December

27, 2002, on which date the record was closed. Enclosed herewith is a copy of the Stipulation.

Having reviewed the terms Stipulation of Settlement Agreement, I **FIND** the parties voluntarily have agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

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

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

January 3, 2003
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

January 7, 2003
DATE

M. Kathleen Jennaro
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

\mvh

OXFELD COHEN, PC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

BEFORE THE COMMISSION OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUOR 07468-99N
AGENCY REF. NO. 108-5/99

JOAN BREVARD,	:	
Petitioner,	:	
-vs-	:	STIPULATION OF SETTLEMENT
BOARD OF EDUCATION OF THE CITY OF IRVINGTON,	:	
Respondent.	:	

The within matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. The Respondent will pay to the Petitioner her full pay for the dates March 11, 1999 through June 30, 1999, her last date of employment prior to retirement;

2. The Petitioner and Respondent agree that the terms of this agreement may be raised before the Division on Workers' Compensation in the matter of Joan Brevard v. Irvington Board of Education, CP No. 99-010242;

3. This settlement fully disposes of all issues and defenses raised by either party in this matter;

4. In return for the action of Respondent in paying to Petitioner the money set forth in Paragraph 1 of this agreement, Petitioner hereby withdraws her petition in this matter before the Commissioner of Education.

OXFELD COHEN, PC
Attorneys for Petitioner
By:

NANCY I. OXFELD, ESQ.

Dated: 12/23/02

HUNT, HAMLIN & RIDLEY
Attorneys for Respondent
By:

MA'LEE L. WING, ESQ.

Dated: 12/13/02

OAL DKT. NO. EDU 7468-99
AGENCY DKT. NO. 108-5/99

JOAN BREVARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/20/03

Date of Mailing: 2/21/03

70-03

IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA LEE,	:	
MOUNTAINVIEW YOUTH CORRECTIONS	:	COMMISSIONER OF EDUCATION
FACILITY, DEPARTMENT OF	:	DECISION
CORRECTIONS.	:	
	:	

February 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6904-02
AGENCY DKT. NO. 318-10/02

IN THE MATTER OF THE TENURE HEARING OF GLORIA LEE, MOUNTAINVIEW YOUTH CORRECTIONS FACILITY, DEPARTMENT OF CORRECTION

Christopher C. Josephson, Deputy Attorney General, appearing for petitioner

Marvin T. Braker, Esq., appearing for respondent

Record Closed: January 22, 2003 Decided: January 22, 2003

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

This matter was transmitted to the Office of Administrative Law on October 23, 2002 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

January 23, 2003
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

January 28, 2003
DATE

M. Kathleen Duncan (Ex)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement Agreement

Gloria Lee

vs

NJ Department of Corrections

SETTLEMENT AGREEMENT

The parties hereto agree to settle this matter in accordance with the following terms:

1. The appellant admits that she is guilty of having violated the State of New Jersey's policies on violence in the workplace, and as such behaved in a manner unbecoming a public employee. She agrees to accept a suspension without pay for 5 working days for that infraction.

   The Department agrees to withdraw its request to the New Jersey Department of Education that tenure charges be implemented.

2. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

3. The appellant will not receive any back pay, counsel fees, costs or any other monetary relief as a result of this settlement.

4. The personnel file for the Department of Corrections will indicate that Ms. Lee served her 5-day suspension on October 21, 22, 23, 24 and 25, 2002. The record will also show that the appellant was placed on a leave of absence without pay for personal reasons effective October 26, 2002. She will be returned to active duty on December 5, 2002, or the day after she signs this settlement agreement, whichever is later. She will contact Assistant Director Patty Friend of the Office of Educational Services (609/633-6648) *prior* to returning to duty in order to receive reporting instructions. The appellant will be assigned to a new duty station at the Edna Mahan Correctional Facility for Women.

5. The appellant agrees to apply for a Service Retirement with a requested effective date of no later than February 1, 2003.

   A. In the event the Division of Pensions grants the appellant's retirement request she will retire from her position on the effective date of her approved retirement.
   B. If the Division of Pensions denies her request for retirement, *or* if she fails to apply for a service retirement by February 1, 2003, she will be considered to have resigned in good standing from her position effective February 1, 2003 or the date of her requested retirement, whichever is first.
   C. If the Division of Pensions has not yet determined, by her requested date of retirement, whether it will approve her application for service retirement, the employee will be considered to have resigned in good standing effective on that date. This will not affect her retirement eligibility. If the application for service retirement is approved sometime after her resignation, she will receive her pension in accordance with the laws governing the Public Employees Retirement System.

6. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

7. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information and disputes giving rise to this action up to the date of this agreement, including but not limited to all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and any contract expressed or implied.

8. Appellant will not reapply in the future to the New Jersey Department of Corrections for any position.

9. In accordance with the *Holland Consent Decree* all internal records of the Department of Corrections with regard to this matter will be kept intact. The Department shall exercise a good faith effort to answer all employer inquiries concerning the appellant with the response she retired or resigned in good standing, whichever is applicable. However, nothing herein shall preclude the Department from releasing information on this matter to any public employer who has a properly executed release.

Authorization has been given by the Department of Corrections to agree to this settlement. The parties have read the settlement agreement and freely and voluntarily agree to its provisions.

Appellant 12-12-02 (Date)

Appellant's Representative 12-12-02 (Date)

Appointing Authority's Representative (Date)

DAVID SAMSON
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher Josephson 12/16/02
Christopher Josephson, D.A.G. (Date)

For the Appointing Authority

4b

CERTIFICATION

I, Gloria Lee, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and my acceptance of the terms of this Agreement. I am satisfied with my representation and I enter into this Agreement voluntarily.

It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey, Department of Corrections.

Gloria Lee 12-16-02

Signature (date)

4

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112
E-Mail: josepchr@law.dol.lps.state.nj.us

(609) 633-7786

JAMES E. MCGREEVEY
Governor

DAVID SAMSON
Attorney General

DOUGLAS K. WOLFSON
Assistant Attorney General
Director

January 17, 2003

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2003 JAN 22 A 11: 11

The Honorable Israel D. Dubin, A.L.J.
9 Quakerbridge Plaza
P.O. Box 049
Trenton, N.J. 08625-0049

Re: Gloria Lee v. N.J. Department of Corrections
Docket No. EDU6904-02

Dear Judge Dubin:

Enclosed is a copy of the executed Settlement Agreement that was reached in the above-listed matter. Please feel free to contact me if you have any questions or concerns about this matter.

Sincerely yours,

DAVID SAMSON
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher C. Josephson
Christopher C. Josephson
Deputy Attorney General

c: Marvin Braker, Esq.

OAL DKT. NO. EDU 6904-02
AGENCY DKT. NO. 318-10/02

IN THE MATTER OF THE TENURE	:	
HEARING OF GLORIA LEE,	:	
MOUNTAINVIEW YOUTH CORRECTIONS	:	COMMISSIONER OF EDUCATION
FACILITY, DEPARTMENT OF	:	DECISION
CORRECTIONS.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners for action as deemed appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/03

Date of Mailing: 2/26/03

91-03

IN THE MATTER OF SARA DAVIS	:	
AND ROSEMARY JACKSON,	:	COMMISSIONER OF EDUCATION
CAMDEN CITY BOARD OF	:	DECISION
EDUCATION, CAMDEN COUNTY.	:	

SYNOPSIS

The School Ethics Commission determined that respondent Board members violated *N.J.S.A.* 18A:12-24(b) and (c) of the School Ethics Act for the actions they took to bring about the appointment of their attorney, Mr. Johnson, as Board solicitor. After considering the nature of the charge and the fact that respondents received erroneous attorney advice, the Commission recommended that respondents be censured.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation that censure was the appropriate penalty for Ms. Davis. The Commissioner, however, found that, in light of Ms. Jackson's prior School Ethics infraction for which she received a reprimand, her recent violation warranted a more severe sanction than that imposed on Ms. Davis. Thus, the Commissioner imposed a penalty of a two-month suspension on Ms. Jackson.

IN THE MATTER	:	**Before the**
	:	**School Ethics Commission**
OF	:	
	:	**Docket No. C08-02**
ROSEMARY JACKSON and	:	
SARA DAVIS,	:	
CAMDEN CITY BD. OF EDUCATION	:	**DECISION**
CAMDEN COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed with the School Ethics Commission by Philip Freeman alleging that Camden City Board of Education (Board) members Rosemary Jackson and Sara Davis violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., in connection with the appointment of Harvey Johnson, Esq. as Solicitor for the Camden City Board of Education. Mr. Freeman is a former member of the Board.

Ms. Davis and Ms. Jackson filed answers to the complaint denying that their participation in discussions and votes regarding the appointment of Mr. Johnson violated the Act.

The Commission advised the parties that the complaint would be discussed at the Commission's meeting of August 27, 2002 and asked the parties to appear. All parties appeared, respondents with counsel. At the public session of the meeting, the Commission found probable cause to credit the allegation that Rosemary Jackson and Sara Davis violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., specifically N.J.S.A. 18A:12-24(b) and (c), when they took various actions to bring about the appointment of Harvey Johnson, Esq. as Solicitor for the Board and voted in favor of his appointment. The Commission found that the material facts were not in dispute. Therefore, it invited the respondents to file written submissions within 30 days of the date of the probable cause decision setting forth the reasons that the Commission should not find them in violation of N.J.S.A. 18A:12-24(b) and (c) of the School Ethics Act.

Respondents hand-delivered a timely written submission, which the Commission fully considered at its November 26, 2002 meeting. At its public meeting on that date, the Commission concluded that the respondents violated N.J.S.A. 18A:12-24(b) and (c) of the Act and recommended a penalty of censure for both Sara Davis and Rosemary Jackson.

FINDINGS OF FACT

The Commission discerned the following facts from the pleadings, the documents submitted, testimony and its investigation of this matter.

Ms. Davis was elected to the Camden City Board of Education in April 1999. She was re-elected to the Board in April 2002. Ms. Jackson was at all times relevant to this complaint, a member of the Board, having served for approximately nine years. Mr. Freeman ran for re-election to the Board in April 2002, but lost.

On April 17, 2002, Harvey Johnson, Esq. sent his firm's resume to the Board's business administrator. In his cover letter, Mr. Johnson set forth that Rosemary Jackson asked him to submit the resume to be considered as board solicitor at the upcoming reorganization meeting. His resume sets forth that the only school board that he represents is the Lawnside Board of Education, which is a district consisting of one school.

On April 24, 2002, the Board held its annual reorganization meeting. Ms. Davis was sworn in for a second term and was elected board president at that meeting. Ms. Jackson was elected vice-president. A motion was made to table resolutions selecting the auditor, solicitor, labor attorney and professional negotiator. That motion was defeated for lack of a second. A resolution had been prepared by the business administrator appointing the law firm of Sumners George, P.C. as board solicitor. Sumners George, P.C. was currently serving as the board solicitor. The motion was moved and seconded, but it was defeated by a vote of three in favor, four against and one abstention. Ms. Davis and Ms. Jackson voted against the appointment. A motion was then made by Ms. Jackson to appoint Harvey Johnson as board solicitor. The minutes show that the vote was four in favor, one against and three abstaining. The motion was noted as defeated. After a similar motion to appoint the labor attorney failed, the Board then adjourned to executive session. When it returned to public session, the Board voted unanimously to return the resolutions appointing the solicitor and labor attorney until the Board received responses to a request for proposals (RFP).

After the vote at the reorganization meeting, Ms. Jackson read a letter dated April 22, 2002 from Harvey Johnson, Esq. to Ms. Jackson. Therein, Mr. Johnson advised Ms. Jackson that she would not have a conflict of interest in voting to appoint him as board solicitor. The letter set forth his opinion that, although his firm represented her in an ethics matter before the Department of Education and a personal injury matter, there would be no conflict because the firm no longer represents her in any actions. He further noted that she should disclose that the firm previously represented her. After the letter was read, Ms. Davis also stated that Mr. Johnson had also done legal work for her prior to the date of the meeting.

Ms. Jackson testified that, after the reorganization meeting, Ms. Jackson spoke to a member of the New Jersey School Boards Association (NJSBA) who advised that the

initial vote to appoint Harvey Johnson as Solicitor on April 24, 2002 had succeeded by a vote of four in favor, one against and three abstentions, although the motion was noted to have failed.

Ms. Davis called a special meeting of the Board on May 2, 2002 and placed on the agenda an item, "Appointment of the Solicitor." Ms. Jackson stated at that time that Mr. Johnson was in effect the solicitor because the Board had erred at the reorganization meeting when it believed that her motion to appoint Mr. Johnson needed five votes. A motion was made to rescind the action taken at the reorganization meeting to send out an RFP for professional services for the Board Solicitor. The motion was seconded by Ms. Jackson. The motion was defeated by a vote of three to three. Ms. Jackson and Ms. Davis voted for the motion.

Another special meeting was held on May 7, 2002 at the request of Ms. Davis. According to the minutes, at this meeting, the first action was a motion by Ms. Jackson to rescind action taken on all professional services at the annual reorganization meeting. In the minutes, this motion was noted as defeated by a vote of four in favor and three against.

Philip Freeman filed this complaint against Ms. Davis and Ms. Jackson with the School Ethics Commission on May 7, 2002, alleging that the respondents had violated various provisions of the School Ethics Act.

On June 4, 2002, a special meeting of the Board was held to review the RFPs that were submitted by law firms for consideration to the appointment of Board Solicitor. The business administrator distributed the responses to the RFPs to the Board members for consideration. Initially, a motion to appoint the firm of Sumners George was defeated by a vote of four in favor and two against, with two Board members abstaining. A subsequent motion to appoint Mr. Johnson prevailed by a vote of six in favor and two against. Ms. Davis and Ms. Jackson voted in favor of Mr. Johnson.

On June 5, 2002, Mr. Freeman amended his complaint to add the respondents' participation in the discussion and votes at the June 4, 2002 meeting.

Attorney Harvey Johnson represented Ms. Davis and Ms. Jackson in separate cases before the School Ethics Commission. Those cases concluded in October 2001 for Ms. Davis and July 2001 for Ms. Jackson, when the Commissioner of Education issued his decision accepting the Commission's settlement finding her in violation of the Act and imposing a penalty of reprimand. Mr. Johnson also represented Ms. Jackson in a personal injury matter in 1995. Mr. Johnson did not charge Ms. Jackson for representing her in the School Ethics Commission case. He charged a fee to Ms. Davis, which she testified that she is still paying. Mr. Johnson represented Ms. Jackson on a contingent fee basis (for one-third of the recovery) in the personal injury matter.

ANALYSIS

The Commission found probable cause to credit the allegation that the respondents' conduct in participating in lobbying for Mr. Johnson to be the solicitor was in violation of N.J.S.A. 18A:12-24(b) and (c).

N.J.S.A. 18A:12-24(b) provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family, or others.

The Commission found probable cause to credit the allegation that respondents used their position to secure unwarranted privileges and advantages for Mr. Johnson in violation of N.J.S.A. 18A:12-24(b). In the present case, the business administrator recommended the law firm of Sumners George, P.C. to be board solicitor. According to the respondents' testimony, the business administrator recommended the reappointment of the firm without application or firm resume. Although it strains credulity to believe that the business administrator did not have some indication from Sumners George, which had been serving as board solicitor for approximately four years, that it wished to continue as board solicitor and that he would not have shared that information with the Board, Ms. Jackson testified that the firm's failure to indicate in writing that they wished to remain counsel was one of her reasons for not supporting the firm. It is undisputed that firm resumes had not previously been sought for the position of the board solicitor and no request for proposals had been initiated at the time of the reorganization meeting, when the respondents cast their vote against the appointment of Sumners George and for Mr. Johnson. Since the Board had not issued an RFP prior to the reorganization meeting, Mr. Johnson would not have known to apply if Ms. Jackson had not asked him to do so as shown by his April 17, 2002 letter to the Board's business administrator stating that he was asked to send his resume by Ms. Jackson in an effort to be considered as board solicitor at the upcoming reorganization meeting. Ms. Jackson's solicitation of Mr. Johnson to seek the position and her letter from him advising that she would be able to vote for him despite his prior representation of her both preceded the April 24, 2002 reorganization meeting when she cast her vote against Sumners George and in favor of Harvey Johnson. Therefore, she cannot say that anything that occurred subsequent to that meeting influenced her to vote for Mr. Johnson.

Further, at the reorganization meeting, Ms. Davis and Ms. Jackson voted against the business administrator's recommendation to appoint Sumners George as board solicitor without any discussion. Neither said at that time that they lacked knowledge that the firm wanted to continue. Mr. Johnson's letter of April 17th showed that Ms. Jackson had already encouraged Mr. Johnson to apply for the position in conversations prior to the meeting. Ms. Jackson then made the motion to appoint Harvey Johnson as Solicitor. She did so with no proposal from Mr. Johnson as to what he would charge the Board for his

services. Three other Board members went along without any information. When that motion was declared to have failed, the Board sought requests for proposals. Ms. Davis then called special meetings of the Board on May 2, 2002 and May 7, 2002 to try to rescind the action of the Board requesting proposals. Ms. Davis called a third special meeting on June 4, 2002. At that meeting, although the business administrator distributed the proposals to the Board, the Board held no discussion about them. The first motion to appoint Sumners George was declared defeated by a vote of four in favor, two against and two abstentions. Interestingly, although Ms. Jackson had received advice that only a simple majority vote was needed to appoint the solicitor, she did not inform the Board of that advice, which would have meant that the motion to appoint the firm of Sumners George actually passed. Mr. Johnson was then finally appointed on June 4th, with six board members voting in favor, including Ms. Davis and Ms. Jackson.

The respondents' objections notwithstanding, the Commission still finds that Ms. Davis and Ms. Jackson went to great lengths as noted above to have Harvey Johnson appointed as board solicitor. All of the special meetings were only to get Mr. Johnson appointed. Even if the meetings were to correct an error made at the initial reorganization meeting, as the respondents assert, the goal was never to discuss the merits of appointing any firm. If it were, then the respondents who were President and Vice-President of the Board would have opened discussion on the merits of the proposals at the June 4, 2001 meeting. The goal of the special meetings was only to see Mr. Johnson appointed, so much so that Ms. Jackson ignored prior legal advice that she had received that a simple majority was enough to appoint a solicitor. The Commission finds that the respondents so acted due to their prior relationship with Mr. Johnson. Mr. Johnson had represented Ms. Jackson at no cost and Ms. Davis had been vindicated from ethics charges with Mr. Johnson's representation.

The Commission does not have to find that Mr. Johnson represented Ms. Davis for free in order to conclude that she used her position to secure unwarranted privileges for him. Ms. Davis testified that she was still paying Mr. Johnson for his representation of her before the Commission, which had concluded October 23, 2001, when the present case was heard before the Commission. This adds to the finding that the representation was close in time to the April 24, 2002 reorganization meeting and indeed played a part in the events that took place at that meeting. The Commission also notes that it dismissed the prior complaint against her. The Commission therefore finds that Ms. Davis used her position to secure unwarranted privileges and advantages for Mr. Johnson in violation N.J.S.A. 18A:12-24(b), when she admittedly solicited from Mr. Johnson an opinion as to whether a conflict of interest would exist if she were to vote on his appointment as board solicitor, when she called special meetings to try to have the Board reconsider or rescind its vote to send out an RFP after the motion to appoint Mr. Johnson was declared failed and when she voted to appoint Mr. Johnson to be board solicitor.

Regarding Ms. Jackson, the Commission again notes that Mr. Johnson previously represented her before the Commission without charge. The Commission concludes that she used her position to secure unwarranted privileges or advantages for Mr. Johnson in violation N.J.S.A. 18A:12-24(b) when she asked Mr. Johnson to submit his firm resume to

seek the appointment as board solicitor, when she sought an opinion from Mr. Johnson as to whether her voting for him would be a conflict of interest, when she made the motion and voted to appoint Mr. Johnson at the reorganization meeting, when she seconded and voted in favor of a motion to rescind the vote to send out an RFP at the May 2nd meeting, when she made the motion and voted in favor of rescinding action taken on all professional services at the May 7th meeting, and when she voted in favor of the motion to appoint Mr. Johnson at the special meeting on June 4th.

The Commission also found probable cause to credit the allegation that Ms. Davis and Ms. Jackson violated N.J.S.A. 18A:12-24(c), which provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

In *Public Advisory Opinion A03-01* (April 24, 2001), the Commission advised that a board member would violate the Act if she were to participate in discussions and vote on the reappointment of the board attorney when the attorney had prepared simple wills and powers of attorney for her and her spouse. The Commission reasoned that the attorney's representation of her in her personal capacity created a personal involvement that constitutes a benefit to her because it creates a perception that her desire for the attorney's continued appointment as solicitor is based on the attorney being her personal counselor and therefore the board attorney's opinions may be more favorable to her viewpoint. The Commission reiterated that the benefit does not have to be financial.

However, as Mr. Johnson noted in his letter to the Board business administrator, and Mr. Peterson noted in his brief on respondent's behalf, the Commission concluded in the case, *In the Matter of Huber*, C19-96 (May 27, 1997), that a board member did not violate the Act by voting on the appointment of an attorney as board solicitor who had prepared closing papers for the board member eleven years earlier. The Commission finds that the present case much more closely resembles the situation set forth in *Advisory Opinion A03-01*, rather than the *Huber* case. In the former, the personal representation was occurring at the same time as the vote in question to reappoint the attorney as counsel to the Board. In the latter, the representation had occurred eleven years earlier, thus dissipating the conflict. Although Mr. Johnson's representation of the respondents in their respective ethics cases and his representation of Ms. Jackson in a personal injury matter had concluded, his letter to her of April 21, 2002 demonstrates that he was still providing personal legal advice to the respondents just before the reorganization meeting. Ms. Davis and Ms. Jackson both indicated that they had solicited the letter from him. When one couples Mr. Johnson's letter with the additional fact that Ms. Davis is still paying for his

representation of her, it becomes clear that the representation is not so far in the past, as in *Huber* that the conflict has dissipated.

The letter demonstrates the reason that the personal involvement creates a "benefit" for the respondents, if Mr. Johnson becomes board solicitor. The benefit of having him serve as the board attorney is that they will perceive that when the law is not clear, they will be more likely to receive legal advice that is favorable to their position. The Commission therefore concludes that Ms. Davis and Ms. Jackson acted in their official capacity in a matter in which they had a personal involvement that constituted a benefit to them when they participated in discussions, made the motions and voted on the appointment of Mr. Johnson to become the new board solicitor in violation of N.J.S.A. 18A:12-24(c).

DECISION

For the foregoing reasons, the Commission concludes that Ms. Davis and Ms. Jackson violated N.J.S.A. 18A:12-24(b) and (c) of the School Ethics Act.

PENALTY

The respondents argue in their submission that the respondents are being punished for relying on the opinion of Mr. Johnson that the School Ethics Act did not prohibit them for voting for him. They further argue that they were without assistance from the former solicitor and the lack of formal legal advice lead to confusion among the Board members.

The Commission would normally find reliance on legal advice to be a mitigating factor. However, in the present case, the respondents asked for an opinion from an attorney who they knew was seeking a contract with the Board as to whether they could vote on his contract. If they had received advice from a disinterested attorney, the fact that they sought advice would have more weight. Nevertheless, the Commission allows some mitigation of the penalty as a result of their reliance on the opinion on the justification that attorneys are obligated to provide correct legal advice, even when they have an interest in the advice that they are rendering. The Commission however, rejects the argument that the former solicitor forced the respondents to proceed without proper legal representation and that the lack of legal advice from the former solicitor contributed to their conduct. Morris Smith, Esq., who the respondents testified was from another firm, was present at the meeting of June 4, 2002 as he was quoted as thanking the board and regretting that the firm was unable to continue in a Philadelphia Inquirer article dated Wednesday, June 5, 2002 attached to Mr. Freeman's amendment to his complaint. Mr. Smith's statement in the article is not relevant for the truth of it, but to show only that he was present.

In considering the nature of the offense and the somewhat mitigating circumstances, the Commission recommends that the Commissioner of Education impose a penalty of censure for both Sara Davis and Rosemary Jackson.

This decision shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C08-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the findings from its investigation; and

Whereas, the Commission found probable cause to credit the allegation that respondents violated N.J.S.A. 18A:12-24(b) and (c) of the School Ethics Act in connection with their votes to appoint an attorney who had represented them on personal matters prior to the appointment; and

Whereas, the Commission reviewed the written submission of the respondents and the complainant and now concludes that their conduct violated N.J.S.A. 18A:12-24(b) and (c) of the School Ethics Act and warrants a penalty of censure; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its decision; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly authorized by the School
Ethics Commission at its public meeting
on November 26, 2002.

Lisa James-Beavers
Executive Director

LJB/e:lisa/decisions/c0802

IN THE MATTER OF SARA DAVIS	:	
AND ROSEMARY JACKSON,	:	COMMISSIONER OF EDUCATION
CAMDEN CITY BOARD OF	:	DECISION
EDUCATION, CAMDEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Camden City Board of Education Members Sara Davis and Rosemary Jackson violated *N.J.S.A.* 18A:12-24(b) and (c) of the School Ethics Act, and recommending a penalty of censure have been reviewed. Upon issuance of the decision of the Commission, respondents were provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Respondents' comments disagree with the findings and conclusion of the School Ethics Commission that they violated *N.J.S.A.* 18A:12-24(b) and (c), claiming that the Opinion of the Commission is replete with factual inaccuracies. Respondents, therefore, argue that the imposition of any penalty is inappropriate.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission.

Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation, for the reasons expressed in the Commission's decision, that censure is the appropriate penalty for Ms. Davis in this matter. The Commissioner is not persuaded, however, in light of the particular factual circumstances existing here, that censure is the appropriate penalty for Ms. Jackson. In this regard, the Commissioner notes that in May 2001 the Commission found probable cause to credit the allegation that Ms. Jackson violated *N.J.S.A.* 18A:12-24(c) by voting on a bill list containing the bill of her employer, for which she agreed to accept a settlement penalty of a reprimand. Although, with respect to this particular violation, the parties agreed that Ms. Jackson did not *intentionally* violate the Act, it cannot be overlooked that an admitted violation occurred. It is without question that board members are expected to have knowledge and understanding of their responsibilities under the School Ethics Act. It is, therefore, Ms. Jackson's duty as a board member to familiarize herself with the requirements of the Act and to conform her conduct to its dictates. Given that the instant violation is Ms. Jackson's second infraction of the School Ethics Act in a short period of time, the Commissioner finds that it evidences a serious lack of attention to and concern for adherence to the law which governs her conduct, which cannot be condoned. It is crucial that board members recognize the importance of maintaining public confidence in them. Central to this effort is a clear recognition that they *must* conform their conduct to the standards set forth in the School Ethics Act. Because he finds it imperative to deter behavior that creates an impression of a violation of the public trust, the Commissioner wants it clearly understood by this and all board members that repetitive violations of the Act cannot and will not be tolerated.

Consequently, on this basis, the Commissioner determines that the School Ethics violation of Ms. Jackson here warrants a more severe sanction than that imposed on Ms. Davis. As such, the Commissioner hereby imposes a penalty of a two-month suspension on Ms. Jackson.

Accordingly, IT IS hereby ORDERED that Sara Davis be censured and Rosemary Jackson be suspended from the Board for a period of two-months,[1] as school officials found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/27/03

Date of Mailing: 2/27/03

[1] Such suspension shall be effective beginning three days after the issuance of this decision.
[2] This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

92-03

CATHOLIC FAMILY AND COMMUNITY SERVICES *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petititioners, Catholic Family and Community Services and Mount St. Joseph Children's Center which operate a daytime program and a full-time resident program for handicapped children, challenged the Department's audit for 1993-94 that determined petitioners had included non-allowable costs in the calculation of the per pupil tuition charge. Following an order granting partial summary decision with respect to the issue of rental charges, the only issues remaining were related to the disallowance of salary for uncertified staff, the allocation of occupancy expenses, as well as the allocation of food expenses.

The ALJ found that petitioners did not demonstrate that the Department's determinations were not reasonable by a preponderance of the evidence. The ALJ found that regulations disallowed the salary of the professional staff member. The ALJ also found that the Department made its determinations concerning the food and occupancy expenses based on the documentation it had before it. Thus, petitioners did not sustain the burden of proof that the Department acted improperly.

The Commissioner concurred with the ALJ that petitioners failed to sustain their burden of establishing that the audit disallowances were arbitrary, capricious or unreasonable. The Commissioner upheld said disallowances. The petition was dismissed.

March 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1051-01
AGENCY DKT. NO. 389-11/00

CATHOLIC FAMILY AND COMMUNITY SERVICES, ET AL.,
Petitioner,
v.
DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
Respondent.

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

Allison Colsey-Eck, Deputy Attorney General, appearing for Respondent
(David Samson, Attorney General of New Jersey, attorney)

Record Closed: December 6, 2002 Decided: January 14, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter arises from an audit the Department of Education (Department) performed on Petitioner's records for the period of July 1, 1993 through June 30, 1994,

which identified several costs that were improperly included in the calculation of the per pupil tuition charge. Specifically, Petitioner disputes the Department's determinations concerning the disallowance of rental charges, the salary of an uncertified speech professional, and the allocation of food and occupancy expenses.

The issue of rental charges was decided on May 24, 2002, at which time an order granting summary disposition in favor of Respondent was entered. Accordingly, only the issues relating to disallowance of the salary and the allocation of food and occupancy costs remain.

The regulations disallow payments made to uncertified staff, *N.J.A.C.* 6:20-4.4(a)(4),[1] and require allocations of administrative and enterprise costs to be based upon the direct costs of each program, *N.J.A.C.* 6:20-4.1(c)[2], (d).[3]

The parties represented, on the record, that the original total amount disallowed by the audit was $250,000; upon appeal, that amount was, at first, reduced to $153,000; thereafter, it was further reduced to $136,000. As a result of the appeal, Catholic Family was credited with approximately $100,000 for tuition credits not sought. The parties agreed that, at the time of hearing, a total of $20,000 was still at issue.

FINDINGS OF FACT

I. *Stipulated Facts*

The following undisputed facts relate only to the issues to be resolved herein, specifically, the disallowance of salary for uncertified staff, the allocation of occupancy expenses, as well as the allocation of food expenses.

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[1] *N.J.A.C.* 6:20-4.4(a)(4) has been recodified as *N.J.A.C.* 6A:23-4.5(a)(6) without substantive amendment. 33 *N.J.R.* 1437 (May 7, 2001)

[2] *N.J.A.C.* 6:20-4.1(c) has been recodified as *N.J.A.C.* 6A:23-4.2(f) without substantive amendment. 33 *N.J.R.* 1415, 1433 (May 7, 2001)

[3] *N.J.A.C.* 6:20-4.1(d) has been recodified as *N.J.A.C.* 6A:23-4.2(g) without substantive amendment. 33 *N.J.R.* 1415, 1433 (May 7, 2001)

1. Petitioner operates a daytime program and a full-time resident program for handicapped children.

2. The Department completed a full scope tuition audit of the business services and tuition charges of the Mount St. Joseph Children's Center (Catholic Family)[4] for the period July 1, 1993 through June 30, 1994.

3. Two auditors, Hui Ming Craft and John Cuprzinski performed the on-site audit work. Mr. Cuprzinski was in charge of the audit and prepared the report for review and approval by his superiors at the Department.

4. The audit took place over a period of time from August 14, 1995 to March 13, 1996.

5. Jacqueline Edelstein did not have an appropriate certificate from the Department to provide speech language services at the time in question.

6. No names or certificates for individuals providing speech language services at the time in question through an entity known as Jacqueline L. Edelstein Associates were provided.

7. Information regarding individual cost of meals and actual meal counts was not provided to Respondent.

8. The required exit conference between the Office of Compliance and Catholic Family was not held until September 22, 1998, over two-and-a-half years after the on-site review was completed.

9. Although the exit conference was held on September 22, 1998, the Office of Compliance did not issue its "Full Scope Tuition Audit" report until June 25, 1999.

[4] Mt. St. Joseph is a part of Catholic Family & Community Services and will be referred to as "Catholic Family."

10. There were a total of 30,396 meals served during the 10-month school year.

DISCUSSION AND CONCLUSION

The only issues to be resolved in this matter are:

a) Whether the disallowance of payment to Jacqueline L. Edelstein was reasonable;

b) Whether the allocation of food costs was reasonable; and

c) Whether the allocation of occupancy costs was reasonable.

Since Petitioner is challenging the reasonability of the audit determination the burden of proof is on CFS to demonstrate that the determinations were not reasonable by a preponderance of the evidence.

I. *Jacqueline L. Edelstein Expenses*

Turning first to the disallowance of payment to Jacqueline L. Edelstein, the regulations require that a speech language specialist, a professional staff member, must possess Department of Education certification with the appropriate endorsement for speech in order to provide services for which reimbursement is sought. *N.J.A.C.* 6:11-5.2, 6:11-6.2.

The regulations disallow the salary of a professional staff member who is not certified but is functioning in a position requiring certification from the per pupil tuition calculation. Former *N.J.A.C.* 6:20-4.4(a)(4).[5]

[5] *N.J.A.C.* 6:20-4.4(a)(4) has been recodified as *N.J.A.C.* 6A:23-4.5(a)(6) without substantial amendment. 33 *N.J.R.* 1415, 1437 (May 7, 2001).

Ms. Edelstein did not possess a current certificate for speech language specialist from the Department. Moreover, although she possessed a provisional license, it expired in June 1971. Petitioner has provided no evidence that Ms. Edelstein possessed a valid speech language specialist certificate from the Department, nor has Petitioner provided an iota of information about the purported "associates" of Ms. Edelstein who may have provided the services.

I **FIND**, therefore, that Petitioner has not sustained the burden of proof on this issue.

II. *Food Expenses*

The regulations provide that whenever a facility used by an approved private school for the handicapped is also used for unrelated activities, all costs associated with the operations shall be charged to the associated activities which they benefit. *N.J.A.C.* 6:20-4.1(d).[6]

In calculating the food costs to be attributed to the sending districts, Respondent reviewed the total food expense costs, including payroll costs, and developed a method of apportioning the costs by totaling the number of meals served based on enrollment numbers provided by the school as well as the number of residents reported on the DYFS reports. Based upon these figures, the Department developed a ratio of the number of meals served to the school program compared to the total number of meals served to both the school program and resident program. This ratio was then applied to the total food service costs which included, among other things, salary.

Respondent established that there were a total of 30,396 meals served during the 10-month school year. This total, 30,396 meals, included only breakfast, lunch and dinner. Respondent did not include meal counts for either the afternoon or evening

[6] *N.J.A.C.* 6:20-4.1(d) has been recodified as *N.J.A.C.* 6A:23-4.2(g) without substantial modification. 33 *N.J.R.* 1415, 1433 (May 7, 2001).

snack. The Department then determined how many breakfasts and lunches were served only to school students, which is 14,586 as shown on Exhibit W, Schedule C. The parties differ by only six meals in the total number of breakfasts and lunches served to students during the 10-month school year.[7] Thus, the ratio of the total number of breakfasts and lunches served to students compared to the total number of meals served is 14,586/30,396 or 47.99 percent. (Using Petitioner's calculations, the ration is 14,580/30,396 or 47.99 percent).

On the other hand, petitioner claims that the ratio should include the cost of the afternoon snack, claiming that the snack costs the same as the cost of a lunch or breakfast. While a snack does cost something, without documentation on which to base a conclusion, it is unreasonable to presume that it costs the same as full meals.

Petitioner also asserts that the daytime lunch meal costs $1.50 more than the evening meal because it is a more substantial, hot meal. While the rationale for providing the hot meal at lunch time is reasonable, as is the presumption that such a meal costs more than the lighter evening meal, there is no documentation in the body of evidence in this matter on which to base a calculation. There is not even a hypothetical cost analysis presented by Petitioner to support the $1.50 additional cost of the noon meal.

Finally, I note that Petitioner raises the issue of the allocation of the salaries from the three cooks at this juncture. Once again, the issue is really whether the Respondent had sufficient information on which to base a determination that the salaries should have been allocated differently. Despite having been given numerous opportunities at the time of the audit, the various levels of appeals and at this hearing, Petitioner failed to adequately document the allocation of time and therefore, salary, for the cooks. The Department made its determinations based on the documentation it had before it; I **FIND** that, because of the absence of documentation to support Petitioner's contention that the salaries should have been allocated differently, that the

[7] Petitioner's calculations indicated that 14,580 breakfasts and lunches were served to school students.

determination of Respondent, which was based on available documentation was reasonable.

Accordingly, I **FIND** that Petitioner has not sustained the burden of proof on the issue of food costs; I **CONCLUDE**, therefore, that the determination disallowing the expenses should be affirmed.

III. *Occupancy Costs*

Costs of occupancy are to be allocated based on the activities which they benefit. Former *N.J.A.C.* 6:20-4.1(d). Also, in accordance with former *N.J.A.C.* 6:20-4.1(c),[8] indirect costs which are incurred for a joint purpose must be included on a consistent and equitable basis.

Mr. Cuprzinski testified that when he reviewed the apportionment of occupancy expenses, he discovered that Catholic Family charged 60 percent of the costs to the school program. Mr. Cuprzinski testified further that the 60 percent figure used by Catholic Family was an estimate that had historically been charged to the school program. With no support to justify the 60 percent apportionment, Mr. Cuprzinski recalculated the costs based upon verifiable factors.

Contrary to Catholic Family's assertions, the Department did not arbitrarily or unreasonably exclude the square footage of common areas from the calculation of the percentage of occupancy costs attributable to the school program. The Department did not consider the square footage of the common areas in determining the ratio of the school program square footage usage to the combined school and residential program square footage usage; however, common area costs were included in the total occupancy costs to be apportioned between the programs and were to be split

[8] *N.J.A.C.* 6:20-4.1(c) has been recodified as *N.J.A.C.* 6A:23-4.2(f) without substantial modification. 33 *N.J.R.* 1415, 1433 (May 7, 2001).

according to the ratio of the school program square footage usage to the combined school program and residential program square footage usage.

With respect to Petitioner's assertion that all of the rooms which should have been apportioned to the school program were not included, Mr. Cuprzinski testified that the Department did consider all of the versions of the floor plans submitted by Catholic Family. In the Final Audit Determination, the Department states that it used the reconfigured floor plans provided by Catholic Family at the July 10, 2000 appeal meeting and revised the percentage of floor space used by the school. Mr. Cuprzinski explained that he could not recall specifically which rooms got reassigned, but looking at Exhibit U, page 10, he was certain that all of the space was accounted for in the Department's revised calculation, including Room #12, which Catholic Family has indicated was used as a gym.

I **FIND,** therefore, that the Department did consider the floor plans provided by the school, including those provided at the appeal hearings, in its calculation of occupancy expenses; I further **FIND** that the Department's calculation of occupancy expenses was reasonable and should be affirmed.

ORDER

I hereby **ORDER** that the determinations of Respondent with respect to each of the issues raised in this petition be and hereby are **AFFIRMED**. I further **ORDER** that this petition be and hereby is **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

January 14, 2003
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

January 17, 2003
DATE

M. Kathleen Duncan (LA)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 21 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

John Kuprzinski

Anthony Novembre

Bob Jacob

Exhibits

J-1 Joint Stipulation of Statement of Facts

P-1 Responses to Interrogatories

P-2 Former Regulations – *N.J.A.C.* 6:20-4.1 (Official Notice)

P-3 Missing pages of Audit Report, Exhibit N.

A Certificate of incorporation for the Roman Catholic Diocese of Paterson

B Certificate of incorporation for Catholic Family & Community Services (formerly known as the "Associated Catholic Charities of the Roman Catholic Diocese of Paterson).

C Certificate of change of name for Catholic Family & Community Services

D Contract for the rental of land and buildings executed by the Roman Catholic Diocese of Paterson and Catholic Family & Community Services on July 2, 1990

E Letter from Joseph A. Besser, CPA, to Anthony Novembre, Ed.D., August 2, 2001

F Current informational leaflet regarding the services of Mt. St. Joseph Children's Center

G Roman Catholic Diocese of Paterson's "Financial Statements as of June 30, 1995 and 1994," prepared by the accounting firm of Arthur Anderson, LLP.

H Organizational chart for Catholic Family & Community Services

I List of members holding positions on the Catholic Family & Community Services Board of Trustees for the 1993-94 fiscal year.

J List of members currently holding positions on the Catholic Family & Community Services Board of Trustees

K Letter from the Director of the Mt. St. Joseph Children Center, sister Dorothy Sheahan, Ph.D., R.N., August 10, 2001

L Letter (along with accompanying documents) from Mr. Jacob, Chief Financial Officer for Catholic Family & Community Services to John M. Cuprzinski, State auditor for the Office of Compliance, January 11, 1999

M Letter from Thomas J. King, Director of the Office of Compliance to Sister Dorothy Sheahan, June 25, 1999

N "Full Scope Tuition Audit" (along with supporting documentation) of Catholic Family & Community Services for 1993-94 fiscal year

O Letter from Mr. Jacob to Jeffrey F. Fox, Director of Investigations and Special Audits for the Office of Compliance, September 7, 1999

P Letter from Mr. Fox to sister Sheahan, reducing the total non-allowable costs indicated in the tuition audit from $225,303.31 to $240,647.06, November 30, 1999

Q "First Level Appeal Decision

R Letter from Mr. Jacob to Mr. King, appealing the Office of Compliance's "First Level Appeal Decision, December 8, 1999

S "Report of Additional Information to the Office of Compliance" (along with accompanying documentation prepared by Catholic Family & Community Services, April 4, 2000

T Letter from Roger Bell, Planning Associate for the Office of Compliance to Mr. Jacob, regarding additional issues to be addressed by Catholic Family & Community Services prior to the preparation of a final determination by the Office of Compliance, April 24, 2000

U Supplemental report (along with supporting documentation) prepared by Catholic Family & Community Services, July 10, 2000

V Letter from Mr. King to Sister Sheahan, reducing the total non-allowable costs from $240,647.06 to $139,337.85, July 24, 2000

W "Final Audit Determination" prepared by the Office of Compliance

X An itemization of the operating costs for Catholic Family & Community Services for the 1993-94 fiscal year

Y An itemization of the operating costs for Mount Saint Joseph Children's Center for the 1993-94 fiscal year

Z Letter from Dr. Anthony Novembre, Educational Consultant to Catholic Family & Community Services' intent to file a formal appeal with the Commissioner of Education for the State of New Jersey, August 15, 2000

AA Memorandum from Sister Sheahan to Joseph Duffy, concerning the midday meal, December 7, 1998

BB Diocesan Self Insurance invoice, July 1, 1993

CC Diocesan Self Insurance invoice, January 21, 1994

DD A true and correct copy of a journal entry page evidencing the payment of rent to Diocese of Paterson, June 1994

EE A ledger sheet titled "Education Salaries Con't."

FF An invoice payment check request and copy of invoice from Jackie (Jacqueline) Edelstein in the amount of $240

GG Computer printout listing certificates held by Leah Edelstein

HH Computer printout pages listing certificates issued to persons with the last name of Edelstein

II Computer printout listing certificates issued to Jacqueline L. Edelstein

JJ A Board of Directors meeting agenda and minutes for Catholic Family & Community Services, March 22, 1994

KK A Board of Directors meeting agenda and minutes for Catholic Family & Community Services, January 25, 1994

LL A Board of Directors meeting agenda and minutes for Catholic Family & Community Services, September 22, 1993

MM A Board of Directors meeting agenda and minutes for Catholic Family & Community Services, June 30, 1993

NN Catholic Family & Community Services – Mount St. Joseph's Children's Center Report of Audit for the Fiscal year ended June 30, 1994

OO Catholic Family & Community Services Roman Catholic Diocese of Paterson Financial Statement June 30, 1994

PP Catholic Family & Community Services mission statement and accompanying information brochure

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

SUMMARY DECISION

OAL DKT. NO. EDU 1051-01

AGENCY DKT. NO. 389-11/00

CATHOLIC FAMILY AND COMMUNITY SERVICES AND MOUNT ST. JOSEPH CHILDREN'S CENTER,

Petitioners,

v.

DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,

Respondent.

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

Allison C. Eck, Deputy Attorney General, appearing for Respondent
(David Samson, Attorney General of New Jersey, attorney)

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

This action arises out of the on-site audit review of the Mount St. Joseph Children's Centers (Mt. St. Joseph's) business services and tuition charges for the period of July 1, 1993 to June 30, 1994.

In this action, Petitioner is challenging four specific findings of the auditors wherein certain costs were found to be non-allowable pursuant to the New Jersey Administrative Code (NJAC). These four costs were: $31,000 for Catholic Family & Community Services' (CFCS) rental of a facility from the Diocese of Paterson ("Diocese"); $7,999 paid to an allegedly uncertified teaching consultant, Jacqueline L. Edelstein; $44, 459.15 for food service costs; and $61,132.77, later reduced to $47,692.94, for occupancy expenses. Petitioner challenged these audit findings as arbitrary, capricious and unreasonable.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on January 3, 2001, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

FINDINGS OF FACT

A. Stipulated Facts

The following facts were stipulated by the parties and are incorporated herein and made a part of this decision.

1) The Office of Compliance for the Department of Education conducted an on-site audit review of the business services and tuition charges of Mt. St. Joseph's for the period July 1, 1993 through June 30, 1994.

2) State auditors John Cuprzinski and Hui-Ming Craft conducted the on-site audit review of Mt. St. Joseph's from approximately August 14, 1995 through March 13, 1996.

3) The required exit conference between the Office of Compliance and Mt. St. Joseph's was not held until September 22, 1998, over two-and-a-half years after the on-site review was completed.

4) Although the exit conference was held on September 22, 1998, the Office of Compliance did not issue its "Full Scope Tuition Audit" report until June 25, 1999.

B. Undisputed Facts

The following facts have been gleaned from the documents which the parties had submitted as a part of their joint statement of stipulated facts and are incorporated herein as findings of fact.

1) During the course of the audit, the Office of Compliance auditors never questioned or communicated with CFCS's CPA Joseph A. Besser about the financial statements that he prepared for CFCS or his knowledge of the corporate structure between the Diocese and CFCS (Certification of Besser at ¶ 9 & 10). The Office of Compliance's audit report stated that direct expenditures were charged to the private school's account which were non-allowable in accordance with NJAC. (See the Joint Statement of Stipulated Facts, Ex. N).

2) The Office of Compliance cited $31,000 for the rental or facilities from the Diocese of Paterson, alleging the Diocese and CFCS were "related parties," pursuant to the NJAC. (Ex. N)

3) The Diocese of Paterson was incorporated on April 29, 1938 and the offices of the corporation are perpetually comprised of individuals holding certain positions in the Diocese. Those positions are Right Reverend Bishop, Right Reverend Vicar General or during a vacancy in such office the administrator of the Diocese, Reverend Chancellor and two priests in good standing. (Ex. A)

4) CFCS was separately incorporated on December 26, 1946. The incorporation documents provided for six trustees in said incorporated

offices and the individuals associated with the incorporation of CFCS were principally different from the original offices of the Diocese. (Ex. B)

5) CFCS has its own Board of Trustees and its own Executive Director. (Ex. U). The Bishop of the Diocese is not a member, officer or even a "Ex Officio" member of the Board of Trustees for CFCS. (Ex. U)

6) Through various locals of appeals and in this action as well, the Office of Compliance has asserted that $31,000 of rental expenses must be excluded from the certified cost per pupil because the Diocese and CFCS are considered by the office to be related parties.

7) In the audit report as well as the various appeals, the Office of Compliance upheld the finding.

8) It was found that $7,990 paid to an outside consultant, Jacqueline L. Edelstein, who worked in a position requiring certification. However, CFCS had provided no proof of certification.

9) In total, there are four items in dispute in this matter which were contested after the audit at the first and second level appeals and which were upheld on those appealed by the Office of Compliance.

10) As a result of the Office of Compliance's position on the four issues in dispute in this matter, CFCS should owe $139,337.85. However, because it did not charge full tuition, which would have entitled CFCS to an additional $118,985, the amount to be refunded per the second level appeal decision is $20,352.85.

LEGAL DISCUSSION AND CONCLUSION

The parties have stipulated to most of the facts and have stipulated to evidence concerning the contested facts with their briefs. Since the underlying issues relate to

legal interpretation of regulations, the parties have made cross application for summary decision.

Summary decision should be granted when the papers and discovery which have been filed, together with any affidavits, show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. The standards governing the grant or denial of summary judgment are set forth by the New Jersey Supreme Court in *Brill v. Guardian Life Insurance Co. of America*, 142 *N.J.* 520 (1995). *Brill* requires a factfinder to consider whether the evidentiary material presented when viewed in the light most favorable to the non-moving party are sufficient to permit a rational factfinder to resolve the alleged dispute in favor of the non-moving party. *Id* at 523.

In the administrative forum, *N.J.A.C.* 1:1-12.5 provides the standard for summary decision. The New Jersey Supreme Court sustained the validity of *N.J.A.C.* 1:1-12.5, "noting that it is related to and, indeed essential to the proper conduct of administrative hearings in a contested matter." *Contini v. Bd. of Education of Newark*, 286 *N.J. Super.* 106, 116 (App. Div. 1995) (Citations omitted).

Since the parties have been able to stipulate to most of the facts and evidence has been submitted with the respective briefs and the underlying issues relate to a legal interpretation of regulations, this matter is ripe for summary decision. There are four issues to be resolved by this application. The first is whether the Department of Education correctly determined that Petitioner and the Diocese of Paterson are related parties and proper disallowed $31,000 in rent for the audit period in question; the second issue is whether the disallowance of $7,990 paid to an allegedly uncertified speech therapist was properly disallowed; third is the issue of whether the Department of Education properly determined that $44,459 in food expenses should be excluded from the certified actual cost per pupil; and finally, whether the Department of Education properly determined that $47,692.94 in occupancy costs were non-allowable.

The State legislature has provided for the education of handicapped children in Chapter 46 of the school laws which set forth the types of facilities and programs in which such youngsters may be enrolled. Public schools having handicapped students whom they are unable to educate through other means, may send these students to approved private schools for handicapped children, provided that certain specific options are not otherwise available. *N.J.S.A.* 18A:46-14(a) through (g). A private school which receives handicapped students from a public school district may not charge the local board tuition which exceeds the actual costs per pupil as determined under rules prescribed by the Commissioner of Education and approved by the State Board of Education. *N.J.S.A.* 18A:46-21.

The Legislature has vested the Commissioner and the State Board of Education (State Board) with the authority to promulgate rules and regulations to provide quality educational opportunities to handicapped children. The statute provides that the Commissioner, with the consent of the State Board, shall approve special facilities and education programs which meet the requirements of the statutory scheme found in Chapter 46 of the school law. In exercising his rule making authority, the Commissioner, with the approval and consent of the State Board, has promulgated rules and regulations governing tuitions for private schools, the handicapped. The regulation at issue here, *N.J.A.C.* 6:20-4.4(a)45, provides that rental costs in excess of the actual allocated cost of ownership with an allowance of two-point-five percent for profit, are disallowed in transactions between related parties.[1] Accordingly, the first determination which must be made is whether Petitioner and the Roman Catholic Diocese of Paterson are related parties pursuant to the regulations.

The regulations provide that certain costs which are not allowable in the calculation of the certified actual cost per pupil include costs related to transactions between related parties. Within the regulations, the term "related party" is defined as a transaction in which one party to the transaction is able to control or substantially influence the actions of the other. Such transactions are defined by the relationship of

[1] *N.J.A.C.* 6:20-4.4(a)45 has been recodified as *N.J.A.C.* 6A:23-4.5(a)47 without substantive amendment. 33 *N.J.A.R.* 1437 through 1438 (May 7, 2001).

the parties and include but are not limited to include those between divisions of an institution; institutions or organizations under common control through common officers, directors, or members, and an instruction and a director, trustee, officer or key employee of the institution or his or her immediate family either directly or through corporations. *N.J.A.C.* 6:20-4.4(a)45.

It is clear, therefore, that the nature of the relationship between CFCS and Roman Catholic Diocese of Paterson must be examined. The Diocese was incorporated on April 29, 1938. The officers of that corporation are perpetually comprised of individuals holding positions with the Diocese. On the other hand, CFCS was separately incorporated on December 26, 1946 and the incorporation documents provides for six trustees instead of corporate officers and the individuals associated with the incorporation of CFCS were principally different from the original officers of the Diocese. In addition, CFCS has its own Board of Trustees and its own Executive Director. Although the Bishop of the Diocese is not a member, officer or even "Ex Officio" member of the Board of Trustees for CFCS and has no authority to dictate the daily operations of CFCS or Mt. St. Joseph's, the fact that the Chancellor of the Diocese of Paterson has been on the Board for many years, as well as the fact that the bylaws of CFCS which spell out the qualifications for membership in the corporation, were not submitted with the briefs, permitting me to draw a negative reference, tend to indicate a relationship between Petitioner and the Diocese.

Moreover, Petitioner's mission is to carryout the "spiritual and corporal work of mercy and any or all kinds of charitable, educational, benevolent, philanthropic and eleemosynary works, which shall be primarily for the benefit of the Catholics of the Roman Catholic Diocese of Paterson. Petitioner's reliance on the fact that the 15 member CFCS Board has only two or three members of the clergy at any given time and none of them are decision makers for the Diocese as well as the fact that there is no requirement that CFCS must have Diocesan representatives on its Board of Directors as indications that the two entities are not related in an "interlocking directorate" is misplaced. Although Petitioner cites to the cases of *Coastal Learning Center, Inc.,* EDU 2535-91, June 30, 1995, Final Dec. January 17, 1996 and *Passaic*

Co. Elks and Cerebral Palsy Treatment Center Board of Trustees, EDU 1371-98 to demonstrate that an essential element to support any "related parties" finding must be an interlocking directorate which demonstrates interlocking control between the parties, the plain language of the regulation clearly contemplates a broader application than that which the Petitioner asserts. The regulation as cited above contemplates various relationships between the parties but also contains non-limiting language to those relationships which are set forth in the regulation. I **FIND** that the Diocesan guarantee of CFCS's ability to continue as an ongoing concern, the long-term debt notation in the amount of $466,600 with no interest rate charged and the participating in the automobile self-insurance fund as well as the pension fund indicate a relationship between the parties. That is to say I **FIND** an ongoing relationship with the Diocese.

Accordingly, the next issue to be resolved is whether the rental agreement in which the parties engaged is an arms length transaction. An arms length transaction has been described as involving actions of essentially unrelated willing parties, each being relatively free to act in its own self-interest, involving actions which are voluntary and actions which generally take place in an open market. *C.F. Saxon Constr. and Mgmt. Corp. v. Master Clean of North Carolina, Inc.,* 273 *N.J. Super.* 231, 235 (App. Div. 1994), cert. denied, 137 *N.J.* 314 (1994).

In the case at bar, the rental agreement between the Diocese and Petitioner is left completely to the discretion of the landlord and does not contain provisions concerning the rights and responsibilities of the landlord and tenant. Moreover, it does not provide the basis upon which the Diocese shall determine the amount of the rent. In short, I agree with Respondent's assertion that the rental agreement evidences a relationship or understanding between the landlord and lessee that suggests more than the usual arms length agreement. It is certainly unusual for an entity to agree to lease space for an unspecified amount of money and does not demonstrate the type of rental agreement that Petitioner would enter in a normal market setting. Accordingly, I **FIND** that the determination to disallow the cost of rent was correct and should be affirmed.

Turning now to the second issue to be resolved, whether the department properly disallowed $7,990 paid to an uncertified speech therapist, Petitioner concedes that Respondent has successfully raised a contested fact regarding Jacqueline L. Edelstein and asserts that this matter can no longer be resolved by way of motion. Indeed, the certification submitted by Jacqueline Lois Edelstein in support of Respondent's position that this is the uncertified speech therapist does contain a Social Security number which is different from the Social Security number reflected in Petitioner's initial brief for Jacqueline or Leah Edelstein. Accordingly, I **FIND** that there is an issue to be determined with regard to the identity of Jacqueline L. Edelstein as well as whether she was certified for the position she held.

Third, Petitioner asserts that CFCS has provided the Office of Compliance with unrebutted evidence that $11,796 in additional costs should be added as allowable food service expenses. A review of the argument of both sides on this issue, however, reveals that the assertions of both are grounded in opinion rather than fact or law. Respondent asserts that its approach to accurately allocate food service expenses is reasonable and based on estimates of meals served as a result of Petitioner's failure to keep meal counts. On the other hand, however, Petitioner asserts that its food expenses were based on attendance records of students present during the year as well as actual food costs. Neither cites to a regulation regarding the determination of food expenses other than to note that regulations require that food service expenses be accurately allocated. Accordingly, neither party has demonstrated a right to a determination on this issue as a matter of law.

The final issue to be determined is whether the Department correctly determined that certain occupancy costs are non-allowable. The Department asserts that it based the calculation of occupancy expenses upon the total square footage used by the school program compared to the square footage used by both the school program and the residence program. The determination which was based on floor plans provided by Petitioner to the Department. On the other hand, however, Petitioner asserts that at least a portion of the square footage in question is occupied and used by the gymnasium located in the basement which is used for physical education and assembly

events during the course of the school program. Accordingly, I **FIND** that there is a genuine issue of material fact to be determined with regard to this issue.

ORDER

It is, therefore, hereby **ORDERED** that summary decision be **GRANTED** on Respondent's cross application; it is further **ORDERED** that the determination that the rental costs are not allowable be and hereby is **AFFIRMED**.

It is further **ORDERED** that the remaining portions of the cross application by Respondent be **DENIED.**

It is further **ORDERED** that all portions of Petitioner's cross application be and hereby are **DENIED.**

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

May 24, 2002
DATE

Maria M La Fiandra
MARIA M. LA FIANDRA, ALJ

jb

OAL DKT. NO. EDU 1051-01
AGENCY DKT. NO. 389-11/00

CATHOLIC FAMILY AND COMMUNITY SERVICES *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioners' exceptions essentially recast and reiterate their arguments advanced below. Additionally, petitioners charge that in reaching her conclusions here the Administrative Law Judge (ALJ) failed to give sufficient credence to the unrebutted evidence and the testimony of the witnesses, Dr. Novembre and Mr. Jacob, presented on each of the disallowances which formed the basis of this appeal.

[1] Petitioners' exceptions purport to include a copy of "transcripts" of the September 18, 2002 hearing conducted at the OAL. Such submission appears to be a privately procured transcription of "unofficial" hearing tapes. The Commissioner notes that *N.J.A.C.* 1:1-14.11 specifies the mechanism for bringing transcripts to the record. Further, *N.J.A.C.* 1:1-14.11(h)1 directs that all transcripts be prepared in accordance with state standards established by the Administrative Director of the Courts. Petitioners' submission does not even approximate conformance with such standards, lacking, among other things, a Title page, an Index page, and Line numbers. Moreover, even assuming, *arguendo*, that petitioners' "transcripts" were in compliance with the applicable rule, they were so poorly produced that any assistive value they might otherwise have had in this matter was greatly reduced.

Upon a thorough and independent review of the full record, and finding nothing in petitioners' exceptions which would compel a contrary result, the Commissioner agrees with the ALJ's findings and conclusion that each of the audit disallowances at issue in this matter must be sustained. Initially, he agrees with the ALJ, for the reasons outlined in her May 24, 2002 partial summary decision order, (appended to this decision as pages 13a through 13j), that petitioners and the Diocese of Paterson ("Diocese") are "related parties," within the intendment of *N.J.A.C.* 6:20-4.4(a)45,[2] and, therefore, respondent's disallowance of $31,000 for petitioners' rental of facilities from the Diocese during the relevant audit period was proper. The Commissioner further concurs, for the reasons detailed in the ALJ's January 14, 2003 Initial Decision, that petitioners failed to sustain their burden of establishing that any of the remaining disallowances of the respondent, which formed the basis of this appeal, *i.e.*, food service expenses, occupancy expenses, and payment to Jacqueline L. Edelstein, was arbitrary, capricious or unreasonable and such disallowances must, therefore, be upheld.

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly articulated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3|03|03

Date of Mailing: 3|03|03

[2] Recodified as *N.J.A.C.* 6A:23-4.5(a)47 without substantive amendment May 7, 2001.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

102-03

IN THE MATTER OF FRANK PIZZICHILLO, :

FAIRVIEW BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

BERGEN COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(e) and (g) of the School Ethics Act for revealing confidential employee documents to a member of the public. After considering the nature of the charge and respondent's submission, the Commission recommended a penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

March 6, 2003

IN THE MATTER	:	
	:	**BEFORE THE SCHOOL**
OF	:	**ETHICS COMMISSION**
	:	
FRANK PIZZICHILLO,	:	**Docket No.: C17-02**
FAIRVIEW BOARD OF EDUCATION,	:	
BERGEN COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed by Radomir Glavan alleging that Respondent Frank Pizzichillo violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. Specifically, Mr. Glavan alleged that Respondent Pizzichillo, as a member of the Fairview Board of Education (Board) revealed to him confidential information regarding a Board employee. He alleged that this conduct, along with other alleged conduct, violated N.J.S.A. 18A:12-24.1(a), (e), (g) and (i) of the Code of Ethics for School Board Members.

Mr. Pizzichillo filed a timely answer to the complaint, admitting to releasing documents to Mr. Glavan at his request and discussing the request with him. He denied having committed any violation of the School Ethics Act.

The Commission advised the parties that it would discuss this matter at its meeting of August 27, 2002 and invited them to attend and bring counsel and witnesses. Both parties appeared, Mr. Pizzichillo with counsel.

At its public meeting of August 27, 2002, the Commission found probable cause to credit the allegation that Mr. Pizzichillo revealed confidential employee records in violation of N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act. The Commission dismissed the remainder of the charges. The Commission found that the material facts regarding the conduct on which the Commission found probable cause were not in dispute and, therefore, the Commission determined that it would decide the matter on the basis of written submissions. Mr. Pizzichillo provided a timely written submission to the Commission pursuant to a requested extension setting forth why the Commission should not find him in violation of N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act in connection with providing the documents in question to Mr. Glavan and disagreeing with some of the undisputed facts.

FACTS

The Commission found the following facts to be undisputed. Frank Pizzichillo is a member of the Fairview Board of Education (Board). Radomir Glavan ran for a seat on the Fairview Board of Education in 2002, but was unsuccessful. Mr. Glavan has known Mr. Pizzichillo for many years due to his longstanding involvement with the Parent Teacher Association (PTA).

In or around December 2001, Mr. Pizzichillo and Mr. Glavan saw each other at a pizza restaurant. [1] At the pizza restaurant, Mr. Glavan was with his three sons. There, Mr. Pizzichillo provided Mr. Glavan with information provided to the Board concerning a school administrator's stipend. The information included correspondence from the school administrator's attorney to the Board and the school administrator's payroll records indicating all of the deductions coming out of the school administrator's paycheck each pay period between March and June 2000. Mr. Pizzichillo spoke to Mr. Glavan later that evening, but the nature of this conversation cannot be confirmed.

In his testimony and his written submission, Mr. Pizzichillo denies providing the documents at this time and says that he did not provide them to Mr. Glavan until later, after he received confirmation from the board secretary that they were public documents that could be disseminated. He also asserts that Mr. Glavan requested them. Although the Commission believes that Mr. Pizzichillo gave Mr. Glavan the documents at the restaurant without request as Mr. Glavan testified, the main issue is whether they were confidential documents that Mr. Pizzichillo should have disseminated. This is a legal issue.

The documents in question were submitted in connection with a discrepancy with a member of the administrative staff in the District. Although the administrator could have had the matter discussed in a closed session meeting of the Board, she waived the right to a private meeting and opted to have the matter discussed publicly. The discussion of the discrepancy was held at a special meeting on May 9, 2001. The administrator was asked to be there, but not given a chance to speak.

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[1] The Commission set forth in its probable cause decision that the meeting took place in January 2002, which Mr. Pizzichillo disputed in his written submission. The Commission does not find this change to be material to its determination.

ANALYSIS

The Commission found probable cause to credit the allegation that Mr. Pizzichillo revealed employee documents to Mr. Glavan that were provided to the Board as part of the Board's dispute with an employee in violation of N.J.S.A. 18A:12-24.1(e) and (g).

N.J.S.A. 18A:12-24.1(e) of the Code of Ethics sets forth:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

In response to this allegation, Mr. Pizzichillo argues that the documents provided to the complainant were public documents because the employee requested that her personnel matter be discussed at a public meeting rather than in executive session. He cites to what appears to be the Open Public Meetings Act for the proposition that an employee can request that a Board discuss his or her employment in open session. However, the provision does not go on to set forth, as he asserts, that the employee therefore waives the right to maintain the privacy of the documents at issue. The Commission has not found authority for the proposition that, because the documents were given to the Board at a public meeting, all of the documents, including those with an employee's withholding information revealing the extent to which deductions were withdrawn from the employee's paycheck, her salary and her benefits, became public and could be distributed to anyone by any Board member. The Commission therefore concludes that the documents contain confidential information of an employee that was to remain with the Board. The Commission also concludes that the Board could be subject to adverse consequences if the employee were to find out that her payroll records were circulated to a member of the public that had no relationship to her dispute with the Board. The Commission therefore concludes that Mr. Pizzichillo failed to recognize that authority rests with the board of education and took private action that may compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

N.J.S.A. 18A:12-24.1(g) provides:

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

As set forth above, the Commission has concluded that the documents that Mr. Pizzichillo provided to the complainant were confidential. Although Mr. Pizzichillo testified that he believed that the records were public, the specific personal information in the documents should have convinced him that they were not. If he was advised by the Board secretary that the documents were public, then he should have referred Mr. Glavan to the board secretary to let him or her provide the documents. For the foregoing reason, the Commission concludes that Mr. Pizzichillo failed to hold confidential a matter pertaining to the schools which, if disclosed, would needlessly injure an individual or the schools in violation of N.J.S.A. 18A:12-24.1(g).

DECISION

For the foregoing reasons, the Commission finds that Mr. Pizzichillo violated N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act. The Commission is persuaded that his penalty should be minimal since the Commission finds credible his stated belief that the documents were not confidential due to the discussion of the employee in a public meeting. Therefore, the Commission recommends a penalty of reprimand.

This decision is a final decision of an administrative agency. Therefore, it is appealable only to the Superior Court--Appellate Division.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C17-02

Whereas, the School Ethics Commission has considered the pleadings, documents, testimony and written submission in this matter; and

Whereas, the Commission found probable cause to credit the allegations in the complaint; and invited respondent to provide a written submission setting forth why he should not be found in violation of the School Ethics Act; and

Whereas, the Commission reviewed and thoroughly considered respondent's submission;

Whereas the Commission concluded at its meeting of December 17, 2002, that respondent violated the Act and recommended a penalty of reprimand and directed staff to write a decision; and

Whereas, the Commission agrees with the draft decision;

Now Therefore Be It Resolved that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the School
Ethics Commission adopted
this decision at its public meeting
on January 28, 2003.

Lisa James-Beavers
Executive Director

IN THE MATTER OF FRANK PIZZICHILLO,	:	
FAIRVIEW BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Respondent submitted no comments.[1]

This matter comes before the Commissioner to impose a sanction upon Respondent Frank Pizzichillo, member of the Fairview Board of Education, based on findings of fact and conclusions of law by the Commission that he violated *N.J.S.A.* 18A:12-24 (e) and (g) of the School Ethics Act for revealing confidential employee documents to a member of the public.

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the Act is **not reviewable by the Commissioner.** Only the School Ethics Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the School Ethics

[1]Complainant Radomir Glavin submitted comments to the Commission's decision by letter dated January 30, 2003. However, pursuant to *N.J.A.C.* 1:6C-1.1 *et seq.* and *N.J.A.C.* 1:1-18.4, Mr. Glavin is not a party to the within matter so as to provide him with the requisite standing to file written exceptions to the Commission's decision. *See, also,* the State Board decision in *In the Matter of Frank Pennucci, Board of Education of Brick Township, Ocean County,* March 1, 2000. Accordingly, Mr. Glavin's comments were not considered.

Commission. Therefore, this decision is restricted solely to review of the recommended penalty and its implementation.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

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

IT IS SO ORDERED. [2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/6/03

Date of Mailing: 3/6/03

[2] This decision, as the Commissioner's final determination regarding penalty in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

100-03

J.B., on behalf of R.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent, on behalf of R.B., an adult student classified eligible for special education and related services, alleged the District's high school transcript form impermissibly identifies the student as disabled, through annotation to the effect that all courses ere "transfer credits from other public or private schools." Petitioner sought emergent relief to declare that the policy violated R.B.'s privacy rights pursuant to the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973.

The ALJ concluded that R.B. was not harmed by the District's transcript policy. The ALJ noted that if the parents wanted more information in the record, they might request to have additional information and/or reasonable comments as to the meaning or accuracy of the record inserted and maintained as part of the record. (*N.J.A.C.* 6:3-6.7(e)) Petition was dismissed.

The Commissioner found that a request for relief, such as petitioner's, which was based upon claimed violations of rights guaranteed pursuant to the IDEA and/or Section 504, falls outside the Commissioner's general jurisdiction to decide controversies and disputes under school laws. The Commissioner, therefore, cannot consider petitioner's claim that the Board violated R.B's right to privacy and confidentiality. Petition was dismissed.

March 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
EMERGENT RELIEF
OAL DKT. NO. EDU 1132-02
Agency Dkt. No. 399-12/02

J.B. o/b/o R.B.,

Petitioner,

v.

WESTFIELD BOARD OF EDUCATION,

Respondent.

Sherry Chachkin, Esq., for petitioner
(Loughlin & Latimer, attorneys)

Richard Kaplow, Esq., for respondent

Record Closed: January 15, 2003 Decided: January 17, 2003

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

STATEMENT OF THE CASE

Petitioner alleges that the school district's high school transfer form impermissibly identifies the student as disabled. Respondent, Westfield Board of Education transcript form for all students who have attended school out of district indicates that the student

has received "transfer credits from a private or public school." Petitioner seeks emergent relief to declare that the policy violates R.B.'s privacy rights pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 *U.S.C.A.* §1415 and Section 504 of the Rehabilitation Act of 1973 (29 *U.S.C.A.* §794a).

The parties have advised me that no other issues remain once the emergent relief is resolved.

FACTS

I **FIND** the relevant **FACTS** are undisputed:

1. R.B. is a 12th grade student who is classified eligible for special education and related services pursuant to IDEA and Section 504 of the Rehabilitation Act of 1973.

2. R.B. is enrolled in the Westfield Public School District.

3. In compliance with her Individual Educational Program ("IEP"), R.B. attended ninth grade in the Behavioral Healthcare outpatient program at the University of Medicine and Dentistry of New Jersey. She received her academic instruction from program staff.

4. For grades ten, eleven, and twelve, R.B. attended Collier High School, an approved in-state private school for the disabled. R.B. will graduate in June 2003.

5. R.B. requested the district to forward her transcript to the colleges and universities for which she has applied admission.

6. The Westfield School District's transcript state, "credits have been transferred from a public or private school." The transcript does not identify the out of district school or the placement. The transcript policy is applied to "all students who graduate from Westfield High School and receive a Westfield High School diploma, irrespective of whether a student is eligible for or receives special education and related services."

DISCUSSION

Petitioner contends that the Board's transcript annotation effectively identifies her as a special education student. Therefore, the Board's policy violates her right to privacy and confidentiality.

Respondent argues that the New Jersey Department of Education permits school districts to include information on the student's transcript that may directly or indirectly identify the student as educational disabled. Respondent relies on the Code Clarification issued by the Director of Special Education Programs. The memorandum states in part,

> (1) A district may include information that identifies a pupil as educationally disabled on a transcript or report card. For example, a transcript or report card may indicate that a course was modified in accordance with an IEP.
>
> (2) Identifying information contained on a transcript or report card regarding special education does not automatically constitute needless public labeling. Including such information is acceptable when the information is educationally relevant.
>
> [Respondent's Exhibit A]

Respondent further notes that for all students, third party access to transcripts must comply with the consent provisions of the Administrative Code, *N.J.A.C.* 6:3-1 *et seq.*

Indeed, *N.J.A.C.* 6A:14-2.9(a) provides, "All student records shall be maintained according to *N.J.A.C.* 6:3-6". Thus, the parents who challenge information in the student records bear the burden of proving that the information is inaccurate, irrelevant, and improper and/or not a permitted disclosure. *N.J.A.C.* 6:3-6.7. *See also*, *B.M. v. Union County Regional High School*, 95 *N.J.A.R.*2d (EDS) 149, 153 (Parents failed to meet burden of showing why reports contained in a student's record must be expunged).

Further, *N.J.A.C.* 6:3-6.3(a)(1) provides that the student record include the student's daily attendance and description of the student's progress "according to the system of ...evaluation used in the district." Consequently, listing the grades given by another district, which may or may not use the same system of evaluation, would be a potential violation of the regulation. Furthermore, *N.J.A.C.* 6:3-6.4(b) requires a school to identify, in the record, locations of student records.

Westfield does not identify the out of school district or information, which directly identifies a student as disabled. Indeed, the district provided an explanation of its transcript policy:

> The out of district schools from which Westfield accepts credits vary widely with regard to the nature of their academic programs and the grading criteria, which is utilized. For this reason...it is important to include a notation regarding credits transferred and accepted from out of district, so that colleges and universities will have the most complete and accurate information regarding students who graduate with a Westfield High School diploma. If postsecondary educational institutions want to make further inquiry regarding the specific nature of the out of district schools from which Westfield has accepted credits, that is their prerogative, and we do not believe that our District should be legally compelled to hide the fact that the students affected have not spent four years at Westfield High School.
>
> [Respondent's Exhibit A]

Petitioner's argument that the transcript annotation is a signal to the college that she has a disability is unpersuasive. Further, I reject petitioner's assumption that the annotation "may" subject her to discrimination by the educational institution.

Based on the above I **CONCLUDE** that petitioner is not harmed by the district's transcript policy. If the parents want more information in the record, the parents may request to have addition information and/or "reasonable comments as to the meaning and/or accuracy of the records" inserted into a student's record. Further, "a parent or adult pupil shall be permitted to place a statement in the pupil record commenting upon the information in the pupil record." And, the parent's statements "shall be maintained as part of the pupil record as long as the contested portion of the record is maintained.

If the contested portion of the record is disclosed to any party, the statement commenting upon the information must also be disclosed to that party." *N.J.A.C.* 6:3-6.7(e).

I **CONCLUDE** that petitioner failed to prove that the district's transcript policy violates R.B.'s privacy rights pursuant to IDEA and Section 504 of the Rehabilitation Act of 1973.

ORDER

It is **ORDERED** that the petition of J.B. o/b/o R.B be **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 17, 2003
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

January 22, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE
LAW

sej

J.B., on behalf of R.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions maintain that the Board's transcript annotation, although facially neutral, effectively identifies R.B. as a student with a disability by indicating that all of her credits have been earned out of district, reasoning that college admissions personnel understand that a student who is placed out of district for her entire high school career is so placed for purposes of special education. (Petitioner's Exceptions at 3, 4) Petitioner also asserts that by disclosing R.B.'s status as a student with a disability, the Board's transcript annotation violates Section 504. (*Id.* at 4) Here, petitioner cites to federal regulations, and guidance relative thereto, arguing that "transcript language which discloses a student's disabled status to a college considering the student for admission *** is enough to constitute a violation of Section 504." (*Id.* at 5) Finally, petitioner asserts that the Board's annotation is neither educationally relevant nor required by State regulation.

Upon careful and independent review of the record in this matter, the Commissioner first notes its unusual procedural history. Petitioner initially filed a request for emergent relief on October 29, 2002 before the Office of Special Education. Following its transmittal to the OAL, on December 9, 2002, Administrative Law Judge (ALJ) Bari-Brown dismissed the matter for lack of jurisdiction. The ALJ therein noted that due process hearings were limited to those subject matters expressly enumerated within the provisions of federal and State regulations and that "challenges to the contents of pupil records are not the type of subject matter contemplated by these regulations." (*J.B. on behalf of R.B. v. Westfield Board of Education,* OAL Dkt. No. EDS 9535-02, slip op. at 2-3, *citing to R.S. v. Hillsborough Board of Education,* OAL Dkt. NO. EDS 2168-00 (2000 WL 558892). The ALJ, therefore, concluded that because petitioner does not challenge issues arising under IDEA and State special education regulations, but, rather, challenges the Board's policy and practice regarding the form of high school transcripts used for all students, disabled and non-disabled, petitioner's dispute was governed by general education rules, rather than the IDEA. (*J.B , supra* at 3) There is no indication in this record whether the ALJ's determination was appealed.

Thereafter, on December 13, 2002, petitioner filed a Petition of Appeal and request for emergent relief before the Commissioner alleging that "[t]he Board's transcript annotation effectively identifies R.B. as a special education student, thereby violating her right to privacy and confidentiality." (Petition at 1, paragraph 4) By way of relief, petitioner requests "that the Board be directed to immediately remove the aforesaid annotation from R.B.'s official high school transcript." (*Id.* at 2) The matter was transmitted to the OAL for hearing, whereupon ALJ Bari-Brown concluded that petitioner failed to demonstrate that the Board's transcript policy violates R.B.'s privacy rights pursuant to IDEA and Section 504 of the

Rehabilitation Act of 1973. (Initial Decision at 5) The ALJ also determined that the Board's policy did not violate State regulations.

The Commissioner recognizes that "[p]upil records are subject to challenge by parents and adult pupils on grounds of inaccuracy, irrelevancy, impermissive disclosure, inclusion of improper information or denial of access to organizations, agencies and persons."[1] *N.J.A.C.* 6:3-6.7(a). Notably, however, State regulation specifically provides that *"[a]ppeals relating to the pupil records of educationally handicapped pupils shall be processed in accordance with the requirements of N.J.A.C. 6A:14."* (emphasis added) (*N.J.A.C.* 6:3-6.7(c)) Moreover, quite apart from this directive, the Commissioner finds that although the transcript annotation at issue *is* facially neutral and applied to all students, *this matter* is grounded in R.B.'s status as a special education student and, as such, petitioner *clearly* seeks to invoke the protections of federal law and regulation. A request for relief, such as petitioner's, which is based upon claimed violations of rights guaranteed pursuant to the IDEA and/or Section 504, falls outside the Commissioner's general jurisdiction to decide controversies and disputes under school laws. *I.D. and M.D. on Behalf of C.D. v. Board of Education of the Township of Hazlet, Monmouth County*, State Board Decision April 2, 1997; s*ee also*, *East Brunswick Board of Education v. New Jersey State Board of Education,* EHLR DEC. 554:122 (DCNJ 1982); *A.N. v. Clark Bd. of Ed.*, 6 *N.J.A.R.* 360 (1983). The Commissioner cannot, therefore, consider petitioner's claim that the Board is violating R.B.'s right to privacy and confidentiality.[2]

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[1] Pursuant to such an appeal, a "parent or adult pupil may seek to: 1. Expunge inaccurate, irrelevant or otherwise improper information from the pupil record; 2. Insert additional data as well as reasonable comments as to the meaning and/or accuracy of the records; and/or 3. Request an immediate stay of disclosure pending final determination of the challenge procedure as described in [applicable regulations.]" *N.J.A.C.* 6:3-6.7(a).

[2] To the extent petitioner contends that the transcript annotation either violates administrative code or is not required thereunder, the Commissioner finds that petitioner has not satisfied his burden of proof.

Accordingly, the within Petition of Appeal is dismissed.[3]

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 3|05|03

Date of Mailing: 3|05|03

[3] The parties agree that no other issues remain once the emergent matter is resolved. (Initial Decision at 2)

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

109-03

G.L.L. AND N.M.L., on behalf of minor child, C.C.L.,

PETITIONERS,

V.

BOARD OF EDUCATION OF UPPER TOWNSHIP, CAPE MAY COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents sought admission of their child, C.C.L., into the French Immersion Program offered for the kindergarten by the District. The District contended C.C.L. was not admitted because he scored below 30 on the Kindergarten Readiness Test (KRT), the test used to screen for eligibility for the program. Parents sought a retest.

The ALJ found that the criterion for the French program was developed in a fair and reasonable manner and that the District's action was well within management's prerogative. In addition to a lottery, the ALJ found that the District used the KRT to establish the child's level of maturity and skills and to reduce the pool of students who applied for the French program. The ALJ determined that petitioners did not meet their burden of establishing that the District's use, administration or grading of the KRT was unfair or arbitrary. Moreover, petitioners had signed a letter of commitment for the French program that contained clear and unambiguous language regarding the necessity of a satisfactory KRT score before a student would be admitted into the program. The ALJ denied petitioners' request to admit C.L.L. into the French Immersion Program or to retake the KRT.

Upon review of the record, including testimony, exhibits and petitioners' exceptions, the Commissioner adopted the findings and determination in the Initial Decision as his own.

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

EMERGENT RELIEF

AND RELIEF ON THE MERITS

OAL DKT. NO. EDU 6173-02

AGENCY DKT. NO. 262-8/02

G.L.L. and N.M.L. o/b/o C.C.L.,

Petitioner,

v.

UPPER TOWNSHIP BOARD OF EDUCATION,

Respondent.

Clement F. Lisitski, Esquire for petitioner

Louis J. Greco, Esquire, for respondent

Record Closed: January 14, 2003 Decided: January 22, 2003

BEFORE **W. TODD MILLER** , ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for emergent relief on August 29, 2002. G.L.L. and N.M.L. parents of C.C.L. (collectively as "petitioner") requested an emergent hearing seeking admission of their child into the French Immersion Program offered by the Upper Township School District (district). The matter was transmitted to the Office of Administrative Law (OAL) on September 3, 2002. The Director of

the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14F-5o. The parties were contacted for the scheduling of an immediate hearing and the matter was then scheduled for hearing on September 6, 2002. The hearing on the application for emergent relief was adjourned, on the record, on September 6, 2002 due to the fact that petitioner, C.C.L. was in France until approximately September 25, 2002. The need for emergent relief was moot since petitioner was in France. Moreover, on September 6, 2002 petitioner was not ready to present the necessary witnesses regarding the merits of the underlying claim. Petitioner opted to proceed directly to a plenary hearing in lieu of addressing the issues at an abbreviated emergent hearing.

On October 11, 2002 petitioner filed a motion seeking leave to take the depositions of Debbie Miller, a teacher and Janet Norbury, a member of the child study team. The Motion was denied on October 23, 2002. Additionally, C.C.L.'s actual Kindergarten Readiness Test (KRT) (P-18) and Manual (P-19) were offered into evidence with a joint motion that they be sealed. Accordingly, an Order was issued sealing C.C.L.'s KRT test manual (P-19) and booklet (P-18) containing his actual answers.

Based upon the aforementioned events, the emergent hearing was waived and a plenary hearing on the merits was held on October 3, 25, November 4, 2002 at the OAL offices located in Atlantic City, New Jersey. After the November 4, 2002 hearing petitioner requested a thirty (30) day adjournment to prepare and supply an expert report. The hearing continued on January 3, 2003. Post hearing briefs were submitted by both parties on January 14, 2003 and the record closed on that date.

SUMMARY OF RELEVANT FACTS AND TESTIMONY

The Upper Township School District was offering a French Immersion Program[1] ("Program") for the kindergarten class of 2002-2003. The same program was offered to the

[1] This controversy is one of a series of contested matters that were filed with the Commissioner of Education challenging the district's decision-making in connection with enrollment in a French immersion program offered by the district. *See, J.L.D. o/b/o N.D. v. Board of Education of the Upper Township School District,* OAL Dkt. No. 4841-02, Agency Dkt. No. 239-8/02 and *D.M.L. v. Board of Education of the Upper Township School District,* OAL

kindergarten class of 2001-2002. The programs were titled by the district as Cohort I and Cohort II. The children in this program are taught the New Jersey core curriculum courses in French except, assignments are sent home in French and English. Petitioner's parents were advised of the program during kindergarten registration on February 7, 2002. By letter dated February 12, 2002 petitioner was notified that he was accepted into the program, subject to receiving a score above 30 on the KRT. The KRT examination was not a condition of the first cohort in 2001-2002. The applications for the first cohort were sparse and the district had to initially "push" the program in order to meet the necessary minimum enrollment. The French government sponsored the program and wanted at least 18 students to attend after factoring in a dropout rate. However, after creating more awareness for the program, the district received enough applications to start the course for the 2001-2002 school year. Twenty students were ultimately selected. Because of the low participation rate and the fact that the program was new, the first cohort did not necessitate a lottery or KRT examination. Admission into the program was on a "first come-first serve" basis. (P-9).

The district's public relations effort for the second cohort was more aggressive. As a result, significant interest was expressed for the program by 2002-2003 kindergarten class. The district received approximately forty (40) applications. Upon revising the program for the second year, the district concluded the academic intensity of the French Immersion Program together with the increased applications for the program, necessitated that a lottery method of selection and a minimum threshold-readiness be part of the admission process. Petitioner is not disputing the lottery method for selection of students for the second program. Instead, petitioner is disputing the use, administration and grading of the KRT examination resulting in C.C.L.'s exclusion from the program.

On May 30, 2002 the KRT exam was administered. Petitioner scored a 28 on the test. A score of 31 or better was required to be admitted into the second French program. According to the standardized KRT test, a score below 31 is considered as "questionable readiness." (P-18, p.33). Petitioner avers that the KRT examination was administered and graded unfairly. Further, petitioner contends that while he is not classified, he is burdened with some learning difficulties

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Dkt. No. 4641-02, Agency Dkt No. 207-7/02 While the issues were different in each of the aforementioned matters, the Commissioner affirmed the district's decision in each case.

and therefore, should have been provided extra aides, services or consideration for the KRT examination and resulting score. They further contend that the district arbitrarily denied petitioner the opportunity to retake the KRT exam in spite of the board policy which guarantees equal access to all educational programs. (Policy 0125, 0134, 2110.1 and 5750; P-24 to P-29). Petitioner suggest that, base upon the foregoing, the actions of the district were arbitrary and capricious.

Petitioner's adoptive parents, G.L.L. (father) and N.M.L. (mother) (hereinafter "parents") testified on behalf of C.C.L. They explained that the Division of Youth and Family Services placed C.C.L. in the custody of G.L.L. and N.M.L. on February 20, 2001. He was formally adopted on December 7, 2001. (P-1). Prior to being adopted petitioner was in foster care. His adoptive parents contend that C.C.L.'s natural mother was dependent on drugs and alcohol. They suggest that C.C.L. must contend with the residual effects from these substances and that it may have impacted his KRT score. (See, P-2, Adoption Summary Report). N.M.L. is a French National and is fluent in French. She converses with C.C.L. at home in French. From the onset G.L.L. and N.M.L. were very interested in the French program and, like many other parents, were active in getting the program off the ground. Moreover, because N.M.L. is a French National, the program was even more appealing to the family. Based upon the foregoing, C.C.L.'s parents were very disappointed that he was not accepted into the French program.

Prior to kindergarten C.C.L. attended a local preschool entitled Tomorrows World. His 2001-2002 evaluation from preschool demonstrates that he was progressing satisfactorily. (P-3). Nevertheless, his parents were concerned about his behavior and requested an evaluation from the district's Child Study Team (CST). The district offers free screening for any parent/child who request it. In February 2002 the parents met with the district's CST team. The Tomorrow's World progress report (P-3) was not provided to the CST team. Nor was the adoption summary referencing petitioner's physical and mental history provided to the CST team. (P-2). Janet Norbory, a social worker and CST member administered an early screening examination entitled Developmental Indicator for the Assessment of Learning, Third Edition. (hereinafter "DIAL 3") (P-22). The screening test measures a child's development of motor skills, concepts and language. The test was completed and scored in accordance with instructions contained in the manual. Petitioner scored satisfactory according to Norbory. Norbory noted that the examination

is only a tool for screening and that test scores could vary significantly depending upon the child's age at the time the test is administered. For example, a 3-year old child may score 1 out of 10 which could be acceptable for that age bracket while a 4-year old child may score 5 out of 10 which would be acceptable for that age bracket. Norbory was satisfied from the test results that C.C.L. was progressing and developing adequately for his age.

Norbory also cited a section of the DIAL 3 booklet that contains a parental evaluation of the child. The parental evaluation contained in the booklet, in this instance, indicates that according to his parents, C.C.L. is performing adequately in all areas except general development, understanding and thinking. (P-22). In these areas the parents marked that they were "a little worried" which is the first tier below "my child is doing ok." (See, P-22). Otherwise, C.C.L.'s parents noted that he was performing adequately in health, motor skills, language skills, self help skills, social skills, vision and hearing. (P-22). The parent's chief concerns at this time were related to C.C.L's behavior rather that his skills.

In early 2002 the district distributed information for the second cohort including a commitment letter. On or about February 3, 2002 petitioner executed a letter of commitment for the French program. (P-4). The commitment letter contains clear and unambiguous language regarding the necessity of a satisfactory KRT score before a student would be admitted into the program. It provides, in relevant part, as follows:

> Full understanding that if your child **scores 30 or below** on the KRT (Kindergarten Readiness Test) that your child **will not be admitted to the program.**
>
> Waive your rights to appeal admittance due to the limited enrollment or due to Board of Education decision.
>
> I have read the above and understand fully my commitment if this program is offered and signify my understanding by my signature.
>
> Parent/Guardian Signature /S/_____

On February 12, 2002 the district provided notice of the lottery results to all parents. (P-6). C.C.L. was accepted pursuant to the lottery however, his parents were alerted in the acceptance letter as follows:

> Please be aware that the status of your student in the program **will depend on** their performance in the Kindergarten Readiness Test (must test above a 30) which will be conducted in June. (P-6).

On May 24, 2002 Debbie Miller administered the KRT test to C.C.L. Miller has been a schoolteacher for fifteen years. Miller is a basic skills teacher and had taught kindergarten for two years. In 2002 she was assigned to teach first and second grade. As a basic skills teacher her duties involved instruction and teaching for students with the lowest readiness. She specifically worked with students in the area of reading and language arts. Miller had previously administered the KRT exam to about 40 students. In preparation for the KRT exam she reviewed and read the test booklet. The test was presented one-on-one. (i.e., without other students in the room). According to the instructions, the test is not time restricted but, if student does not respond to a question after a reasonable period, the itemed is considered failed. (P-21, p. 3) Moreover, the instructions further provide:

> **Do not** prompt the child into answering or performing certain items. Any additional help, other than what is listed on the test in completing a task will make the scoring invalid. So, remember let the child complete the task, without your help. **Do not** give credit for an item unless the child performs the task when you request him/her to do it, even though a parent may have noticed the child doing it at an earlier time. *The objective of the task, is that the child performs the task on request.* (P-21, p.2)

Based upon the instructions, Miller did not prompt or aid C.C.L. during the course of the exam. Miller stated that she would not have aided C.C.L. even if she was aware of his personal and medical history. Miller explained that the test consists of twenty-six tasks. Her role was to present the tasks or questions to the child and keep them "on task" during the exam. Upon completion, she also was required the grade the test. Grading the exam consisted of comparing the student's answers for each task to a predetermined answer or range of answers provided in the booklet. If the student's actual answer was not in the booklet, no credit is given for the

Monillas noted that his specific area of training and expertise is in educational administration. He explained that he designed the criteria for the first and second cohorts. Monillas was extremely active in getting the French program started and very familiar with all aspects of the program. He testified that the French Government wanted at least 18 students in each cohort through eighth grade. Monillas concluded that each class should initially consist of 20-24 students, before allowing for attrition. He adopted the state guideline for class size and explained that if a class runs over 24 students, an aide would be required. Since the French Government desired at least 18 students, Monillas estimated that if 22 students were initially accepted, the sized would diminish to 18-20 after dropouts and KRT results. If the list dropped below the desired level before the program started in September 2002, more students could be added from the waiting list. (P-6). Once the school year began the waiting list expired and the class was fixed. Monillas testified that in his educational judgment and based upon the intensity of the French program, a smaller to moderate class size was more appropriate. He opined that a smaller class would better serve the program and students.

Dr. Monillas emphasized that the French program was academically demanding since all in-class work and exams are in French. It is an all day program as opposed to the district's normal half-day program. The French program focuses less on play and more of French culture. Writing is done in script not print. More focus is placed on literacy. Based upon the demands of the program and results from the first cohort, Monillas opined that a full day kindergarten program that was taught in French warranted a preliminary assessment of the student readiness. In Dr. Monillas' opinion, this would be an improvement over the first cohort program because two students were having difficulty in the first cohort.

Monillas attempted to develop an objective method for admission into the second cohort. The district uses the KRT test for all students entering kindergarten. Monillas concluded that the KRT test was an appropriate screening tool for the French Immersion program since it was a nationally recognized readiness test as well as the test most familiar to the district. He also stated that if a student scored below 31 and thus evidenced a lack of readiness, they would be permanently excluded from the program. He did not intend for the KRT test or a different test to be retaken. Monillas explained that the KRT test was one indicator of readiness that was fair and

reasonable. In his educational judgment, the KRT test was an objective criteria and a reasonable indicator of a student's readiness for kindergarten as well as for the French program.

Notwithstanding the KRT results, Monillas stated that generally he would look at what was best for the child. On this point petitioner's counsel questioned whether Monillas would have given C.C.L. additional consideration if he was superintendent in May 2002 and had known that he was the son of a French National and suffered from residual effects of his natural mother's substance abuse. Dr. Monillas explained that he did not design the criteria for admission into the French program to be weighted upon social or family factors. The admission criterion was intended to be simple and free from subjective interpretation so as to avoid appeals and disputes such as the present matter. Accordingly, Monillas stated that he would not guess what he would have done if he were still the superintendent.

Petitioner offered the testimony of Janice G. Dennis. This witness offered a new attack on the district's decision to ues the KRT. Petitioner's case through December 2002 challenged the administration and grading of the KRT exam. The approach taken by Ms. Dennis was to challenge the district's use of the KRT exam as an inappropriate tool. Ms. Dennis is a retired educator with substantial experience and qualifications. (P-30). They include an M.A. degree in educational psychology, clinical psychology, New Jersey certifications as a school administrator, student personnel services, school psychologist and social worker as well as panoply of actual experience ranging from social worker, CST team coordinator of special education and director of special services. Ms. Dennis emphasized that during the period 1986-1989 she was employed by the Pemberton Township Board of Education and participated in crafting a kindergarten screening program that was very similar to the KRT exam. Based upon Dennis' experience and qualifications petitioner moved that she be recognized as an expert in the areas of her training and experience. The motion was granted without objection except, respondent noted that Dennis was not an expert in the area of the KRT exam or kindergarten admissions. Finally, her report and addendum were moved into evidence (P-31).

Dennis' preparation for the present matter consisted of interviewing C.C.L. and his parents, reviewing the tapes or transcripts of prior proceedings and testimony and performing research on the internet with respect to other districts that offered immersion programs.

Dennis' interview of petitioner confirm that they were highly motivated by the French program and that C.C.L. experienced a difficult early childhood by virtue of his exposure to drugs, alcohol and foster care. The fact that the household included a French National and that the C.C.L. had unique socio-economic history were important criteria that the district should have considered, according to Dennis. Dennis reviewed the testimony of witnesses and suggested that the district did not consider these important factors. Dennis cited the KRT exam booklet to support her opinion that personal factors were relevant and material to the decision making process. The KRT booklet provides, in part:

A Word of Caution:

> The KRT was designed as a screening device for kindergarten readiness, to be used with other methods in determining readiness. The instrument has a number of limitations which should be kept in mind. Handicapped children and non-English speaking children may have difficulties on some items. These children should be assessed using a wide variety of measures and techniques. Although it was intended to remove as much ethnic and socioeconomic biases as possible in the instrument, it is advised that considerations be given to a child's social, familial, and cultural environments when a significantly low score is obtained. (P-19, p. 13).

Based upon her research, experience and the KRT exam booklet, Dennis opined that the KRT exam should not be used as an exclusionary device. She concluded that it should only be used as a screening tool in conjunction with other important factors such as socioeconomic background.

Dennis also searched the internet as a means of comparative analysis regarding immersion programs. She found approximately 48 districts offering some type of immersion program. The data was then narrowed to only those districts that offered a total immersion program. Dennis found that all districts used either an application and/or a lottery method of admission. She also found that, of the districts she surveyed, none used an entrance or admission exam unless there were special or unusual circumstances (see P-31). For instance in Duval County, Florida, the district requires older students who desire to enter the program late, to take a

foreign language test. Similarly, in Prince George's County, Maryland, students take a test after completing the first year of the program. If the student is found to be struggling the district and parents discuss continued participation in the program. The data accumulated by Dennis supported her contention that the KRT exam should not be used as an exclusionary entrance exam. She concluded that such use was inappropriate and arbitrary.

ISSUES FOR CONSIDERATION

1. Was the action of the district, including the use, administration and grading the kindergarten readiness test (KRT), unreasonable, arbitrary, capricious, conducted in bad faith, without rationale basis or discriminatory? If so,

   (a) Should C.C.L. be permitted to retake the KRT test? or,

   (b) Should C.C.L. be admitted into the French immersion course on a permanent basis?

LEGAL DISCUSSION

It is a well-settled principle that policy, legislative and quasi-legislative determinations are committed to the judgment of local governmental bodies. *Riggs v. Long Beach Tp.,* 109 *N.J.* 601, 610-11, 538 *A.*2d 808 (1988); *United Advertising Corp. v. Metuchen,* 42 *N.J.* 1, 8, 198 *A.*2d 447 (1964). Such determinations enjoy a distinct presumption of validity, *First Peoples Bank of N.J. v. Medford Tp.,* 126 *N.J.* 413, 418, 599 *A.*2d 1248 (1991); *Hutton Park Gardens v. West Orange Town Council,* 68 *N.J.* 543, 564, 350 *A.*2d 1 (1975), and will remain left undisturbed absent a showing of arbitrary, capricious or unreasonable action on the part of the governmental agency. *Palamar Constr., Inc. v. Pennsauken Tp.,* 196 *N.J.Super.* 241, 250, 482 *A.*2d 174 (App.Div.1983). These principles apply to policy determinations made by local boards of education. *See Parsippany-Troy Hills Educ. Ass'n v. Board of Ed. of Tp. of Parsippany-Troy Hills,* 188 *N.J.Super.* 161, 167, 457 *A.*2d 15 (App. Div. 1983), *certif. denied,* 94 *N.J.* 527, 468 *A.*2d 182 (1983); *Kopera v. Board of Ed. of West Orange,* 60 *N.J.Super.* 288, 294,

158 *A.*2d 842 (App.Div.1960). Local boards of education are vested with broad powers in the making of decisions affecting the day-to-day operation of the schools under the jurisdiction. They have the authority to adopt rules and policies for the government and management of the schools, provided such regulation 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 as 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.

In the present matter petitioner is not afforded any protected property right or constitutional right for an individual component of the curriculum. Administrative Law Judge Diana Sukovich discussed a student's due process rights in *E.A., Sr. And D.A., o/b/o E.A., Jr., v. State-Operated School District of the City of Jersey City,* OAL DKT. NO. EDU 3499-98; AGENCY DKT. NO. 50-3/98; Decided October 28, 1999. Judge Sukovich relied upon *Glidden v. County of Monroe*, 950 *F.Supp.* 73 (W.D.N.Y. 1997) and stated:

> In [*Glidden*] the court held that a high school student did not have a protectable property interest in participation in a school marching band, whether such was deemed to be a curricular or extra-curricular activity, although, under applicable state law, he had a legitimate claim of entitlement to a public education. The court interpreted *Gross v. Lopez 419* U.S. *565, 95* S. Ct. *729, 42* L.Ed. *2d. 728* (1975) as follows:
>
> > Therefore, under *Gross*, the property interest which is protected by the Due Process Clause is the right to participate in the entire educational process and not the right to participate in each individual component of that process. Accordingly, it is only when a student is excluded from the entire educational process that due process must be afforded. His exclusion from a particular course, event or activity is of no constitutional import. *Glidden* at 73.

Therefore, the proper standard in this matter, which involves a dispute over participation in a specific course, is whether the district acted arbitrary or capricious. Arbitrary and capricious is defined as an "unreasonable action without consideration or in disregard of the facts or without determining principle." *Blacks Law Dictionary* (Fifth Edition). In *Bayshore Sew. Co. v. Dep't of*

Env., N.J., 122 *N.J. Super.* 184, 199 (Ch. Div. 1973) the Court expounded upon the meaning of this standard and stated:

> In law, 'arbitrary' and 'capricious' means having no rational basis. *Bicknell v. United States,* 422 *F.2d* 1055, 1057 (5 Cir. 1970). The terms 'arbitrary' and 'capricious' embrace a concept which emerges from the due process clauses of the 5th and 14th Amendments of the United States Constitution and operate to guarantee that acts of government will be grounded on established legal principles. See *Canty v. Bd. of Education, City of New York,* 312 *F.Supp.* 254, 256 (D.C.S.D.N.Y.1970). Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. *Kansas City Southern Ry. Co. v. Louisiana Public Service Comm'n,* 254 *La.* 160, 223 *So.2d* 132, 136 (La.Sup.Ct.1969).

The burden of proving unreasonableness for actions that are within the management's prerogative for a local board of education is on petitioner. *G.M. v. Roselle Park Borough Board of Education*, 95 *N.J.A.R* 2d. (EDU) 107, 109. It will not be "usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." *Ibid.* Local boards of education have reasonable discretion for various managerial matters.

In a matter similar to the present, the Commissioner held that the matter of class assignment, and specifically, the session assignment of kindergarten pupils, constitutes a `management prerogative' of local boards of education, which will not be assumed nor usurped by the Commissioner unless there is " . . . a definite showing that the action of a local board of education was arbitrary, in bad faith, without rational basis, or discriminatory." *Paddock v. Demarest Bor. Bd. of Educ.*, 1974 *S.L.D.*, 435, 440. Similarly, local boards of education's authority to design school attendance area boundaries is "well-established." *Hoffman v. Board of Education of the Twp. of Cherry Hill*, 1 973 *S.L.D* 406, 408 (citations omitted.) A board's determination in that respect will be upheld if such action were not arbitrary, capricious, or discriminatory. *See*, *Hoffman,* at 409. A local board of education has discretion to determine pupil attendance zones. In the absence of prejudice or discrimination, a board may transfer

students from school to school. The Commissioner will not interfere with the determination of a local board regarding school attendance lines unless there is " . . . evidence of unjust discrimination." *J.A.P. v. Morristown Board of Education,* 1988, *S.L.D.* 2651,270 (citation omitted). The import of the aforementioned authorities is that a board of education is free to utilize its' management prerogative when dealing internal matters involving curriculum, attendance and other similar areas so long as it is rationally based and free from any arbitrary action.

The Board is responsible for the production of a "thorough and efficient" school system (*N. J. Const.* (1947), Art. VIII, § IV, par. 1) and particularly the statutory obligation to provide courses of study suited to the ages and attainments of all pupils. *N. J. S. A.* 18A :33-1. The Board has a continuing obligation placed upon it by the Legislature to adopt and alter courses of study. The standard of review utilized by the Commissioner of Education, when the districts performs this statutory function, is set forth in *Wasser v. Board of Education, Wharton* 1967 *S. L. D.* 125. In *Wasser*, a group of parents protested the adoption of a resolution reorganizing certain classes. Therein the Commissioner stated.

> "* * * 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 the matter at hand, petitioner challenges the KRT exam as being used inappropriately, unfairly administered and unfairly graded. Petitioner further asserts that the questions and the grading process did not take into consideration socioeconomic factors such as personal, family and medical circumstances as well as cultural differences. On this basis, petitioner claims that the district acted in an arbitrary and capricious manner.

Petitioner offered expert testimony and opinion of Janice G. Dennis. The testimony provided by Ms. Dennis clearly established that, of the districts she surveyed, an exclusionary entrance exam was not employed. Moreover, she opined that the KRT exam was an inappropriate tool to exclude a child from an immersion program unless, the final decision included socioeconomic factors. Based upon her research and experience she concluded that the district's entrance criteria was arbitrary and capricious because it incorporated the KRT exam solely for the purpose of excluding students without consideration of other factors. Dennis suggested that petitioner's socioeconomic history should have been considered. Notably, only after the KRT exam was administered did petitioner disclosed C.C.L.'s childhood difficulties to the district. The KRT results apparently corroborate some of C.C.L's difficulties. Petitioner cannot complain about or fault the decision by the district if petitioner withheld pertinent information prior to the KRT exam.

Dennis' opinion, while supported by the data she obtained from the internet and other sources, does not rise to the level such that the districts rational or decision connected with this matter must necessarily be deemed arbitrary and capricious. Her primary source of data was the internet. Once a pool of data was obtained from the internet, Dennis refined the data through e-mail or telephone contacts with the respective districts. The data was not an exhaustive search of all immersion programs but a sample of those available on the internet. Most programs included a lottery and application. Dennis found that of the 16 districts that offered total immersion programs, none required an initial entry exam. However, 4 out of 16 districts required some type of post-admission exam or similar action. The data supports that some districts use a post-admission exams while respondent uses a pre-admission exam. Therefore, the data from other districts outside New Jersey does not *ipso facto* mean that respondent herein made an arbitrary decision by using a well recognized, standardized, Kindergarten Readiness Test in a manner not used by other districts.

The purpose of the KRT exam is expressed as follows:

> The Kindergarten Readiness Test (KRT) is an assessment tool developed to measure a child's functioning through various developmental tasks. Any one or a combination of poor performance on skill areas can contribute to interference with a child's success in Kindergarten. The developmental skills which are measured in the KRT are usually considered stepping stones for success in school. Most pre-school children have acquired the skills used in this test by the time they are five. The items on this test are intended ONLY as a general screening of where a child performs in maturity, when compared with other children of this age group.
>
> The KRT is designed and intended to be used by early education teachers and other professionals who work with this age group of children. To assess levels of maturity and development of the typical later-four, five, and six year old children who are entering our kindergarten classes today. Its primary purpose is to provide additional information in helping a parent determine if his/her child is developmentally ready to begin kindergarten, in a given school year. The KRT is not meant to be used inclusively, but rather, in combination with other decision making factors. (P-20, p. 1)

It was undisputed that the KRT exam is a well-recognized, reputable, kindergarten-screening exam. Respondent uses it for all students entering kindergarten as well as by other districts for children entering kindergarten. The French program was "extra-curricular" and therefore it was not unreasonable for the district to use the KRT exam as a screening device. *Glidden, supra.*

While the districts surveyed by Ms. Dennis did not use a screening exam, it does not mean that respondent acted without reason, logic, or rational purpose. *Wasser, supra.* As explained by Dr. Monillas, the French program was intense and difficult. Two students experienced problems in the first cohort. The intent was to screen students before they entered the program so as to prevent or avoid problems up front. C.C.L.'s KRT score confirmed that he may not even be ready for kindergarten much less an intense all day foreign language program. While C.C.L. was not classified, his evaluations, parental observations and records from pre-

school confirm that he was at the low-end of kindergarten readiness. When interpreting the test results the KRT test booklet provides:

> If a child scores somewhat lower, LOWER AVERAGE this suggests that a child has not yet mastered some of the necessary developmental skills which will more than likely be needed for success in kindergarten. A parent may want to, at home, work with these weaker performance areas, or consult with private, professional or school personnel, before beginning their child in school. The KRT also indicates to the examiner, possible significant problems. If BELOW AVERAGE- QUESTIONABLE READINESS characterizes a child's performance, the parent should consult with professionals at school or in their community. (P-20, p.2).

Accordingly, based upon the KRT results, C.C.L. had not yet mastered some of the developmental skills needed for success in a regular kindergarten class. This is undisputed by the test results. How the district used or interpreted the results, in terms of petitioner's kindergarten curriculum, was clearly within its' discretion. *Glidden, supra.*

I **FIND** that the criterion for the second French program was developed in a fair and reasonable manner. Dr. Monillas utilized impartial and acceptable methods for determining which students would be admitted into the program. The lottery system was rational, fair and reasonable for a situation where forty students wanted to participate in an intense French course that the district opened to only 22 students. The logic behind the criteria had a sufficient nexus to a meaningful educational purpose. The French program is a full-day program as opposing to the districts half-day regular kindergarten program. It is taught entirely in French except for homework. More emphasis is placed on French culture rather than more traditional activities. Dr. Monillas wanted the student-teacher ratio to be in the 20-24-pupil range because of the intensity of the program. Based upon the experience from the first program, where two students were having difficulty, Monillas reasoned that a class size of 22 students was reasonable in light of the intensity of the program. He also relied upon state law as a reference for comparative class size and noted that any class above 25 students would require an aide. Based upon all these factors, Dr. Monillas relied upon his educational judgment and concluded that the class size should be small (20-24 students) and that a KRT exam should be used as a screening mechanism. The

KRT test was selected because it is a well recognized, standard screening test, which has been used by the district. I **FIND** that the action and decision by the district in connection with development of the criteria for the French program were well within management's prerogative. The criteria developed by the district was rational and within the realm of management decision-making.

I FIND that the district used the KRT exam for two purposes. First was to establish whether the child possessed the level of maturity and skills to successfully complete an intense immersion program. The evidence and testimony support respondent that the primary purpose of the KRT exam was to make sure that a child who was not ready for kindergarten did not find their way into a more intense program. The second, indirect purpose was to reduce the pool of students who applied for the French program. This too was a valid use of the KRT exam because it was clearly set forth in the program commitment letter signed by petitioner (P-4) and it provided a means of keeping the student ratio adequate for the program. I **FIND** that either use of the KRT exam was within the discretion of the district. While some districts may opt to let all students in the program and then deal with those students who struggle later, respondent choose to pre-screen admission into the program in order to avoid placing an immature child into a difficult program. Moreover, the district determined that the class size should be limited and therefore using the KRT exam for that purpose was within their discretion.

The KRT test was properly administered and graded by Debbie Miller, an experienced teacher. She performed her function strictly in accordance with the KRT instruction booklet. She painstakingly reviewed each and every question/task during the hearing. She was objective and fair in her assessment of C.C.L. Miller stated that she was not pressured by the district to produce a predetermined result or to engage in favoritism. Petitioner wanted Miller to accept C.C.L.'s various answers on the KRT test or give credit because they thought the answers were close enough. As explained by Miller, either the answer is right or wrong. The KRT exam does not permit the instructor to subjectively give credit for certain answers that are not provided in the answer booklet. Petitioner wanted additional consideration for C.C.L.'s as though he was a classified student. There was no evidence that C.C.L. was a classifiable child at the time he applied for the French program or the time of the KRT exam. Petitioner was progressing

satisfactorily, albeit at the low end, as indicated from the results of the district's DIAL 3 screening as well as from the preschool report from Tomorrows World. Even the parental portion of the DIAL 3 screening test did not strongly suggest or raise a "red flag" regarding any potential disability. Finally, the KRT test clearly states that the instructor may not assist or aid the student on any task. Miller explained that any assistance during the test by the instructor would defeat the purpose of the exam.

Petitioner relies upon *Board of Education of the Borough of Lawnside v. Board of Education of the Borough of Haddon Heights*, OAL Dkt. No. 5749-84; Agency Dkt. No. 333-6/84, Decided May 5, 1986 wherein the Commissioner reversed a decision of the district that denied a black pupil, with an exceptional academic record, entry into the National Honor Society. Petitioner's brief at page 30. That decision is distinguishable from the present matter. In *Lawnside* the district's decision was reversed because they gave no reason for denying the student admission into the honor society. The Commissioner found that the district's decision was based upon a flawed methodology and that the decision makers lacked familiarity with the criteria. In the present matter, the district clearly set forth the criteria and followed the criteria in such a way to be fair to all those students who wanted to participate in the program. Moreover, this is not a case where the petitioner was a gifted student and was denied access. To the contrary, petitioner herein has some academic problems in terms of kindergarten readiness. Those who made the decision in the present matter were aware of petitioner's problems thorough the KRT exam and from subsequent conversations with his parents. Unlike *Lawnside,* the district's decision in this matter was based upon sufficient familiarity with the pupil and the criteria was rationally related to a meaningful educational purpose.

I **FIND** that based upon all the educational information and data that was available to the district in May 2002, the district did not act in an arbitrary or unreasonable manner. I therefore **FIND** and **CONCLUDE** that Petitioner has not met its burden in establishing that the district's use, administration or grading of the KRT exam was unfair or arbitrary.

Petitioner should be commended for their zeal in seeking to educate their child especially under the circumstances presented in this matter. However, in spite of the compelling personal factors relating to C.C.L. and his family, the district discharged their duties evenhandedly.

Petitioner faced a difficult burden because, as set forth above, managerial decisions of the district must be presumed as valid absent a showing that they acted in an arbitrary, capricious or unreasonable manner. *First Peoples Bank of N.J., supra.* I note that C.C.L's father testified that the KRT test was a reasonable tool to screen students for the French program. Although he did not agree with its use in excluding C.C.L. from the French program, he nonetheless, did agree that the district's use of the KRT exam was reasonable. Moreover, Petitioner had great respect for Debbie Miller. These observations by petitioner further supported the decision of the district. Finally, petitioner believed that he had the legal right to be in the French program since he knew French. Petitioner's brief at page 14. Petitioner did not offer any authority to support such a conclusion. In fact, it has been held that the right to be included in an extra-curricular course is not a protectable property right. *Glidden, supra*

CONCLUSION AND ORDER

I **CONCLUDE** that petitioner has not satisfied its burden that the district acted in an arbitrary or capricious manner. Accordingly, petitioner's request to be admitted into the French Immersion Program (Cohort II) or to retake the KRT exam is hereby **DENIED.**

For the reasons set forth above, it is hereby **ORDERED** that petitioner's request for relief is hereby **DENIED** and petitioner's action is hereby **DISMISSED**.

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

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

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

1-22-03
DATE

W. T. Miller
W. TODD MILLER, ALJ

January 28, 2003
DATE

M. Kathleen Duncan Ed
DEPARTMENT OF EDUCATION

JAN 29 2003
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Documents In Evidence

For Petitioner:

P-1 Judgment of Adoption
P-2 Letter from DYFS – C.C.L.'s Personal History
P-3 Tomorrows Work – Progress Report
P-4 French Immersion – Commitment Letter
P-5 Basic Kindergarten Readiness – Skills Check List
P-6 Letter: February 12, 2002 – Notice of Lottery Results
P-7 District Minutes – January 22, 2001
P-8 District Minutes – March 21, 2002
P-8a District Minutes – January 14, 2002
P-9 French Immersion – Commitment Letter
P-10 Letter: June 5, 2001 – Monillas to J.B.
P-11 District's Kindergarten Entrance Requirements
P-12 District Minutes – May 20, 2002
P-12a District Minutes – June 17, 2002
P-12b District Minutes – June 24, 2002
P-13 February 2001 – Application for Funding
P-14 Funding for French Program
P-15 Letter: June 5, 2001 – Monillas to J.B.
P-16 District's Policy #5112
P-17 Letter: August 3, 2002 Repici to R.K. & J.K.
P-18 KRT Test Booklet (Sealed)
P-19 C.C.L.'s KRT Test Manual (Sealed)
P-20 KRT Manual Excerpt
P-21 Intentionally Skipped (See P-19)
P-22 DIAL-3 Parent Questionnaire
P-23 Intentionally Skipped (See P-19)
P-24 District Policy 0134
P-25 District Policy 0125
P-26 District Policy 5750
P-27 French Immersion Committee Minutes
P-28 District's Mission Statement - April 15, 2002
P-29 District Policy 2110.1
P-30 Resume'/Curriculum Vitae-Janice G. Dennis, M.A.
P-31 Report of Janice G. Dennis, M.A.

For Respondent:

None

WITNESSES

For Petitioner:

G.L.L.	Father of C.C.L.
N.M.L.	Mother of C.C.L.
Debbie Miller	Teacher & KRT Examiner
Janet Norbury	Social Worker and CST Member
John Phillips	Principal Primary School
Carmine Bonanni	Former Superintendent of Schools
Dr. Albert Monillas	Former Superintendent of Schools
Janice G. Dennis, M.A.	Petitioner's Expert

For Respondent:

None

OAL DKT. NO. EDU 6173-02
AGENCY DKT. NO. 262-8/02

G.L.L. AND N.M.L., on behalf of minor child, C.C.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UPPER TOWNSHIP, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, including nine hearing tapes, and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions[1] were submitted in accordance with *N.J.A.C.* 1:1-18.4[2] and were duly considered by the Commissioner in reaching his determination herein.[3]

In their exceptions, petitioners take issue with 15 of the "Factual Findings," in the Initial Decision, as follows:

> 1) Page 17 and 21 of the Initial Decision wherein the French Immersion Program was referred to as "extra-curricular." Petitioners submit that the French Immersion Kindergarten Class is a regular kindergarten class in which the New Jersey Core Curriculum courses are taught and that the only difference in this program as opposed to the standard kindergarten program is that most subjects are taught in French. (Petitioners' Exceptions at 2)

[1] Petitioners enclosed an unofficial transcript of the hearing conducted on October 3, 2002 and Petitioners' Closing Argument Brief, which was filed in proceedings before the Administrative Law Judge (ALJ) with their exceptions.

[2] Notwithstanding the filing of exceptions by counsel on their behalf, petitioners submitted a letter, dated February 19, 2003 and received on February 24, 2003, pertaining to the instant matter. In that petitioners' submission was not timely filed pursuant to *N.J.A.C.* 1:1-18.4, this letter was not considered.

[3] Respondent did not file exceptions to the Initial Decision, nor reply to petitioners' exceptions.

2) Page 8 of the ALJ's summary of facts, wherein it is stated that "[o]nce a standardized test is administered, it is preferable not to have the student re-take the test." Petitioners point out that the Kindergarten Readiness Test (KRT) booklet states that "the test may be re-administered within a month's time, if the examiner feels it is warranted." (Petitioners' Exceptions at 2)

3) "There was not sufficient time to permit a reexamination of the test. Page 8 of the Decision." Petitioners claim that there was more than enough time to re-administer the KRT to their child, given that the test was administered at the end of May and the Commitment Letter for the Cohort II class provides for the administration of the test in June. (*Ibid.*)

4) "The French Immersion Program is more intense and more difficult than the regular Kindergarten class." Petitioners assert that the program is for all levels of students and that the immersion program covers the same curriculum as the regular kindergarten class. The extended day, petitioners posit, is for additional curricular areas including cultural factors and writing in script. (*Id.* at 3)

5) "The KRT is objective and an indicator of readiness for kindergarten as well as French." Petitioners argue that "the primary purpose of the KRT is to assess the child's readiness for school" and that, according to petitioners' expert witness, Janice Dennis, the KRT is "not an appropriate instrument to be used as a determining factor in admission into a foreign language immersion program" and that the KRT is meant to be used in combination with other factors. (*Id.* at 3-4) Moreover, petitioners assert that the previous superintendent, Dr. Monillas, a witness for petitioner, testified that, if he were still the superintendent, he would consider the KRT as one indicator of readiness for kindergarten. Petitioners also aver that Dr. Monillas stated that, in considering the child for admittance into the immersion program, he would consider the fact that the child's mother spoke French in the home and then determine what was in the best interest of the child. (*Id.* at 4)

6) "On Page 71 of the opinion, the Court finds that the KRT was used as a screening device." Petitioners take issue with this language and aver that the KRT was used as an exclusionary device. (*Ibid.*)

7) "Page 19 of the opinion. The evidence and testimony support respondent that the primary purpose of the KRT was to make sure that a child who was not ready for kindergarten did not get into a

more intense program." Petitioners submit that the French Immersion Program was not a more difficult program and that that was not the purpose of the KRT. Petitioners also point to Janice Dennis's testimony that none of the other French Immersion Programs she studied administered an entrance or admission exam. (*Id.* at 5)

8) "Page 21 of the Decision. C.C.L.'s father testified that the KRT test was a reasonable tool to screen students for the French program. He did agree that the District's use of the KRT exam was reasonable. Petitioners claim that these answers were elicited by the ALJ from the father, a layman, who did not understand the implications of his answers and that in direct examination afterwards, the father clarified that it was reasonable to administer the KRT as an assessment, but not reasonable to exclude a child from a program by that assessment alone. (*Ibid.*)

9) "Page 16 of the opinion. In referring to Janice Dennis's opinion concerning other districts 'the data supports that some districts use a post-admission exam while Respondent uses a pre-admission exam.'" Petitioners argue that there is a big difference between a post-admission and pre-admission exam because the pre-admission exam excludes students from participating. (*Id.* at 6)

10) "Page 16 of the Decision. Petitioner cannot complain about or fault the decision by the District if Petitioner withheld pertinent information prior to the KRT exam." Petitioners advance the argument that they did contact the child study team concerning their son's background and difficulties in January 2002, prior to the KRT test, and also requested a retest on the KRT within 30 days of the child's testing, which is provided for in the KRT manual. (*Ibid.*)

11) "Page 3 of the Decision. Upon revising the program for the second year, the district concluded the academic intensity of the French Immersion Program together with the increased applications for the program, necessitated that a lottery method of selection and a minimum threshold-readiness be part of the admission process." Petitioners rely on Dr. Monillas' testimony, who, according to petitioners, testified that he established the lottery to exclude students from the program and that the KRT was established not to limit the number of students in the class, but to give an opportunity to go into a remedial reading program. (*Ibid.*) Petitioners also claim that Dr. Monillas testified that it was not his intent that if a child was educationally handicapped and would

have difficulty in taking the test, that he would be excluded from the immersion program. (*Id.* at 7)

12) "The parents' [chief concerns] at the time of the Dial 3 evaluation were related to C.C.L.'s behavior rather than the skills." Petitioners dispute this, stating that the child study team, in particular Janet Norbury, was advised as to the problems relating to their son's academics, as well as behavior. (*Ibid.)*

13) "The KRT test was properly administered and graded by Debbie Miller, an experienced teacher." Petitioners aver that Ms. Miller admitted that she had trouble scoring the test ad that she was not aware that the KRT could be re-administered within 30 days. (*Id.* at 8)

14) "Debbie Miller stated that she would not have aided CCL even if she was aware of his personal medical history." Petitioners deny that Ms. Miller gave such testimony, proferring that she did not know the child's history to even speculate on what she might have done. (*Id.* at 9)

15) "[Dr. Monillas] also stated that if a student scored below 31 and thus evidenced a lack of readiness, they would be permanently excluded from the program. He did not intend for the KRT test or a different test to be retaken." (Initial Decision at 9) Petitioners contend that Dr. Monillas did not have much knowledge about the KRT test, did not read the manual or the part of the test that said it may be re-administered and never said that he did not intend for the KRT test to be retaken. (Petitioner's Exceptions at 10)

As part of their exceptions, petitioners also submit what are characterized as "Additional Factual Findings," which aver that: 1) the letter of commitment for the French Immersion Program did not specify that a child scoring below 30 on the KRT would be offered the Title I full-day kindergarten program (*Id.* at 7); 2) although the KRT booklet specifies that the examiner has the option to re-administer the test, the decision as to whether to retest was made by the principal and supported by the acting superintendent (*Id.* at 8); 3) Ms. Miller and the principal were advised of the child's background by his father (*Ibid.*); 4) the reasons provided to petitioners for not allowing the retest were that Dr. Monillas had established the rules and the principal and acting superintendent could not change them, the visibility of the immersion

program, the lack of time to retest and the effect on others who wanted to be in the program (*Ibid.*); 5) it is not educationally unreasonable to have 23 students in the class (*Id.* at 9); 6) the child's Dial 3 assessment indicated that he was progressing and developing adequately for his age (*Ibid.*); 7) the father testified that the test was given in 15-minute periods (*Ibid.*); 8) the child did better at the beginning of the test and faltered as the test went beyond 15 minutes, toward 30 minutes (*Ibid.*); 9) "the child's attention span was not adequate for the complete evaluation session as he would not focus and the child needed repeated instructions to stay on track" (*Ibid.*); 10) the KRT manual states that the KRT is intended to be used in combination with other factors in helping a parent to determine whether the child is developmentally ready to begin kindergarten (*Id.* at 10); 11) the KRT manual states that the KRT is sensitive to identifying those children with handicapping conditions and those children scoring below the average range should not be discouraged from beginning school until formal evaluations are made to determine whether a child has such handicapping condition (*Ibid.*); and 12) the KRT manual states that handicapped and non-English speaking children should be assessed using a variety of measures and that social, familial and cultural environments should be considered when a significantly low score is obtained. (*Ibid.*)

Additionally, petitioners submit "Legal Exceptions," essentially restating arguments presented in the "Factual Findings" and "Additional Factual Findings." Petitioners do state their agreement that the appropriate standard to be applied to the district's administrators' decision in this matter is that of whether such decision was arbitrary, capricious and unreasonable. (*Id.* at 11) Petitioners also agree that holding a lottery for admittance into the French Immersion Program in order to limit the size of the class was an objective method of limiting the class size. (*Ibid.*) However, petitioners take issue with the requirement that a child score above a 30 on the KRT as a condition of admittance into the French Immersion Program.

(*Ibid.*) Petitioners point out that the French Immersion Program is not a gifted and talented program and that practically everyone can be successful. (*Ibid.*)

Petitioners also argue, *inter alia,* that the Board did not take into consideration the fact that the child's mother is a French national, that French is spoken in the home, that the child is an adopted child of African-American descent, who has a history of being born drug-addicted, with a hearing problem and raised in foster homes, and that the child study team evaluated the child with a Dial 3 screening and found the child to be "okay," with no further assessment for handicapping conditions warranted. (*Id.* at 12) Petitioners reiterate their argument that the KRT gives the discretion of whether to retest a child to the person administering the test, not to the principal and acting superintendent. (*Ibid.*) Petitioners further claim that to use the KRT as an exclusionary device for admission into the French Immersion Program is an unreasonable and arbitrary use of this instrument because the KRT is not designed for this purpose. (*Ibid.*) Moreover, petitioners submit that the principal's decision denying re-administration of the test after petitioners provided information on the child's history was an arbitrary and capricious act. (*Id.* at 13) Petitioners further argue that the use of the KRT score to exclude a child from the immersion program is making use of a test which is not rationally related to the learning of the French language and, therefore, the question is posed, "How could one use a test for kindergarten readiness that is not even used to exclude a child from entering the kindergarten class, to now preclude a child from entering into a French program?" (*Id.* at 14)

Finally, petitioners take exception to the ALJ's conclusion that *Borough of Lawnside* is distinguishable from this matter. (*Id.* at 14) Petitioners aver that *Lawnside* is on point because the KRT is an assessment test and is meant to be utilized with other factors in making decisions concerning the child being tested. (*Ibid.*) Moreover, petitioners assert, that, as

in *Lawnside*, the decision makers in the instant matter lacked familiarity with the provisions for the re-administration of the KRT. (*Ibid.*)

Upon his full and independent review, the Commissioner concurs with the ALJ that petitioners have failed to establish that the managerial decisions of the District denying petitioners' son admission into the French Immersion Program for the kindergarten class of 2002-2003 were arbitrary, capricious or unreasonable.

In so determining, the Commissioner notes that the fact that petitioners disagree with the Board's selection criteria for the French Immersion Program and its decision not to waive its policy as to their son does not make the Board's decision improper; nor does petitioners' suggestion that other school professionals or Boards might establish different criteria for admission to a French Immersion Program or decide differently with respect to the appropriateness of re-administering the KRT when a low score is achieved, render the Board's decision arbitrary. As set forth by the ALJ, the standard of review for arbitrary, capricious or unreasonable action is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education. The standard defined by the New Jersey courts states:

> In the law, "arbitrary" and "capricious" means having no rational basis. (citation omitted) *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two options, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (citations omitted) Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (citation omitted) *Bayshore Sew. Co. v. Dep't. of Env.*122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974)

In the instant matter, the Board established clear selection criteria, including selection via a lottery and a score of 31 or above on the KRT, for admission into the French Immersion Program and applied such criteria in a consistent manner. Moreover, the commitment letter, signed by the child's mother and faxed to the Board on February 3, 2002, prior to the administration of the KRT test, contains clear and unambiguous language, advising that:

> As the parent or guardian of an enrolling student, you are hereby stating your interest and commitment to enrolling your child in this program *with the following conditions:*
>
> * * * * *
>
> Full understanding that if your child scores 30 or below on the KRT (Kindergarten Readiness Test) that your child will not be admitted to the program. (emphasis in text) (Exhibit P-4, in evidence)

In assessing the reasonableness of the Board's cutoff score of 31 as the minimum score for entry into the program, the Commissioner observes that the Scoring Interpretation appearing in the KRT booklet provides school districts with the following evaluative information:

45-49	above average
42	the median score
38-44	average
31 to 37	lower average
24-30	below average, questionable readiness
below 23	a parent should check with local school personnel (Exhibit P-18 at 33)

Given these evaluative interpretations, the Commissioner finds that the Board's decision to establish a cutoff score of 31 on the KRT as a minimum score for participation in the French Immersion Program to avoid placing an immature child in a difficult program was rational and within the realm of the Board's decision-making authority. In that C.C.L.'s score of

28 falls in the 57th percentile and in the below average, questionable readiness range, it is undisputed that his score did not meet the minimum score required. (Exhibit P-18) Although the Board was not precluded from re-administering the test to C.C.L. as requested by his parents, there was no provision, nor requirement to do so in the Board's established selection process for the immersion program.

With respect to petitioners' claim that the French Immersion Program is a regular kindergarten class except that most classes are taught in French, and, thus, not "extra-curricular" as the ALJ states, the Commissioner points out that the ALJ most likely characterized this program as "extra-curricular" because school districts are not required by law to offer kindergarten programs, but may do so pursuant to *N.J.S.A.* 18A:44-2. It makes no difference for purposes of entitlement, however, whether the French Immersion Program is deemed curricular or extra-curricular because it is well-established that the protected interest is "the right to participate in the entire educational process and not the right to participate in each individual component of the process." *Glidden, supra* at 73. Thus, petitioners cannot establish a protected property interest in participating in an individual component of the school's curriculum, such as the French Immersion Program, at issue herein. *See E.A., Sr. supra; Glidden, supra; and Gross, supra.*

Additionally, the Commissioner agrees with the ALJ that this matter is distinguishable from the *Borough of Lawnside, supra,* in that, unlike *Lawnside*, the selection criteria established in this instance was clearly set forth and administered in such a way as to be fair to all students who desired to participate. Also, in *Lawnside*, a gifted student was denied access to the National Honor Society due to a flawed methodology and the decision makers' unfamiliarity with the selection criteria; whereas the child in this matter was administered the

KRT by a qualified staff member and simply did not meet the selection criteria due to a low score on the KRT indicating questionable readiness to enter kindergarten.

The Commissioner, therefore, concludes that petitioners have failed to meet their burden in establishing that the Board's use, administration or grading of the KRT as a selection criterion for the French Immersion Program was arbitrary, capricious or unreasonable. Accordingly, the Initial Decision of the OAL is affirmed for the reasons detailed therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED. [4]

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

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

110-03

IN THE MATTER OF THE TENURE	:	
HEARING OF ERNIE CHAVEZ,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
PHILLIPSBURG, WARREN COUNTY.	:	DECISION
_____	:	

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3312-02

AGENCY DKT. NO. 73-3/02

IN THE MATTER OF THE TENURE HEARING OF ERNIE CHAVEZ, PHILLIPSBURG BOARD OF EDUCATION, WARREN COUNTY

Richard H. Bauch, Esq., appearing for petitioner Board of Education of the Town of Phillipsburg (Schenck, Price, Smith & King, LLP, attorneys)

Mary Frances Palisano, Esq., appearing for respondent Ernie Chavez (Law Office of Alan L. Zegas, attorneys)

Record Closed: January 21, 2003 Decided: January 29, 2003

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATE OF THE CASE AND PROCEDURAL HISTORY

Petitioner Phillipsburg Board of Education (Board) certified tenure charges of conduct unbecoming a school employee against teacher Ernie Chavez (respondent) under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to 18.1. The Bureau of Controversies and Disputes of the Department of Education transmitted the matter to the Office of Administrative Law (OAL) on April 5, 2002, for hearing as a contested case,

At the settlement conference on June 11, 2002, settlement discussions were held and a settlement was reached. Ultimately, the settlement was reduced to writing signed

by the parties and approved by the Board. Based upon a review of the record and testimony at the hearing, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Mr. Chavez has been an employee of the Board and has acquired tenure as a teaching staff member.

2. During the 1999-2000 and 2000-2001 school years, certain allegations of improper conduct toward a female student were made against Mr. Chavez.

3. The Board determined, after investigation, to charged Mr. Chavez with multiple counts of conduct unbecoming a school employee, as this term is used in *N.J.S.A.* 18A:6-9, and charged that this conduct warranted Mr. Chavez's dismissal (See Board's Petition and Statement of Supporting Evidence).

4. Prior to the hearing, the parties became convinced that it was in the public interest to settlement this matter.

5. The Board represented that it decide to settle rather than try the matter for several reasons, including that the students involved, of middle school year, feared testifying, the Board's sincere belief that the students might be traumatized by a formal hearing, inconsistencies in student's statements could undermine the Board's case, a settlement would result in a complete and permanent separation as desired by the Board, and the Board's concern with litigation expense.

6. Mr. Chavez, under oath, testified credibly and appropriately that he understood the ramifications of the settlement and he agreed to them.

7. Mr. Chavez expressly understood that the Commissioner of Education may refer this matter to the State Board of Examiners for possible certificate revocation proceedings. Before entering into the agreement, Mr. Chavez was advised by counsel and fully understood his rights.

8. The parties have voluntarily entered into the agreement, which fully disposes of all issues in controversy and is consistent with law.

Therefore, I **CONCLUDE** that the terms of the settlement are in the public interest as well as the parties' interest and otherwise meets the requirements of *N.J.A.C.* 6A:3-5.6.

ORDER

It is **ORDERED** that the parties comply with the terms of the settlement and that these proceedings are hereby concluded.

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

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

January 29, 2003
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

January 31, 2003
DATE

M. Kathleen Dennean (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "Agreement") is made and entered into this 6th day of ~~December, 2002~~ January, 2003, by and between the BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, with its administrative offices located at 445 Marshall Street, Phillipsburg, New Jersey 08865 (hereinafter referred to as the "Board" or "District") and ERNIE CHAVEZ, whose address is P.O. Box 204, 2570 Route 57, Stewartsville, New Jersey 08886 (hereinafter referred to as the "Employee").

WITNESSETH:

WHEREAS, the Employee is an employee of the District and presently is employed as a teaching staff member by the Board; and

WHEREAS, the Phillipsburg Education Association (hereinafter, the "Association") is the exclusive majority representative of all non-supervisory teaching staff members employed in the District, including Employee: and

WHEREAS, the Employee's current terms and conditions of employment are set forth in a collective negotiations agreement between the Board and the Phillipsburg Education Association covering the period of July 1, 1999 through June 30, 2002 (hereinafter "PEA Agreement"); and

WHEREAS, during the 1999-2000 and 2000-2001 school years certain allegations of inappropriate conduct toward a female student were made in connection with the Employee during the course of teaching his Careers Class; and

WHEREAS, the Employee was suspended with pay pursuant to said allegations on or about November 1, 2000 pending further investigation; and

WHEREAS, investigations of the alleged incident were conducted by the Warren County Prosecutor's Office and the Division of Youth and Family Services ("DYFS"); and

WHEREAS, said investigation conducted by the Warren County Prosecutor's Office did not result in the filing of criminal charges against the Employee; and

WHEREAS, said investigation conducted by DYFS did not result in the filing of formal charges against the Employee; and

WHEREAS, the District conducted an internal investigation of said allegations; and

WHEREAS, as a result of the District's internal investigation, the Superintendent recommended to the Board that the filing of tenure charges against the Employee for conduct unbecoming a teacher was justifiable and warranted; and

WHEREAS, the Superintendent did, in fact, file with the Board Secretary a Statement of Charges Under the Tenure Employee Hearing Act charging the Employee with Conduct Unbecoming a Public Employee ("Charges"); and

WHEREAS, the Employee, through his attorneys, responded to the Charges, denying that he had committed any acts constituting conduct unbecoming a public employee and noting that he had been cleared of charges by the Warren County Prosecutor's Office and the Division of Youth and Family Services; and

WHEREAS, case was transferred by the Commissioner of Education to the Office of Administrative Law ("OAL") and assigned for hearing before the Honorable William Jeremiah, A.L.J.; and

WHEREAS, Judge Jeremiah, so that they might avoid the uncertainties of litigation and the time, expense and trauma that would be incurred by a protracted hearing, urged the parties to consider potential settlement of this matter; and

WHEREAS, all the key fact witnesses for the Board concerning the main series of incidents which led to the filing the Charges, were children of middle school age who were testifying against their will and who expressed themselves and through their parents, their significant fear and anxiety of testifying in court; and

WHEREAS, prior statements given by these students to the police and to the District had a number of inconsistencies which would have subjected the students to rigorous cross-examination, possibly undermining the Board's case against Employee; and

WHEREAS, the students' parents urged the Board to attempt to resolve the case so that their children would not have to testify; and

WHEREAS, in view of its sincere concerns that the student witnesses might be traumatized by a formal hearing, that inconsistencies in student statements and testimony could undermine the Board's case, its determination that any settlement must include a complete and permanent separation between the Employee and the District, a result that might not be achieved if the litigation proceeding to a plenary hearing, and its concern that litigation expenses could cause the expenditure of monies that otherwise could be used to support education within the District, the Board determined that it would be in the public interest to enter into settlement negotiations with Employee; and

WHEREAS, the parties agreed to utilize mediation with the Honorable Margaret Hayden, A.P.A.L.J.; and

WHEREAS, after negotiating in good faith, with the assistance of Judge Hayden, the parties, through their respective counsel, reached an agreement on June 11, 2002 providing for a complete a resolution of their dispute within the parameters of the law regarding the settlement of tenure charges, and which precluded the necessity of having children of impressionable years testifying in court and provided for the Employee's complete separation from employment in the District; and

WHEREAS, following the execution of a Memorandum of Understanding setting forth the terms and conditions of the parties' agreement, which included their agreement to enter into this more formal and comprehensive Settlement Agreement, Judge Hayden took testimony from the Employee confirming that he was entering into the settlement of his own free will, voluntarily and without coercion, and that he was satisfied with the legal representation he had received throughout this matter and specifically during the settlement negotiations; and

WHEREAS, pursuant to the aforesaid Memorandum of Understanding, the parties hereto wish to memorialize their promises and covenants more formally in this Agreement; and

WHEREAS, the Association consents to the parties entering into this Agreement;

NOW, THEREFORE, the Board and the Employee, for the consideration specified below, set forth the following mutual covenants and agreements:

1. RESIGNATION. The Employee hereby tenders with this Agreement his signed and irrevocable resignation from employment with the District, which shall be effective immediately upon the approval by the Commissioner of Education of this Agreement.

2. COMPENSATION. As partial consideration for the Employee's agreements in this Agreement, the Board agrees that, following the approval of this Agreement by the Commissioner of Education, the Board will pay to the Employee, commencing thirty (30) days following the approval of this Agreement by the Commissioner, pursuant the payment schedule set forth below in this paragraph, the amount of $30,000.00, plus $3,352.00 representing a senior service increment he would have received during the 2000-2001 school year, plus a prorated amount of the I.A. Club Co-Advisor stipend, Soccer Club stipend, and Freshman Boys Soccer Coach stipend, all amounts based upon the collective negotiations agreement between the Board and the Association in effect covering the 2000-2001 school year. All amounts set forth in this paragraph are gross amounts and will be subject to required withholding including taxes and pension. The amounts to be paid pursuant to this paragraph will be paid in biweekly equal payments on the 1st and 15th of each month for a period of three (3) months until fully paid. Other than the aforesaid amounts set forth specifically in this paragraph, the Employee will not be entitled to any other payment from the District of any kind whatsoever for any period of time.

3. OTHER PROCEEDINGS. The Employee expressly understands that the Commissioner of Education may refer this matter to the State Board of Examiners for possible certificate revocation proceedings. By entering into this Agreement, the Employee is not waiving any rights he may have to defend against such a proceeding. Despite this understanding that he may suffer revocation of his teaching certificate, the Employee agrees to enter into this Agreement.

4. The Board Agrees not to initiate any proceedings before the Division of Pensions that would prejudice the Employee's pension rights. The Employee understands that the Board of

Trustees of the Teachers Pension and Annuity Fund may determine to take action regarding the Employee's pension which may adversely affect his right to receive a pension. Despite this understanding that his pension rights may be adversely affected by entering into this Agreement, the Employee agrees to enter into this Agreement.

5. FUTURE EMPLOYMENT. The Employee agrees that, subsequent to the approval of this Agreement by the Commissioner of Education, he will not apply for employment with the Board or volunteer for any Board-sponsored programs/activities.

6. NO CONTACT. The Employee agrees that he will not knowingly initiate any contact with any witnesses set forth on the witness list provided to him by the Board during the pending litigation and that he will have no knowing contact with the student witness designated as B.V.N. or any member of her family.

7. ATTENDANCE AT BOARD-SPONSORED EVENTS. The Employee agrees that, for a period of seven (7) years commencing September 1, 2002, he will not come on Board property or attend any athletic events at any other location involving Phillipsburg School District students with the following exception: The Employee may attend athletic events in which his son, K.C., is participating provided that Employee will use his best efforts to avoid direct contact with any students who were in his 2000-2001 7th period Careers Class.

8. SERVICE LETTER. Upon request, the Board will provide a neutral service letter stating the Employee's dates of employment, positions held in the District, and reason for separation. Nothing in this Agreement will preclude the Board from releasing information required by law, regulation and/or Executive Order.

9. CONFIDENTIALITY. As further consideration for this Agreement, the parties agree that, following the full execution of this Agreement, they will keep all terms of this Agreement completely confidential. It is expressly understood and agreed that, following the full execution of this Agreement, neither the District, the Employee, or their attorneys or representatives will take any action to publicize the terms or nature of this Agreement, except that disclosure is permitted: (1) as necessary with regard to any proceeding for the enforcement

of this Agreement; (2) as may be required by any court or agency of competent jurisdiction; and (3) as may be required by law.

10. NO ADMISSION. By entering into this Agreement, the Employee is not admitting liability or guilt regarding any of the factual or legal allegations set forth in the Charges or in other related documents. The Employee reserves all his defenses for any future proceeding.

11. NO REIMBURSEMENT OF ATTORNEYS FEES AND COSTS. The Employee and the Board each are responsible for the payment of their own attorneys fees and costs incurred in this matter.

12. GENERAL RELEASE. As further consideration for the Board's covenants as set forth in this Agreement, upon the full execution of this Agreement, the Employee, for himself and his past, present and future heirs, agents and representatives, forever and irrevocably releases and discharges the Board, its members, officials, employees, representatives, agents and attorneys (collectively referred to as the "Board") from any and all claims they may have against the other resulting from anything that has happened up to the date of this Agreement, including claims of which he is unaware and claims which are not specifically released and given up in the following language. The Employee specifically releases and gives up any and all claims which he may have against the Board arising from or relating to Employee's employment with the Board and/or arising from or relating to the filing and prosecution of the Charges and/or Employee's separation from employment with the Board, including, but not limited to, claims arising under (1) the Constitution of the United States, (2) the Education Laws of the State of New Jersey, *N.J.S.A.* 18A:1-1 *et seq.,* including but not limited to the Tenured Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.,* (3) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, (4) the Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.*, (5) the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, (6) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (6) the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, (7) the Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, (8) the Constitution of the State of New Jersey, (9) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (10) the Conscientious Employee Protection Act, *N.J.S.A.* 35:19-1 *et seq.*, (11) the

New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, (12) any expressed or implied contract between the Board and the Employee, whether oral or written, (13) any collective negotiations agreement, (14) all regulations promulgated pursuant to any of the aforementioned laws, (15) any other Federal, State, County, local or Board common law, statutes, ordinances, resolutions and regulations not mentioned above, and (16) any employment manual or handbook or personnel or Board policies. Specifically excepted from this release are any claims or rights arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Law, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that the Employee is not entitled to have the Board pay any amounts for her or his dependents' health insurance continuation coverage under COBRA.

13. CONSULTATION. The Employee represents that he has been offered the opportunity to consult with an attorney during the negotiations and development of this Agreement. Employee further represents that during the negotiations and development of this Agreement he has been represented by his attorneys, Mary Frances Palisano, Esq. of the Law Offices of Alan L. Zegas, and that she fully explained all provisions of this Agreement and its consequences to the Employee before the Employee signed this Agreement. The Employee represents that he is fully satisfied with the advice he received from Ms. Palisano.

14. NO COERCION. The Employee represents that the only consideration for signing this Agreement is the terms actually stated in this Agreement and that no other promises or agreements of any kind have been made to the Employee by any person or entity whatsoever to cause the Employee to sign this Agreement. The Employee represents that he fully understands the meaning and intent of this instrument and that he is voluntarily signing this Agreement of his own will without coercion or duress. The Employee understands, accepts and agrees to all of the terms of this Agreement.

15. APPROVAL. This Agreement is subject first to the approval of the Phillipsburg Board of Education, then by the Office of Administrative Law, and finally by the Commissioner of

Education, before it becomes a legally binding document. The parties agree to produce and execute any documents and to take any acts that may be required to effectuate the terms, conditions and spirit of this Agreement.

16. NO TAX ADVICE. The Employee acknowledges that the Board has made no representations to him regarding the tax implications of this Agreement.

17. GOVERNING LAW. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

18. PLAIN MEANING. The terms and conditions of this Agreement shall be construed according to their plain meaning, and shall not be construed in favor of or against either the Employee or the Board.

19. HEADINGS. The headings set forth in this Agreement are merely for the convenience of the reader and it is expressly understood and agreed that the headings shall not control or modify the meaning of this Agreement in any way.

20. WHO IS BOUND. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, as well as the Employee's heirs and the executor of his estate, also are bound. This Agreement is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, employees, agents, attorneys, successors and assigns.

21. NOTICES. Any notices required to be sent pursuant to this Agreement shall be considered to be effective when sent by certified mail, return receipt requested, to:

To the Employee:

Ernie Chavez
P.O. Box 204
2570 Route 57
Stewartsville, NJ 08886

To the Board:

Board Secretary
Phillipsburg Board of Education
445 Marshall Street
Phillipsburg, New Jersey 08865

Any changes in the above addresses must be provided by certified mail, return receipt requested to the other party.

22. NON-AGREEMENT OR NO APPROVAL. If this Agreement is not fully executed by all parties, then this Agreement shall become null and void and shall be of no effect and, whereupon, the District immediately shall proceed with the continued prosecution of the Charges against the Employee as provided by law and regulation. In the event that either the Office of Administrative Law or the Commissioner of Education fail to approve this Agreement, then, subject to the parties' appellate rights, the parties agree to follow the last legal ruling and either pursue continued efforts to settle this matter or proceed to litigation as directed by the Commissioner of Education or other tribunal of competent jurisdiction. In the event that this Agreement is not approved by the Office of Administrative Law or the Commissioner of Education neither party shall refer to it in the pending or any future litigation.

23. COMPLETE AGREEMENT. This Agreement embodies the entire agreement between the parties hereto and supersedes any prior or contemporaneous agreement, representation or understanding, whether written or oral. This Agreement may not be modified except by written instrument executed by all the parties hereto and approved by the Commissioner of Education.

END OF PAGE

PLEASE READ THIS SETTLEMENT AGREEMENT CAREFULLY. IT IS A LEGAL DOCUMENT. IT INCLUDES ERNIE CHAVEZ'S AGREEMENT TO GIVE UP CERTAIN KNOWN AND UNKNOWN CLAIMS AGAINST THE BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, ITS MEMBERS, OFFICIALS, OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES AND ATTORNEYS.

IN WITNESS WHEREOF, the parties hereto set their hands and seals to this Separation Agreement effective on the day and year first above written.

ERNIE CHAVEZ

STATE OF NEW JERSEY, COUNTY OF WARREN SS.:

I CERTIFY that on the 17th day of December, 2002

Ernie Chavez personally came before me and acknowledge under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as her act and deed.

Sworn and subscribed to before me
this 17th day of December, 2002.

Mary Frances Palermo

BOARD OF EDUCATION OF THE
TOWN OF PHILLIPSBURG,
WARREN COUNTY

By: _____
Roderick L. Pianelli
President

ATTEST:

_____
William W. Poch
Board Secretary

CONSENT

The Phillipsburg Education Association, Inc. hereby consents to the implementation of the terms and conditions of this Agreement this _____ day of December, 2002.

PHILLIPSBURG EDUCATION ASSOCIATION, INC.

By: _____
George Chilmonik
President

December 17, 2002

To the Phillipsburg Board of Education

Please be advised that I hereby resign my employment with the Board of Education of Phillipsburg, effective immediately, pursuant to and in reliance upon the Board's performance of the material terms and conditions of the attached Separation Agreement and General Release ("Agreement").

Sincerely,

Ernie Chavez

EXHIBIT "A"

Document #: 559606/RHB

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, NJ AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Town of Phillipsburg in the County of Warren, NJ, convened in Regular Session on Tuesday, February 25, 2003, at 7:30 p.m., in the Commons of the Phillipsburg Middle School, 525 Warren Street, Phillipsburg, New Jersey.

The following members of the Board of Education were present:

Mrs. Patricia Babcock
Mr. Bernie Brotzman
Mr. D. John Harper
Mr. Stanley Hughes
Mr. Thomas F. McGuire
Mr. Paul Rummerfield
Mr. Richard Pensack
Mrs. Irene M. Weller
Mr. Gary R. Willis
Mr. Chafik Zarbatany
Mr. Roderick L. Pianelli

The following members of the Board of Education were absent:

Mr. Frank Kish

The following resolution was offered by Mr. Hughes and seconded by Mr. McGuire and adopted by the Board of Education by the following Roll Call vote:

TITLE: Adopt resolution ratifying final executed form of Settlement Agreement

RESOLVED: Move to adopt the attached resolution ratifying the final executed form of Settlement Agreement, as recommended by the Superintendent.

AYES: Mr. Brotzman, Mr. Harper, Mr. Hughes, Mr. McGuire, Mr. Rummerfield, Mrs. Weller, Mr. Willis, Mr. Zarbatany, President Pianelli

NAYS: None

STATE OF NEW JERSEY)
COUNTY OF WARREN)

I, William W. Poch, Secretary of the Board of Education of the Town of Phillipsburg, in the County of Warren, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on February 25, 2003, has been compared by me with the original minutes as officially recorded in the minute book of said Town of Phillipsburg, Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 26th day of February, 2003.

AFFIX SEAL:

William W Poch
Signature of Secretary

PHILLIPSBURG BOARD OF EDUCATION

ITEM NUMBER: 1.3

ACTION ITEM: Adopt resolution ratifying final executed form of Settlement Agreement

RESOURCE STAFF MEMBER(S): H. G. Pethick, J. Attinello, J. Milone

X **Regular Meeting** February 25, 2003

___ **Special Meeting**

X **Board Affairs**

___ **Business Affairs**

___ **Personnel Affairs**

___ **School Programs**

PERTINENT INFORMATION:
See attached resolution.

Account Number(s): N/A

RECOMMENDATION:
Move to adopt the attached resolution ratifying the final executed form of Settlement Agreement, as recommended by the Superintendent.

X **ITEM REQUIRES A ROLL CALL VOTE**

EXTENDED BOARD

RESOLUTION RATIFYING
FINAL EXECUTED FORM OF SETTLEMENT AGREEMENT
WITH ERNIE CHAVEZ

WHEREAS, Ernie Chavez (hereinafter the "Employee") currently is employed in the Phillipsburg Public School District ("District") as a tenured teaching staff member by the Phillipsburg Board of Education ("Board"); and

WHEREAS, following an internal investigation concerning allegations that the Employee engaged in conduct unbecoming a public employee, the Superintendent of Schools determined to file and did, in fact, file tenure charges against the Employee seeking his removal as a tenured teaching staff member in the District; and

WHEREAS, the Board subsequently met pursuant to its obligation under the Education Laws to consider the tenure charges and at that time voted to certify the tenure charges to the Commissioner of Education; and

WHEREAS, the Commissioner, pursuant to law and regulation, transferred the tenure charges to the Office of Administrative Law ("OAL") for a hearing before an administrative law judge; and

WHEREAS, on the first day scheduled for hearing the OAL conducted a settlement mediation conference and at that time the Board and the Employee, through their designated counsel negotiated for a non-litigation resolution to this matter; and

WHEREAS, during the settlement mediation, following extensive negotiations, the District's counsel was able to negotiate settlement terms that met the District's objectives in this litigation of seeking the Employee's removal as a tenured teaching staff member; meeting its responsibilities as a public school board; while sparing the Board's witnesses

from being required to testify in a formal tenure hearing; and minimizing the expense to the Board and the public from this tenure proceeding; and

WHEREAS, such settlement is subject to the Board's approval; and

WHEREAS, prior to the execution of a formal Settlement Agreement, the parties' reached agreement on a Memorandum of Understanding which was executed by the Employee and his counsel and which the Employee, on the record before the Honorable Margaret Hayden, A.L.J., stated he understood and agreed to; and

WHEREAS, the Board previously approved and ratified the confidential Memorandum of Understanding executed by the Employee and his counsel on June 11, 2002, and authorized the District's Special Counsel to finalize the language of a formal Settlement Agreement which will effectuate the terms of the confidential Memorandum of Understanding, and

WHEREAS, the Board authorized the Board President to execute the final form of the Settlement Agreement on the Board's behalf, upon receiving the approval of the District's Special Counsel and the Superintendent of Schools of the Agreement; and

WHEREAS, the parties' representatives did, in fact, reach a final form of the Settlement Agreement which was approved by District's Special Counsel and the Superintendent of Schools and which, pursuant to the Board's earlier resolution, was executed by the Board President in the presence of the Board Secretary; and

WHEREAS, the Superintendent of Schools recommends that the Board approve and ratify the final form of Settlement Agreement with the Employee; and

WHEREAS, the Board wishes to confirm that it approves of the final form of Settlement Agreement that has now been executed by all parties;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY, that the Board hereby approves and ratifies the final form of Settlement Agreement executed by all parties and transmitted to the Office of Administrative Law and is of the opinion that this agreement is consonant with the Education Laws and is in the best interests of the District, its constituents and all persons involved on behalf of the District in this matter; and

BE IT FURTHER RESOLVED that the District's Special Counsel is hereby authorized to take whatever actions are necessary and required to obtain final approval of the Settlement Agreement by the Commissioner of Education.

OAL DKT. NO EDU 3312-02
AGENCY DKT. NO. 73-3/02

IN THE MATTER OF THE TENURE	:	
HEARING OF ERNIE CHAVEZ,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
PHILLIPSBURG, WARREN COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

111-03

BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,

PETITIONER,

V.

THE CHILDREN'S INSTITUTE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board alleged that respondent, The Children's Institute (TCI), a nonprofit organization which operates an approved New Jersey State Department of Education private school for children with special education needs, submitted a tuition rebill for the 1999-2000 school year that was unreasonable, invalid and void *ab initio*. Respondent argued that the petition should be dismissed for failure to timely file.

Initially, the ALJ found that summary decision should not be granted against petitioner based on the issue of untimeliness since time limitations might have been relaxed if it was shown that petitioner was led to believe that it could informally seek relief and not be concerned with the time limitations. The ALJ, however, granted respondent TCI's Motion for Summary Decision finding summary decision was appropriate on the grounds that the record did not show that TCI's inclusion of lease termination costs and unamortized depreciation on leasehold improvements in the expenses of TCI for the 1999-2000 school year, in accordance with Generally Accepted Accounting Procedures, was patently unreasonable.

The Commissioner adopted the Initial Decision with modification.

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. : EDU 5132-02

AGENCY DKT. NO.: 67-3/02

BOARD OF EDUCATION CALDWELL – WEST CALDWELL,

Petitioner,

v.

THE CHILDREN'S INSTITUTE,

Respondent.

Mark A. Wenczel, Esq., for petitioner (Gaccione, Pomaco & Beck, attorneys)

Rodney T. Hara, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: January 22, 2003 Decided: January 28, 2003

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

FACTS AND PROCEDURAL HISTORY

TCI is a nonprofit organization, which operates an approved New Jersey State Department of Education private school for children with special education needs. TCI had entered into a 15-year lease with the Livingston Board of Education for land and a building to be used for a school. The lease began on July 1, 1990 and was due to expire on June 30, 2005. There existed a need for additional space at the leased facility. One of the components of the special education plan submitted to the Department of Education by TCI in 1992 was to address the need for building expansion. Continued permission from the Department of Education to utilize portable

classrooms was dependent on the good faith implementation of TCI's construction plans. TCI pursued the possibility of a purchase or long-term lease of their facility to address this need for additional space. There was also a concern by TCI, parents and students over the impact of electromagnetic fields from high-tension wires adjacent to the school. Readings of electromagnetic fields were taken in and around TCI's facility. Although the testing did not require the closing of the school, TCI continued to have concerns. TCI then terminated negotiations with the Livingston Board of Education. TCI accepted a donation of property in Verona from Hoofman-LaRoche, Inc. to be used as a school. Subsequently, TCI negotiated with the Livingston Board of Education to reach a lease termination agreement. After unsuccessful attempts to obtain a tenant on its own, TCI retained the services of a realtor, who was able to secure another tenant to mitigate TCI's financial obligations under the lease. TCI had five and one-half years remaining on its lease for a total obligation of $1,274,196.45. However, TCI negotiated a lease termination agreement in the amount of $361,998.00, in exchange for a release of its obligations. The realtor's commission resulted in an additional cost of $22,805.00.

During the 1999-2000 school year, five children from Caldwell's school district were placed with TCI. In 1999, Caldwell and TCI executed a tuition contract for each student, pursuant to which Caldwell paid TCI a tentative tuition charge of $166.00 per student. Based upon a ten-month school year, the tuition charge for the year was $29,880.00 per student.

Susan T. White of McKinley, White & Co., LLP, Certified Public Accountants, prepared the TCI audit for the 1999-2000 school year. The audited expenses included lease termination costs in the amount of $341,887.00 and $112,495.00 in unamortized leasehold improvements for TCI's former facility in the Township of Livingston. Based upon the audit, the certified actual cost per pupil was calculated by the auditor as $37,612.66 for the ten-month school year, which was $7,732.66 in excess of the tentative tuition rate of $29,880.00. TCI determined, after discussions between the auditor and Bruce Ettinger, Executive Director/Superintendent for TCI, that it would establish the tuition rate at $34,580.00 per pupil, which was $3,032.66 less than the certified actual costs per pupil.

TCI sent Caldwell a letter, dated December 5, 2000, with an invoice, dated December 1, 2000, rebilling Caldwell an additional $4,700.00 per student for $21,542.00[1] for the 1999-2000 school year to recover additional expenses associated with TCI's move to a new facility. By letter dated December 21, 2000, Thomas C. McMahon, Assistant Commissioner, Division of Finance, Department of Education, notified all public school districts, including Caldwell, that the per pupil undercharge reported by TCI was $7,600.00 and that the school districts should include the undercharges in the 2001-2002 budget, since payment must be made to the private school no later than June 30, 2002. However, this letter also stated that these preliminary adjustments must not be used for billing purposes and that the Office of Fiscal Policy and Planning, Department of Education, would review the private school audits to determine whether the costs were properly calculated and whether the audit meets the department's compliance requirements. The Office of Fiscal Policy and Planning approved TCI's tuition adjustment and audit by letter, dated May 3, 2001. This letter recommended that the private school promptly notify each district board of education of the audit adjustments within 30 days.

In a letter to the Commissioner from Ronald P. Skopak, Board Secretary/Business Administrator, dated May 30, 2001, Caldwell acknowledged receipt of notification from TCI that "an adjustment had been approved by the State Department of Education for the 1999/2000 school year of $4,7000.00 per pupil," and requested that the Commissioner review "the extraordinary charges" that were included in TCI's tuition adjustment. Mr. Skopak states, in his certification, that he drafted the letter after Jim Verner, Section Supervisor, Division of Finance, Department of Education, had told him that his only recourse was to send a letter to the Commissioner asking for an evaluation of the appropriateness of TCI's actions in incurring the lease termination and moving expenses.

By letter dated December 11, 2001, from Peter E. Genovese, III, Assistant Commissioner, Division of Finance, the Department of Education upheld TCI's rebill for the additional tuition as being for costs that were properly expensed on TCI's audited financial statements in accordance with regulations governing the assessment of tuition

[1] It is unclear how TCI arrived at this figure.

for private schools for the disabled and generally accepted accounting principles. As set forth in TCI's financial statements, TCI incurred costs in 2000 for the termination of its prior lease and also sustained a loss on the disposal of leasehold improvements.

On or about March 8, 2002, Caldwell filed a verified petition of appeal with the Commissioner, which challenged charges for additional tuition for the 1999-2000 school year. An answer was filed by TCI on or about April 26, 2002. The court issued a Prehearing Order in this matter on August 23, 2002. On December 6, 2002, TCI filed a brief in support of its motion for summary decision. Caldwell filed its brief in opposition to the motion on or about December 27, 2002. The court granted an extension for TCI to file its reply by January 21, 2003.

LEGAL DISCUSSION

Legal Issues and Arguments of the Parties

There are two issues that are involved in the motion for Summary Judgment:

The first deals with the issue of whether the Caldwell-West Caldwell Board of Education's ("Caldwell") petition of appeal should be dismissed for failure to timely file. The petitioner argues that the 90 day requirement for filing did not begin to run until after the district received a letter from Peter E. Genovese, III, Assistant Commissioner, Division of Finance, the Department of Education upholding the TCI's rebill for additional tuition. Under this scenario, the appeal petition filed on March 8, 2002 would be within the prescribed 90-day period. In the alternative, they argue that the "90 day rule" has been relaxed by the courts in special circumstances and that this matter falls under those exceptions.

The Respondent takes the position that the Board of Education received notice triggering the "90 day rule" as early as 2000, but at the latest May 2001. The petitioner failed to file within the prescribed time and therefore, their claim should be barred. In addition, they argue that there are no special circumstances that would call for an exception from the 90-day rule.

The second issue is whether the inclusion of lease termination costs and depreciation on leasehold improvements in The Children's Institute's ("TCI") expenses for the school year was patently unreasonable. The Respondent argues that the inclusion of lease termination costs and unamortized depreciation on leasehold improvements for the 1999-2000 school year was in accordance with G.A.A.P. and therefore, was not patently unreasonable. Caldwell argues that the standard should be whether the lease termination and moving costs incurred by TCE during the 1999-2000 school year were "ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds." Therefore, to find out if the costs were reasonable, testimony would have to be taken and Summary Judgment should be denied.

DISCUSSION:

STANDARD FOR SUMMARY JUDGMENT

The rules governing practice in the Office of Administrative Law provide that a motion for summary decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. The determination should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non- moving party, to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding.

N.J.A.C. 1:1-12.5(b).

The courts have further elaborated upon the issue of granting summary decision. The court, in *Brill v Guardian Life Ins Co of America*, 142 *N.J.* 520, 541 (1995), encouraged trial judges to evaluate and analyze competent evidential materials presented with the application and to consider whether when they are viewed in the light most favorable to the non-moving they are sufficient to permit resolution of the

alleged dispute in favor of the non- moving party. Id. at 540. Moreover, once the moving party has presented evidence in support of its application, the burden is on the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Id. at 529. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 *F. Suppl.* 255, 261 (D.N.J. 1998).

ISSUE #1—*THE "90-DAY" RULE*

The threshold issue deals with whether Caldwell's claim was timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d).[2] *N.J.A.C.* 6A:3-1.3(d) governs the filing of an action arising under the school laws and states in part that:

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

[*N.J.A.C.* 6A:3-1.3(d).]

In Kaprow v. Bd. of Ed. of Berkeley Township, 131 *N.J.* 572 (1993), the New Jersey Supreme Court held that the Commissioner and the State Board of Education have the authority to establish a time limitation for the resolution of disputes arising under the school laws and addressed the public policy reasons behind the 90-day rule:

The limitation period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. ... The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. ... *N.J.A.C.* 6:24-1.2(c) represents a

[2] *N.J.A.C.* 6:24-1.2(c) was recodified as *N.J.A.C.* 6A:3-1.3(d), effective April 3, 2000. The language of *N.J.A.C.* 6A:3-1.3(d), except for an addition not relevant here, is identical to *N.J.A.C.* 6:24-1.2(c). Therefore cases interpreting *N.J.A.C.* 6:24-1.2(c) apply to *N.J.A.C.* 6A:3-1.3(d).

fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws."

[*Kaprow v. Bd. of Ed. of Berkeley Township*, 131 *N.J.* at 582.]

The public policy, which favors providing school districts (in this case TCI, a private school) with a measure of repose must be weighed against the right of Caldwell, the petitioner, to be notified that TCI has taken a position adverse to it:

Adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. ... [T]he notice requirement should effectuate concerns for individual justice by not triggering the limitations period until [the petitioner has been alerted to the existence of facts that would be adverse to it]. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 48 (1956).

[*Kaprow*, 131 *N.J.* at 587.]

Adequate notice under *N.J.A.C.* 6A:3-1.3(d) should accommodate the dual purposes of the limitations period:

[T]he first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. ... The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs.

[*Kaprow*, 131 *N.J.* at 587 (internal citations omitted).]

In *Kaprow*, the petitioner was notified, by a secretary of the respondent board of education, that someone else was given her job. The Court held that such informal notice satisfied the "notice of a final order, ruling or other action" by the respondent, as required by *N.J.A.C.* 6:24-1.2(c). *Id.* at 588.

The ninety-day requirement has been strictly followed and applied almost without exception. Specifically, in *Dreher v. Jersey City Bd. of Ed.*, EDU 2777-87, (December 18, 1987), adopted Comm'r. (February 2, 1988), aff'd. State Bd. of Ed. (July 8, 1988), a petition filed just two days after the ninety-day period was dismissed. *Ibid.* Other cases have also strictly applied the ninety-day rule. In *Eisenburg v. Bd. of Ed. of the Borough of Fort Lee*, EDU 9451-01, Final Decision, (October 3, 2002) http://lawlibrary.Rutgers.edu/oal/search.html>, the Commissioner held that the petitioners formal appearance before the respondent Board of Education and subsequent notice that the Board had not reversed or modified a resolution not to offer the petitioner continued employment did not change the point at which the 90-day period began to run, which was determined to be at the time of an earlier letter notifying the petitioner of the resolution because it "alerted petitioner to the existence of facts that might equate in law with a cause of action and was sufficient to enable him to pursue a claim thereby triggering the 90-day filing period in *N.J.A.C.* 6A:3-3(d)." *Ibid.*

Generally, the courts' interpretations of *N.J.A.C.* 6A:3-.3(d) and its predecessor would precipitate a finding that Caldwell was on notice of TCI's additional tuition charges when it received TCI's December 5, 2000 letter and invoice requesting the additional amount of tuition in the amount of $4,700.00 per student. However, in giving Caldwell the benefit of the doubt, the December 21, 2000 letter from the State Department of Education advised the parties that the preliminary per pupil rebill amounts were preliminary adjustments "strictly for budgetary purposes and must not be used for billing purposes." One could reasonably conclude, upon reviewing this letter, that approval by the Office of Fiscal Policy and Planning was necessary prior to the incurrence of an obligation by Caldwell to pay any additional tuition to TCI. Thus, it could be reasonably argued that Caldwell was not responsible for the additional payment, until it was notified that the additional amounts were approved. In a letter dated May 3, 2001 the Department of Education informed TCI that it had reviewed and

approved its tuition adjustments and recommended that TCI "properly notify each district board of education of the audit adjustments no later than 30 days after the receipt of this letter." Caldwell claims it received no such notification. Assuming that this is true and that Caldwell is given the benefit of every conceivable doubt with respect to the triggering of the ninety-day filing period, the latest starting date is May 30, 2001. Caldwell sent a letter, dated May 30, 2001, to the Commissioner, in which it acknowledges receiving notification of an adjustment that had been approved by the State Department of Education. However, Caldwell did not file its appeal with the Commissioner until March 8, 2002, more than eight months after May 30, 2001. Therefore, **I FIND** that Caldwell's petition was untimely.

The next issue is whether the circumstances in this case warrant relaxation of the rule and allow a petition to be filed after the ninety-days has lapsed. The governing regulation provides as follows:

> The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in his or her discretion in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.
>
> [*N.J.A.C.* 6A:3-1.16.[3]]

The ninety-day rule may only be relaxed under exceptional circumstances or if there is a "compelling" reason to do so. *Kaprow*, 232 *N.J.* at 590. Certain cases are excepted from the rule, which include "cases involving (1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975). The expenditure of public funds is not a sufficient public interest to justify a waiver or

relaxation of the ninety-day rule. Elmwood Park Bd. of Ed. v. Farrell, 95 *N.J.A.R.* 2d (EDU) 375, 378. "The authority to relax or waive the ninety-day rule is rarely invoked and is generally unsuccessful unless strict adherence would be inappropriate, unnecessary or where injustice would occur." DeMaio v. New Providence Bd. of Ed., 96 *N.J.A.R.* 2d (EDU) 449, 453 (citing Gordon v. Passaic Bd. of Ed., 1985 S.L.D. 1929, 1931, aff'd., A-3294-84T7 (*App. Div.* May 27, 1986)(unreported), certif. denied, 105 *N.J.* 534 (1986)).

I FIND that there is no important or novel constitutional question or important public interest, which requires adjudication. Therefore, the "ninety day rule" cannot be waived under those exceptions.

However, the Appellate Division has held that there is justification for relaxation of the ninety-day rule where "the Commissioner's findings that [a] petitioner was reasonably led to believe that he could continue to informally seek relief and not be concerned about the time limitations for filing his petition are adequately supported by the record and that strict adherence to the 90-day time limitation ... would result in individual justice not being served." Brown v. Bd. of Ed. of the Vocational School in the County of Sussex, A-4854-83T7 (*App. Div.* April 4, 1985)(unreported). In this case, which involves informal determinations by administrative officials (the Commissioner's representatives),the record might support the position that there was a reasonable belief on the part of Caldwell that it could informally seek relief and not be concerned with the time limitations. In viewing the affidavit of Caldwell's Business Administrator/Board Secretary, Ronald Skopak, as true, he spoke with Jim Verner, Section Supervisor in the Division of Finance, to express Caldwell's concerns about their approval of TCI's additional tuition costs. Mr. Verner told Mr. Skopak that the only recourse was to send a letter to the Commissioner asking him to evaluate the appropriateness of TCI's actions. Mr. Skopak then, as directed, drafted a letter to the Commissioner, dated May 30, 2001. Caldwell filed its appeal after receipt of the response letter from Peter Genovese, III, Assistant Commissioner, Division of Finance, dated December 11, 2001, which instructed that if Caldwell desired to appeal the determination, that it could initiate a formal proceeding by filing a "Petition of Appeal"

[3] N.J.A.C. 6A:3-1.16, effective April 3, 2000, is the recodification of N.J.A.C. 6:24-1.15. However the

with the Commissioner. One could conclude that Caldwell, based on the conversation with the Commissioner's representative and the subsequent letter received from another representative of the Commissioner giving the option of a formal appeal, had a reasonable belief that it not only could, but was required to, informally seek relief with the Commissioner before filing a formal appeal. While I am not entirely convinced that Caldwell was led to believe that it did not need to be concerned about the time deadline, because of the actions of the Commissioner's representative, on a motion for summary judgment, the facts must be considered in the light most favorable to the opposing party. Boyer v. Anchor Disposal, 135 *N.J.* 86 (1994).

Under the circumstances, **I FIND** that testimony would need to be elicited at a hearing to determine if Caldwell was led to believe that it could informally seek relief and not be concerned with the time limitations. If those facts were established, then it might be proper to relax the "ninety day rule." Therefore, **I FIND** that Summary decision should not be granted against Caldwell on this ground.

The second issue involved in this motion is whether the inclusion of lease termination costs and unamortized depreciation on leasehold improvements in the expenses of TCI for the 1999-2000 school year, in accordance with Generally Accepted Accounting Procedures ("GAAP"), were patently unreasonable.

N.J.S.A. 18A:46-21 enables the Department of Education to regulate the tuition rate a private school can charge a sending public school district for educating disabled students.[4] Under such regulations, these private schools are required to file a certified audit. *N.J.A.C.* 6:20-4.8.[5] "This audit serves two purposes; calculating the school's

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language in both regulations is substantially the same.

[4] *N.J.S.A.* 18A:46-21 states that:

> Any board of education, jointure commission, or private school for the handicapped which receives pupils from a sending district under this chapter shall determine a tuition rate to be paid by the sending board of education, but in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board of education.
> [*N.J.S.A.* 18A:46-21.]

[5] *N.J.A.C.* 6:20 was repealed by R.2001 d.140, effective May 7, 2001 (operative July 1, 2001), and replaced with *N.J.A.C.* 6A:23. However it has been stipulated in this case "that, unless otherwise indicated in the regulations in effect at the time that the additional tuition charges were incurred and billed

actual cost per pupil and verifying that the school spent tuition monies it received on allowable costs. Carrier Foundation – East Mountain School v. State Bd. of Ed., EDU 508-00, Initial Decision, (February 21, 2001), adopted Comm'r. (April 12, 2001), *aff'd.* State Bd. of Ed. and remanded to Comm'r. on other limited grounds (October 3, 2001)<http://lawlibrary.Rutgers.edu/oal/search.html>(citing Coastal Learning Center, Inc. v. State Bd. of Ed., 96 *N.J.A.R.* 2d (EDU) 406,407, 415, *aff'd.* State Bd. of Ed., 96 *N.J.A.R.* 2d (EDU) 740). "The State Board promulgated two regulations regarding how private schools shall determine tuition rates charged; *N.J.A.C.* 6:20-4.1, mandating tuition rate procedures, and *N.J.A.C.* 6:20-4.4, listing non-allowable costs. While *N.J.A.C.* 6:20-4.1 and 4.4 [had] remained significantly unchanged for ten years, there is neither judicial nor administrative case law interpreting them." Carrier Foundation – East Mountain School, supra. The regulations also state that "[a]ccounts shall be kept in accordance with generally accepted accounting principles (GAAP) as defined by the American Institute of Certified Public Accountants, except as already modified in the rules." *N.J.A.C.* 6:20-4.3(a)(1).

The regulations in effect at the time the additional tuition charges were incurred and billed to Caldwell provided that:

Actual allowable costs for the 10 month school year program ... shall be consistent with the individualized education program of a handicapped pupil and shall be reasonable, that is, ordinary and necessary and not in excess of the cost which would be incurred by an ordinary prudent person in the administration of public funds.

[*N.J.A.C.* 6:20-4.1(a)(1).]

The regulations also set forth a list of fifty-four types of non-allowable costs. One such cost is "[a] cost found to be patently unreasonable by the Commissioner or his or her representative(s) or the independent auditor/accountant." *N.J.A.C.* 6:20-4.4(a)(54). There exists no case law that addresses the requirements of *N.J.A.C.* 6:20-4.4(a)(54).

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to the district are the regulations that apply to the resolution of this dispute." See Prehearing Order dated September 23, 2002.

TCI presents a substantial amount of evidence to support the proposition that inclusion of the lease termination costs and unamortized depreciation on leasehold improvements in the expenses of TCI were not patently unreasonable. Most notable is that neither an independent auditor nor two of the Commissioner's representatives found these costs to be patently unreasonable. First, the independent auditor, relying upon GAAP in accordance with the requirements of *N.J.A.C.* 6:20-4.3(a)(1), did not conclude that the costs were patently unreasonable. The auditor further concluded that GAAP required TCI to include leasehold termination costs and unamortized depreciation on leasehold improvements in the expenses of TCI for the 1999-2000 school year. Next, Jim Verner, a section supervisor, from the Office of Fiscal Policy and Planning within the Department of Education, by letter dated May 3, 2001, conveyed his findings that the report of the independent auditor satisfied the 1999-2000 State Department of Education audit and format requirements. This letter also referred to the determination of the actual tuition charge that resulted in an additional billing of $4,700.00 per pupil. Finally, Peter E. Genovese, III, Assistant Commissioner, Division of Finance, Department of Education, in response to the May 30, 2001 letter from Caldwell, confirmed the accuracy of the inclusion of these costs in the expenses of TCI for the 1999-2000 school year in a letter dated December 11, 2001.

The only evidence Caldwell offers in support of this position is that another organization now operates a school at the Livingston site and a special education plan for 1993-1996, dated December 16, 1992, provided for additional space through the building of a new wing on the existing facility. The fact that another school has chosen to use the Livingston facility and that the electromagnetic study did not recommend closing the school does not mean that TCI's decision to move was unreasonable. Neither does it shed light on the reasonableness of the costs involved in the matter. Caldwell also makes a general claim that the inclusion of the costs in question in TCI's expenses is violative of *N.J.A.C.* 6:20-4.1(a)1, in that the costs were not "consistent with the individualized education program[s] of the handicapped pupil[s]" sent by Caldwell to TCI, but rather were costs more generally incurred for the benefit of TCI. However, Caldwell fails to provide any evidence to support this argument. Thus, in light of all the evidence in the record, Caldwell, even when given the benefit of all facts and

reasonable inferences there from, can not show that the costs that it questions are patently unreasonable. Therefore summary decision is appropriate.

CONCLUSION

Thus, for the foregoing reasons summary decision should be **GRANTED** to the Children's Institute. Although Caldwell may be able to escape summary judgment with respect to the untimeliness of the filing of its petition, in that the 90-day requirement could be relaxed. Summary decision is appropriate on the grounds that the record does not show that TCI's inclusion of lease termination costs and unamortized depreciation on leasehold improvements in the expenses of CI for the 1999-2000 school year, in accordance was patently unreasonable.

ORDER

It is hereby **ORDERED** that the Children's Institute's Motion for Summary Decision be **GRANTED.**

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

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

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

1/28/03
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

January 31, 2003
DATE

H. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

yw

OAL DKT. NO. EDU 5132-02
AGENCY DKT. NO. 67-3/02

BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
THE CHILDREN'S INSTITUTE,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, respondent maintains its position that the Petition of Appeal was untimely filed, arguing that petitioner was on notice, no later than December 5, 2000, that The Children's Institute (TCI) was going to rebill petitioner; however, petitioner thereafter engaged in "stalling tactics," refusing to pay the rebilled amount. (Respondent's Exceptions at 6) Although respondent acknowledges the circumstances upon which the 90-day rule may be relaxed, it contends that it was simply not reasonable in this instance for petitioner "to have relied on alleged representations made by the Department of Education that the 90-day rule was inapplicable.***" (*Id.* at 12) Respondent asserts:

> As a matter of law, it should be determined that no trier of fact would be able to conclude that it was reasonable for a sophisticated school administrator versed in the ways of the Commissioner's procedures to believe, based upon a phone conversation with Verner, that a procedural rule, which is strictly applied and enforced, would be waived under these circumstances.

> Furthermore, even if Verner advised Skopak as asserted and Skopak relied upon the information, it would have no legal significance since ignorance of the law cannot toll the limitation period, except in instances of fraud.***" (citations omitted) (*Id.* at 13, 14)

Moreover, respondent points out that a review of petitioner's May 30, 2001 letter demonstrates that Skopak did not reasonably believe that he was relieved of the obligation to file a petition with the Commissioner, where the May 30, 2001 letter specifically states that Skopak was instructed by Verner that the District's only appeal was to the Commissioner of Education. (*Id.* at 14) Instead, respondent contends that petitioner knew of its obligation to file a petition but, instead, "gambled for a favorable decision in one forum and, having been unsuccessful, now seeks further relief in another.***" (*Ibid.*) Respondent contrasts this situation with *Brown, supra*, wherein the petitioner "was a teacher who likely never had a dispute submitted to the Commissioner and would not have been versed in either the Commissioner's procedures or the substantive law." (*Id.* at 15)

Finally, respondent argues that filing an action in the wrong forum does not toll the 90-day filing rule. (*Ibid*) "Likewise, seeking an informal resolution to a controversy does not relieve the petitioner of fulfilling the 90-day requirement." (*Id.* at 16) Respondent urges, therefore, that the petition should have been filed 90 days after receipt of TCI's rebilling on December 5, 2000 or, *at the latest*, 90 days after May 30, 2001, the date when petitioner concedes in its correspondence that it was informed that the rebilling was sought. (*Id.* at 17)

Upon careful and independent review of the record in this matter, the Commissioner determines to modify the Initial Decision, as set forth herein. Initially, the Commissioner concurs, for the reasons set forth in the Initial Decision, that the within petition was untimely filed. Additionally, the Commissioner finds no cause for relaxation of the 90-day

filing requirement, since this matter presents "no important or novel constitutional question or important public interest, which requires adjudication." (Initial Decision at 10)[1] Neither does the Commissioner find that strict adherence to the 90-day rule will yield an unjust result in this instance.[2]

Notwithstanding this determination, the Commissioner notes that inasmuch as the ALJ reaches to the merits of this matter, he acknowledges his concurrence with the ALJ's conclusion that petitioner has failed to meet its burden of proving that respondent's inclusion of the lease termination costs and unamortized depreciation on leasehold improvements in TCI's expenses for the 1999-2000 school year was patently unreasonable.

Accordingly, the Commissioner concurs that summary decision must be granted in respondent's favor.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

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[1] In this connection, the Commissioner notes that respondent correctly states that "Caldwell's reliance on *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975) and *TriState Ship. Repair and Drydock v. City of Perth Amboy*, 349 *N.J. Super.* 418, 423 (App. Div. 2002), is misplaced since both cases pertain to actions in lieu of prerogative writs ***." (Respondent's Reply Brief in Support of Motion for Summary Decision, at 4)

[2] In so determining, the Commissioner rejects the ALJ's finding that petitioner's communications with the Department, even assuming, *arguendo*, such communications were misleading, may warrant relaxation of the 90-day rule under these circumstances. (Initial Decision at 11) *See, Board of Education of the Township of East Brunswick, Middlesex County v. New Jersey State Department of Education, Division of Finance,* Commissioner Decision August 10, 2001, slip. op. at 10, wherein the Commissioner held that it is not the responsibility of Department personnel to inform a high level administrative officer of the specific procedural requirements for filing an appeal. The Commissioner dismissed the appeal as untimely and underscored, "[a]s stated by the New Jersey Supreme Court in *Kaprow*, attempts to resolve a claim through negotiations are irrelevant. Such efforts do not negate the fact of adequate notice nor do they toll the running of the time limitation."

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

112-03

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN C. FREEMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8567-02

AGENCY DKT. NO. 384-12/02

IN THE MATTER OF THE TENURE HEARING OF JOHN C. FREEMAN, SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.

Karen A. Murray, Esq., for petitioner, Camden Board of Education (Murray & Murray, attorneys)

Keith Waldman, Esq., for respondent, John C. Freeman (Selikoff & Cohen, attorneys)

Record Closed: January 30, 2003 Decided: January 31, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 18, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Joint Request for Approval of Settlement, including Withdrawal of Tenure Charges and a Stipulation of Settlement, which is attached and fully incorporated herein.

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

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

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

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

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

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

January 31, 2003
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

2-4-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jh

Karen A. Murray, Esq.
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25 Sycamore Ave.
Little Silver, NJ 07739
(732) 747-2300
Counsel for Petitioner,
Camden Board of Education

SELIKOFF & COHEN, P.A.
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(856) 778-6055
Counsel for Respondent,
John Freeman

IN THE MATTER OF THE TENURE HEARING OF JOHN FREEMAN, SCHOOL DISTRICT OF CAMDEN CITY, CAMDEN COUNTY.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO. 384-12/02

JOINT REQUEST FOR APPROVAL OF SETTLEMENT, INCLUDING WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Camden Board of Education ("Board") and counsel for its tenured employee John Freeman ("Freeman") join in moving for an order declaring that the Stipulation between the Parties, attached hereto as Exhibit A, meets the requirements of *N.J.A.C.* 1:1-19.1, recommending that the Stipulation be approved by the Office of Administrative Law ("OAL") and the Commissioner of Education ("Commissioner"), and on condition that the Commissioner approves without modification the Stipulation attached hereto as Exhibit A, ordering that the Stipulation be implemented, and that the tenure charges filed by the Board be withdrawn and this matter dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of charges certified by the Board to the Commissioner on October 25, 2002, against a tenured teaching staff member primarily on grounds of chronic absenteeism and lateness. The tenure charges were transmitted to the OAL as a contested case on December 19, 2002. A hearing concerning the Board's tenure charges has been scheduled before the Honorable John Schuster, III, ALJ, on March 21, 2003, April 1, 2 and 4, 2003. The Parties have reached a tentative settlement conditioned upon the drafting of mutually satisfactory settlement documents to be submitted for approval by the OAL and the Commissioner in accordance with which the tenure charges might be withdrawn.

The Parties have agreed under the terms of the Stipulation attached hereto as Exhibit A that Freeman will tender his resignation effective December 31, 2003 or the date that the Teachers Pension and Annuity Fund ("TPAF") grants or determines with finality Freeman's application for a voluntary disability pension, whichever is earlier ("resignation date").

The Parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the OAL's and the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against Freeman shall be withdrawn and dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections.

THE JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

Due to the fact that the most substantial bases for the charges were the allegations of chronic absenteeism and lateness and the Parties agree that these alleged attendance problems arise from disabling conditions which also serve as the bases for an application by FREEMAN to the Teachers' Pension and Annuity Fund ("TPAF") for a voluntary disability pension, the Board has reviewed the evidence and decided to withdraw the charges upon approval of this settlement by the OAL and the Commissioner.

CONCLUSION

Counsel, as well as FREEMAN and the BOARD are satisfied with the Stipulation and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Stipulation meets the requirements of *N.J.A.C.* 1:1-19.1, recommend that the Stipulation be adopted without modification by the Commissioner, order that the Stipulation be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges and petition of appeal in this consolidated matter.

Respectfully submitted,

MURRAY & MURRAY
Attorneys for the
Camden Board of Education

BY: _____
KAREN A. MURRAY

SELIKOFF & COHEN, P.A.
Attorneys for John Freeman

BY: _____
KEITH WALDMAN

Karen A. Murray, Esq.
Murray & Murray
25 Sycamore Ave.
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(732) 747-2300
Counsel for Petitioner,
Camden Board of Education

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307 Fellowship Rd., Suite 314
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(856) 778-6055
Counsel for Respondent,
John Freeman

IN THE MATTER OF THE TENURE HEARING OF JOHN FREEMAN, SCHOOL DISTRICT OF CAMDEN CITY, CAMDEN COUNTY.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO. 384-12/02

STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is entered into by and between the Petitioner Board of Education of the City of Camden (hereinafter "BOARD") and Respondent JOHN FREEMAN (hereinafter referred as "FREEMAN") (the BOARD and FREEMAN are hereinafter referred to jointly as the "Parties" and each may be referred to severally as a "Party");

WHEREAS, FREEMAN has been continuously employed by the Board as a teaching staff member since September 1, 1984;

WHEREAS, on or about October 25, 2002, the BOARD certified to the Commissioner of Education ("Commissioner") charges against FREEMAN which it felt under the circumstances, if true, were sufficient to warrant his dismissal;

EXHIBIT A

3d

WHEREAS, on or about December 10, 2002, FREEMAN filed an Answer to the charges denying the allegations as stated;

WHEREAS, the Commissioner transmitted this matter to the Office of Administrative Law ("OAL") for hearing and this matter has been listed for hearing before the Honorable John Schuster, III, ALJ, on March 21, 2003, April 1, 2 and 4, 2003 and the Parties having agreed to a means of resolving this dispute in a manner consonant with the public interest;

WHEREAS, the most substantial bases for the charges were the allegations of chronic absenteeism and lateness and the Parties agree that these alleged attendance problems arise from disabling conditions which also serve as the bases for an application by FREEMAN to the Teachers' Pension and Annuity Fund ("TPAF") for a voluntary disability pension; and

WHEREAS, FREEMAN and the BOARD have entered into this Stipulation with a full understanding of their rights, recognizing that this Stipulation and their agreement is subject to the review and approval of the Commissioner, and with FREEMAN's further understanding that pursuant to *N.J.A.C.* 6:11-3.6(a)1 any determination made by the Commissioner resulting in a loss of tenure or dismissal may be referred to the State Board of Examiners for determination of possible revocation or suspension of teaching certificate;

NOW THEREFORE, the matter in difference having been amicably adjusted by and between the parties,

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. The recitals set forth above are repeated and incorporated by reference as a material part of this Stipulation.

2. Immediately upon execution of this document, the Parties will file the accompanying Joint Request for Approval of Settlement, Including Withdrawal of Tenure

Charges and this filing serves as a joint motion before the OAL and the Commissioner for an order permitting the Board to voluntarily dismiss the charges as moot.

3. FREEMAN will apply to TPAF for a voluntary disability pension. The Board will fully cooperate with Mr. Freeman's application and any appeals that he may file from the denial of his application. Neither the Board, the OAL, the Commissioner, the New Jersey Education Association, the Camden Education Association, counsel for the parties or anyone else has promised FREEMAN or can guaranty that his pension application will be approved by TPAF. FREEMAN also acknowledges the possibility that his resignation may take effect on December 31, 2003 with his voluntary disability pension application being denied.

4. By signing this Stipulation, FREEMAN tenders his resignation effective December 31, 2003 or the date that TPAF grants or otherwise decides with finality FREEMAN's application for a voluntary disability pension, whichever is earlier ("resignation date"). A copy of the letter of resignation is attached as Exhibit A to this Stipulation. The BOARD accepts FREEMAN's resignation effective on the resignation date. The Board's records will reflect that FREEMAN left the BOARD's employ to pursue an ordinary disability pension. The Board will place FREEMAN on a medical leave of absence without pay but with benefits. Benefits will continue until six (6) months from the execution of this Stipulation or until TPAF grants or otherwise decides with finality FREEMAN's application for a voluntary disability pension, whichever comes first. The medical leave of absence will continue until December 31, 2003 or until TPAF grants or otherwise decides with finality FREEMAN's application for a voluntary disability pension, whichever comes first.

5. The Board will immediately release FREEMAN's pre-suspension paychecks to him in care of Selikoff & Cohen, P.A. As is required by *N.J.S.A.* 2A:17-56.37, Selikoff & Cohen, P.A. will perform a child support arrearage search before disbursing any funds to FREEMAN.

6. The Parties enter into this Stipulation with the mutual understanding that this Stipulation will be placed into the record for this matter. He certifies that he is knowingly and voluntary waiving his tenure rights, including the right to a tenure hearing.

7. The Board and the Camden Education Association agree that this settlement will not be construed as establishing a binding precedent or past practice.

8. The Parties agree that each paragraph of this Stipulation is material. The settlement is subject to the granting of the Board's motion and the approval without modification by the OAL and the Commissioner. In the event that any portion of this settlement is not approved by the OAL or the Commissioner, the parties agree, in advance, to attempt to reform this Stipulation in good faith to provide each Party with the full benefit of the settlement memorialized by this Stipulation. In the event that reformation is not possible, this Stipulation will become null and void and the parties will return to the status quo as it existed before the settlement and the parties will have the opportunity to fully and fairly litigate the tenure charges and defenses thereto. In such event, neither this Stipulation, the Joint Request for Approval of Settlement nor the recitals contained in them will be admissible for any purpose.

9. The BOARD agrees that FREEMAN will be eligible to receive benefits at his sole expense under the Consolidated Omnibus Budget Reconciliation Act, ("COBRA"), 29 *U.S.C.* §§1161-1168, in the event that his pension is not approved within six (6) months and should he elect such coverage. BOARD agrees to cooperate with FREEMAN to the extent necessary for him to be eligible for and receive COBRA benefits;

10. The Parties agree that they and their officers, agents, and administrators will be bound by a covenant of good faith and fair dealing with respect to performance under this Stipulation. The BOARD expressly warranties that neither the BOARD nor its agents or administrators will take any retaliatory action against FREEMAN.

11. This Stipulation constitutes a full release of any and all claims of either Party against the other. Specifically, FREEMAN forever releases the BOARD from any and all complaints, charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including claims for damages (including but not limited to back pay and front pay), equitable relief, and attorney fees or costs, which FREEMAN now has, or claims to have, or which FREEMAN at any time may have had or claimed to have had, or which FREEMAN at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which he signs the document. FREEMAN specifically releases the BOARD from any claims he has or may have had under the New Jersey Law Against Discrimination or the federal Americans with Disabilities Act. Nothing in this paragraph is intended to operate as a release, waiver, or forfeiture of FREEMAN's rights, and the BOARD's obligations under: (a) any state worker's compensation act or statute, or (b) any State of New Jersey retirement, pension, savings, or 401(k) plan in which FREEMAN is a participant;

12. The BOARD forever releases FREEMAN from any and all complaints charges, liabilities, demands, debts, accounts, obligations, promises, suits, actions, causes of action, demands in law or equity, including, but not limited to, claims for damages, equitable relief, attorney fees or costs, which the BOARD now has, or claims to have, or which the BOARD at any time may have had or claimed to have had, or which the BOARD at any time hereafter may have, or claim to have, whether presently known or unknown, arising at any time, up to and including the date on which this document is signed on its behalf.

13. The Parties agree to waive exceptions.

14. The Parties agree that this document constitutes their full understanding. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon the present action.

15. By signing this Stipulation, the Parties certify that they have had the opportunity to discuss this Stipulation with counsel. They are fully satisfied with the services of their counsel with respect to both this Stipulation and all other aspects of this case and they enter into this Stipulation knowingly, willingly and without any coercion or improper inducements.

16. By signing this Stipulation, each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf.

17. The Parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

FOR THE CITY OF CAMDEN
BOARD OF EDUCATION

DATED: 1/28/03

By: Karen Murray
Karen A. Murray, Esq.

CAMDEN EDUCATION ASSOCIATION

DATED:

By: _____
Claraliene Gordon, President

DATED:

By: _____
John Freeman

FOR THE CITY OF CAMDEN
BOARD OF EDUCATION

DATED: By:_____
Karen A. Murray, Esq.

CAMDEN EDUCATION ASSOCIATION

DATED: 1/28/03 By: Claraliene M. Gordon
Claraliene Gordon, President

DATED: By:_____
John Freeman

FOR THE CITY OF CAMDEN
BOARD OF EDUCATION

DATED: By:_____
Karen A. Murray, Esq.

CAMDEN EDUCATION ASSOCIATION

DATED: By:_____
Claraliene Gordon, President

DATED: 1/28/03 By: John Freeman
John Freeman

JOHN FREEMAN
10109 Sunrise Dr.
Stone Harbor, NJ 08247

~~[INSERT DATE]~~
1/28/03

Leon Freeman, Board Secretary
CITY OF CAMDEN BOARD OF EDUCATION
201 North Front Street
Camden, NJ 08102-1935

re: Resignation Effective 12/31/03 or Upon Granting of Pension Application, Whichever Comes First

Dear Mr. Freeman:

Please be advised that subject to the terms of the Stipulation of Settlement, I will be resigning from my position as a teacher in the Camden City Public Schools effective December 31, 2003 or upon the granting or the final determination of my application for an ordinary disability pension, whichever comes first.

I will take with me many fond memories of the children I have taught.

Very truly yours,

John Freeman

JOHN FREEMAN

EXHIBIT A

S-

TOTAL P.13

3 M

OAL DKT. NO. EDU 8567-02
AGENCY DKT. NO. 384-12/02

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN C. FREEMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
CAMDEN, CAMDEN COUNTY.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner finds the Stipulation to be consistent with established standards for settlement of tenure matters, and, accordingly, he approves and adopts it as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement, and a copy of this decision shall be forwarded to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

115-03

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANETTE F. NIXON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CRANFORD, UNION COUNTY.	:	

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10968-94
AGENCY DKT. NO. 421-10/94
and OAL DKT. NO. 6584-95
AGENCY DKT. NO. 186-5/95

BOARD OF EDUCATION OF THE
TOWNSHIP OF CRANFORD,
UNION COUNTY,
Petitioner,
v.
JEANNETTE F. NIXON,
Respondent.

David B. Rubin, Esq., for petitioner

Louis P. Bucceri, Esq., for respondent
(Bucceri & Pincus, attorneys)

Record Closed: January 28, 2003 Decided: January 30, 2003

BEFORE: **ELINOR R. REINER,** ALJ

These matters concern tenure charges served against respondent, a tenured employee of petitioner, in her capacity as board secretary/school business

administrator. More particularly, on October 12, 1994, petitioner Cranford Board of Education certified tenure charges charging respondent with various acts of mismanagement, incompetence and unprofessional conduct. Petitioner accordingly suspended respondent without pay for 120 days, and with pay thereafter, pursuant to *N.J.S.A.* 18A:6-14. This matter was transmitted to the Office of Administrative Law (OAL) on November 15, 1994 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. It was assigned to the undersigned judge.

On or about March 17, 1995, the Board obtained a temporary restraining order freezing certain assets of respondent's and diverting her net salary into an escrow account. All tax and pension deductions were still being made, but respondent was denied access to the funds.

During respondent's suspension, petitioner uncovered evidence indicating that respondent had also engaged in embezzlement and fraud during her employment. In light of this discovery, petitioner certified additional tenure charges on May 22, 1995, and again suspended respondent without pay for 120 days.

On June 12, 1995, respondent filed a verified counterclaim seeking retroactive reinstatement of her salary payments, *albeit* into the escrow account absent further order of the Superior Court. The Board filed its answer to the counterclaim on June 21, 1995. This matter was transmitted to the OAL on June 23, 1995 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. It was assigned to the undersigned judge and consolidated with the previously filed case for hearing.

The discovery of fraud and embezzlement also resulted in a civil trial in which petitioner secured an injunction freezing certain assets of respondent on March 17, 1995, as well as a criminal trial which resulted in respondent's conviction in December 1995. More particularly, respondent was ultimately convicted following a jury trial before Chief Judge Thompson of the U.S. District Court and served time in a federal

penitentiary pending appeal. In December 1996, Judge Thompson issued an order requiring respondent to pay $150,900 in restitution to the Board.

On September 27, 1996, an Order of Forfeiture (attached) was entered by the Honorable Philip S. Carchman, A.J.S.C., ordering that respondent forfeit her offices as business administrator/board secretary of the Cranford Board of Education and any other public positions held by her under the government of this state or any of its administrative or political subdivisions.

These matters were placed on the inactive list at the OAL for various six month periods of time pending the final outcome of the appeals of respondent's criminal conviction. The tenure charges were held in abeyance pending the outcome of the appeals because the previously ordered forfeiture pursuant to *N.J.S.A.* 2C:51-2 would moot the charges if the conviction stood.

During the pendency of these matters on the inactive list, respondent sought summary decision on her counterclaim and the retroactive reinstatement of her salary, subject to the terms of the Superior Court escrow. By letter decision to counsel, dated June 30, 1997, the undersigned denied respondent's motion and dismissed respondent's counterclaim in regard to the issue of respondent's salary.

By letter dated October 10, 2002, the undersigned was advised by respondent's counsel that all appeals had been exhausted with no alteration of the conviction. A conference call was held with counsel on October 15, 2002, during which the undersigned requested clarification from respondent's attorney as to whether any issues remained outstanding. More particularly, at issue was whether respondent wished to pursue in any manner the salary issue. In response to this request, counsel for respondent submitted the attached letter, dated January 24, 2003, advising that no issues remain outstanding.

Based on the contents of that letter, I **FIND** that respondent does not wish to pursue the merits of any claim relative to a salary issue. Furthermore, I **FIND** that since all appeals have been exhausted in regard to respondent's criminal conviction, the attached Order of Forfeiture remains in effect thereby making the tenure charges moot.

On the strength of the foregoing, I therefore **ORDER** that these proceedings should be and are hereby **TERMINATED**.

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

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

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

January 31, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

February 5, 2003
DATE

M. Kathleen Duncan (CJ)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

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MEMBER N.J. & N.Y. BARS

January 24, 2003

Hon. Elinor R. Reiner, A.L.J.
Office of Administrative Law
33 Washington Street, 9th Floor
Newark, NJ 07102

Re: In the Matter of the Tenure Hearing of Jeanette F. Nixon, Cranford Public School District
O.A.L. Docket No. EDU 10968-94
Agency Ref. No. 421-10/94
-and-
O.A.L. Docket No. EDU 06584-95
Agency Ref. No. 186-5/95

Dear Judge Reiner:

In October, 2002 we had a conference call with Mr. Rubin as to the final resolution of this matter. I was asked to confer with my client as to whether she intended to pursue the issue of her withheld salary which Your Honor had previously ruled upon on an interlocutory basis. If Ms. Nixon wished to appeal Your Honor's order denying her the salary, an initial decision would be needed. If Ms. Nixon did not wish to further appeal that question, the matter could be disposed of as moot since the Order of Forfeiture made the tenure charges unnecessary.

I was also asked to ascertain if Ms. Nixon's certificates had been formally revoked.

My client has responded and has authorized me to advise you that she does not wish to pursue the salary issue. Accordingly, the counterclaim on that issue may be deemed withdrawn or otherwise dismissed as Your Honor deems appropriate. I assume the petitioner will have no objection.

The tenure charges themselves are moot and, therefore, can be resolved without an independent decision on the merits in light of the forfeiture and criminal conviction.

My client has a recollection of certificate revocation, but cannot locate any order to that effect. It is possible that one was issued, or she could be recalling the forfeiture order which has a similar effect, though it comes from a Court as opposed to the Department of Education. I have no record of such an Order from the State.

If I can be of further service, please advise.

Respectfully submitted,

Louis P. Bucceri

/mab
cc: David Rubin, Esq.
Ms. Jeanette Nixon

5a

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF
BY: MICHAEL J. WILLIAMS
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU
P.O. BOX CN 086
TRENTON, NEW JERSEY 08625
(609) 292-9086

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. MER-L-349-96

STATE OF NEW JERSEY,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	ORDER
JEANETTE FLORA NIXON,	:	
Defendant.	:	

This matter having been opened to the Court by Peter Verniero, Attorney General of New Jersey (Michael J. Williams, Deputy Attorney General, appearing), and service having been made upon defendant, and the Court having considered the papers filed and the argument of counsel presented on September 27, 1996, and for good cause shown:

IT IS on this 27th day of September, 1996,

ORDERED that defendant Jeanette Flora Nixon forfeit her offices as Business Administrator/Board Secretary of the Cranford Board of Education and any other public positions held by her under the government of this State or any of its administrative or political subdivisions;

IT IS FURTHER ORDERED that defendant Jeanette Flora Nixon is never disqualified from holding any public office or position of honor, trust, or profit under the government of this State or any of its administrative or political subdivisions; and

IT IS FURTHER ORDERED that the terms of this Order shall be deemed to have taken effect on July 3, 1996.

Hon. Philip S. Carchman, A.J.S.C.

OAL DKT. NOS. EDU 10968-94 AND E DU 6584-95 (CONSOLIDATED)
AGENCY DKT. NOS. 421-10/94 AND 286-5/95 (CONSOLIDATED)

IN THE MATTER OF THE TENURE	:	
HEARING OF JEANETTE F. NIXON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF CRANFORD, UNION COUNTY.	:	

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

Upon his full and independent review, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that the Order of Forfeiture entered by the Honorable Philip S. Carchman, A.J.S.C. on September 27, 1996, deemed to have taken effect on July 3, 1996, renders these consolidated tenure matters moot.[1] The Commissioner further agrees that, based on the January 24, 2003 letter of respondent's attorney to ALJ Reiner, there are no remaining outstanding issues to be resolved in this matter.

Accordingly, the Initial Decision of the OAL recommending dismissal of this matter is adopted for the reasons stated therein. A copy of this decision will be transmitted to the State Board of Examiners for that body's consideration.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03
Date of Mailing: 3/14/03

[1] It is, however, unclear from the record whether notification of this forfeiture was ever communicated to the State Board of Examiners and, therefore, whether revocation of respondent's certificate(s) has been accomplished.
[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

114-03

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL A. STURM,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY.	:	
	:	

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION –WITHDRAWAL
OAL DKT. NO. EDU 2685-02
AGENCY DKT. NO. 114-4/02
Consolidated with EDU 8559-02
AGENCY DKT. NO. 369-11/02

In the Matter of the Tenure Hearing
Of Paul A. Sturm, Board of Education of
The South Plainfield School District,
Middlesex County,

Nicholas Celso, Esq., for the petitioner Board of Education of South Plainfield School District (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Stephen Klausner, Esq., for the respondent Paul A. Sturm (Klausner & Hunter, attorneys)

Record Closed: January 31, 2003 Decided: February 4, 2003

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

Respondent herein has withdrawn his defense to two sets of separate tenure charges. A discussion of the procedural history of these cases is necessary as well as a discussion of the reasons I recommend the Commissioner of Education transmit these matters to the State Board of Examiners for possible further proceedings.

The matter of the tenure hearing of Paul A. Sturm, Docket No. EDU 2685-02, was originally transmitted to the Office of Administrative Law (OAL) on May 6, 2002 by the Department of Education for a hearing pursuant to *N.J.S.A.* 52:14B-1 through –15, *N.J.S.A.* 18A:6-11 and *N.J.S.A.* 52:14F-1 to –13. Pursuant to *N.J.S.A.* 52:14B-10.1, an expedited hearing commenced on August 21, 2002. The hearing then resumed on October 2, 2002 at which time I adjourned the proceeding with the consent of both counsel due to the emotional stress exhibited by respondent and his wife and also to allow the parties to engage in settlement discussions.

The hearing then resumed on October 10, 2002 at the South Plainfield Municipal Complex in South Plainfield. After approximately one-half day of testimony, the hearing was halted in order to resolve the potential disqualification of respondent's counsel due to his prior representation of one of the petitioner's witnesses, former principal Robert Dogget. The matter was fully briefed and I verbally advised the parties that due to the nature of Mr. Klausner's prior representation of Mr. Dogget, the timeframe in issue and in consideration of the Rules of Professional Conduct as well as a review of the case law, Mr. Klausner could continue to proceed in this matter as no basis for disqualification existed. Mr. Klausner did not violate any Rules of Professional Conduct.

The hearing was rescheduled to resume on January 13, 2003. Prior thereto, on December 16, 2002 the Department of Education transmitted a second set of separate sworn charges; *In re In the Matter of Tenure Hearing of Paul A. Sturm, Board of Education of the South Plainfield School District,* Docket No. EDU 8559-02, Agency Reference No. 369-11/02.

At a conference call to discuss scheduling matters, I requested counsel advise whether they would consent to consolidation of these two matters. Respondent's counsel indicated no objection and petitioner's counsel advised in writing shortly thereafter that petitioner did not object. Thus, in accordance with *N.J.A.C.* 1:1-17.1 and *N.J.A.C.* 1:1-14.9, I consolidated these two matters on the record in the presence of counsel on January 28, 2003. The matters were consolidated as they involved common questions of fact and law between the identical parties. Further, the criteria for consolidation as set forth in *N.J.A.C.* 1:1-17.3 was considered in reaching this decision. Although the consolidation order, *per se* is required to be disposed of by interlocutory Order prior to the commencing of the evidentiary hearing, the second set of sworn charges did not come to fruition until the proceeding on the first filed matter had already commenced. In addition, although *N.J.A.C.* 1:1-14.10 provides that the Order of Consolidation by the Office of Administrative Law is interlocutory and reviewable by the Commissioner of Education, respondent has withdrawn his defense in this case by tendering his resignation thereby rendering the matter before the OAL moot. A plenary hearing had been scheduled

2003 I received a facsimile from respondent's counsel advising that respondent had resigned from his position as music instructor.

The parties then appeared before me on January 28, 2003 for purposes of a *voir dire* of respondent Paul Sturm with regard to his resignation.

Mr. Sturm testified that approximately ten days prior to January 28, 2003 he contacted his counsel to advise of his resignation and that he had retained a new position. He testified that on January 21, 2003, he authorized Mr. Klausner to forward his resignation to petitioner School Board. At the time he drafted and executed his resignation letter (J-1), Mr. Sturm testified he was not under the influence of any medications, illicit drugs or alcohol. He indicated the only reason he resigned was based on discussions with his family as well as the fact that he had secured another position with the Avon Avenue School in the Newark Public Schools District. Mr. Sturm presented himself at this hearing before me as belligerent and continued to glare at petitioner's counsel after being instructed by me to cease that conduct. He also attempted to indicate that he felt pressure by the school board to resign but, upon further clarification as elicited by both counsel and this Judge, described the pressure to have been the pursuit of the sworn charges. He reiterated that his resignation was based exclusively on his securing a position as band director in the Newark public school system as well as discussions with his family.

He also testified that he received and understood the letter forwarded to him by his counsel (R-1)[i] in which he was advised that the Commissioner of Education had the authority to forward the charges to the State Board of Examiners to seek to have his teaching license removed even though he had withdrawn his defense in the matter before the OAL and resigned from petitioner school district.

On cross-examination Mr. Sturm testified he understood his resignation would be irrevocable once approved by the Commissioner of Education and then by the Board of Education of South Plainfield School District. He again reiterated he had resigned his position of his own free will and volition.

Based upon testimony before me by respondent on January 28, 2003, I **FIND** Mr. Sturm has voluntarily withdrawn his defense to the charges set forth in these consolidated matters and resigned from his position at the South Plainfield School District of his volition and without any duress.

In accordance with *N.J.A.C.* 1:1-19.2 the parties were advised that I would be issuing an Initial Decision memorializing the withdrawal of defense by respondent and also recommending to the

[i] The redacted portion of this letter is protected by the attorney-client privilege.

Commissioner of Education this matter be referred to the State Board of Examiners for possible further proceedings. I make this recommendation even though the consolidated matters before me would constitute a hearing *de novo* with petitioner Board of Education bearing the burden of proof by preponderance of the credible evidence as to each separate sworn charge sustained below and transmitted to the Office of Administrative Law by the Department of Education for a plenary hearing. The charges are serious in nature. (C-1, C-2) My recommendation is also based on the observations I have made during my presiding over these hearings including the hearing of January 28, 2003 where, despite previous admonishments made to respondent, he continued to glare at petitioner's counsel. During the limited proceedings conducted in these matters, respondent repeatedly ignored my directives to cease contact with school board members and cease glaring at petitioner's counsel during the proceedings. I have also considered the certification of October 11, 2002 of petitioner's counsel Marc Zitomer of what transpired at the conclusion of the hearing at South Plainfield Municipal Complex that day between respondent and himself (C-3) as well as the Order for Temporary Restraint issued against respondent herein for "good cause shown" by Superior Court Judge Honorable Joseph Messina in the matter entitled *South Plainfield Board of Education v. Paul Sturm*, Superior Court Chancery Division, Middlesex County, Docket No. C-356-02 issued on December 20, 2002 (C-4). Finally, I note on this date, counsel advised that the Honorable Joseph Messina, in a proceeding before him on January 31, 2003, found respondent herein in contempt of court and issued a permanent injunction against him as well.

Based on all of these considerations, I hereby recommend to the Commissioner of Education this matter be forwarded to the State Board of Examiners for possible further proceedings.

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

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

February 4, 2003
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

Receipt Acknowledged:

2/6/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 7 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

/jck

WITNESSES

For the petitioner:

None

For the respondent:

Paul A. Sturm

EXHIBITS

Jointly Submitted:

J-1 Letter of resignation of January 16, 2003

For the petitioner:

None

For the respondent:

R-1 January 22, 2003 letter from respondent's counsel to respondent

Judge's Exhibits:

C-1 Sworn charges, Docket No. EDU 2685-02
C-2 Sworn charges, Docket No. EDU 8559-02
C-3 Certification of Mr. Zitomer
C-4 Order Granting Temporary Restraints

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL A. STURM,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SOUTH PLAINFIELD,	:	
MIDDLESEX COUNTY.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions.

Upon his full and independent review of the record, the Commissioner concludes that in light of Mr. Sturm's unilateral resignation from the District, there is no basis upon which he can order this consolidated matter to proceed and it must, therefore, be dismissed as moot. Notwithstanding this determination, a review of the tenure charges against Mr. Sturm reveals, *inter alia*, allegations of improper rubbing and touching of students, abusive, threatening and harassing conduct and language directed at students, parents, faculty members and administrators. The serious nature of these charges compels that this matter be referred to the State Board of Examiners for action as that body deems appropriate.[1]

Accordingly, the Initial Decision of the OAL recommending dismissal of this consolidated matter is adopted. A copy of this decision, along with the record, shall be

[1] The Commissioner also found particularly noteworthy the discussion of the ALJ, before whom respondent personally appeared, wherein, based on her in-court observations, respondent's continually defiant demeanor throughout the proceedings, and other incidents which occurred during this period, she specifically recommended that this matter be referred to the State Board of Examiners for possible further action. (Initial Decision at 4)

transmitted to the State Board of Examiners for its consideration. The District is hereby reminded of its obligations, pursuant to *N.J.A.C.* 6:11-3.5, in this regard.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

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

JOHN CALABRIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher alleged the Board's action to nonrenew his employment for the 2002-03 school year was violative of his tenure rights, claiming that he acquired tenure on March 24, 2002. The Board contended petitioner remained in the status of "substitute teacher" during the entire 1998-99 school year and, thus, did not acquire tenure.

The ALJ found that once the teacher petitioner was hired to replace returned to the District in another position and the position from which she departed became vacant, petitioner could not properly be excluded from accruing time toward tenure since the vacant position was not filled by petitioner as a substitute teacher but as a regular teacher. The ALJ concluded petitioner acquired tenure on March 24, 2002 and the Board's failure to employ him for the 2002-03 school year was a violation of his tenure rights. The Board was ordered to reinstate petitioner to the full-time teaching position he held or to an equivalent teaching position within the scope of his teaching certificates effective immediately with compensation for lost salary, benefits and emoluments.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

March 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
SUMMARY JUDGEMENT
OAL DKT. NO. EDU 6403-02
AGENCY DKT. NO. 210-7/02

JOHN CALABRIA,
Petitioner,
v.
WINSLOW TOWNSHIP SCHOOL DISTRICT
BOARD OF EDUCATION, CAMDEN COUNTY,

Carol H. Alling, Esq., and **Steven R. Cohen**, Esq.
Selikoff and Cohen P.A., attorneys
for petitioner John Calabria

John J. Armano, Jr., Esq.,
Trimble and Associates, attorneys
for respondent BOE Winslow Township

Record Closed: January 17, 2003 Decided: February 4, 2003

BEFORE **EDGAR R. HOLMES**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

The petitioner complains that the respondent BOE, Winslow Township, failed to renew his teaching contract for the 2002-2003 school year in violation of his tenure rights. The BOE denies petitioner acquired tenure rights. The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedure Act *N.J.S.A.*52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to 13.

Petitioner filed a motion for summary judgment pursuant to *N.J.A.C.* 1:1-12.5(b) and alleged certain facts all of which save one the BOE admitted. The fact denied by the BOE is not material to the ultimate conclusion.

STATEMENT OF THE RELEVANT UNCONTESTED FACTS

Jean Hamilton was the seventh grade Study Skills teacher at Overbrook Jr. High School in the Lower Camden County Regional High School District (LCCRHSD) for the 1997-1998 school year. She was granted a medical leave of absence for the 1998-1999 school year. John Calabria, petitioner, was hired as a replacement teacher for Jean Hamilton on or about September 1, 1998. He was continuously employed by the district and its successor Winslow Township BOE, until June of 2002.

During the 4 year period described above, the following events occurred:

1. On March 23, 1999, Jean Hamilton returned from her leave of absence and was assigned to a position as a secondary school English teacher at Overbrook Senior High School. She resigned at the end of the school year.

2. Petitioner applied for, interviewed for and was chosen to fill the position of seventh grade Study Skills teacher at the Junior High School, effective March 23, 1999.

3. Petitioner described his status on May 19, 1999, in a letter to the District as "a leave replacement in a non-tenured position."

4. On June 30, 2001, the Winslow Township BOE succeeded LCCRHSD which dissolved. Petitioner's rights and status continued pursuant to *N.J.S.A.* 18A:13-64.

5. On April 25, 2002, petitioner was notified by the Superintendent that he would not be recommended for renewal for the 2002-2003 school year.

6. Petitioner completed the 2001-2002 school year and was not reemployed.

7. At all times mentioned petitioner held the required teaching certificates; Elementary Education, Physical Education and Driver's Education.

ISSUES RAISED

Petitioner contends that he acquired tenure on March 24, 2002, more than three years after he filled the vacancy created by Jean Hamilton on March 23, 1999. *N.J.S.A.* 18A:28.5

The BOE contends that petitioner remained in the status of "substitute teacher" during the entire 1998-1999 school year and thus did not acquire tenure. *N.J.S.A.* 18A:16-1.1.

In addition, the BOE contends that no vacancy existed in 1998-1999 because it was filled by a substitute teacher, the petitioner, which fact he acknowledged on May 19, 1999.

LEGAL DISCUSSION

Our Supreme Court determined in *Spiewak v. Rutherford Board of Education*, 90 *N.J.* 63 (1982) that tenure is a statutory rather than a contractual matter. Therefore, every "teaching staff member" who is employed in a position for which a certificate is required and who holds the certificate required for the position is eligible for tenure *unless they come within an explicit statutory exception. Id.*at 90 *N.J.* at 81; *see also Weigand v. Marlboro Township Board of Education,* 84 *S.L.D.* 534, 541, (Duncan, A.L.J., Feb. 23, 1984), *adopted* 84 *S.L.D.* 549 (Comm. Ed., April 9, 1984) *aff'd* 84 *S.L.D.* 549 (S.B.E., Sept. 9, 1984), *aff'd* 85 *S.L.D.* 2033 (App. Div. Nov. 19, 1985).

The Education Laws at *N.J.S.A.* 18A:1-1 define a "teaching staff member" as any professional employed in a position that requires the possession of a certificate issued by the Board of Examiners. It is uncontested that Mr. Calabria was a teaching staff member from the time he was first employed by the LCCRHSD and possessed the required certificates. The only question is whether he fell within some statutory exception, and if so, for how long.

As in *Spiewak*, the only exception possibly relevant here is that applicable to substitutes set forth in *N.J.S.A.* 18A:16-1.1. The case law makes it clear, however, that *N.J.S.A.* 18A:16-1.1 renders the substitute's service ineligible for tenure *only* during the time spent filling a position *temporarily* vacated by another existing teaching staff member whose return is contemplated. In *Spiewak* itself the Court observed that the exception to tenure accrual provided by *N.J.S.A.* 18A:16-1.1 ". . . is limited to employees hired to take the place of an absent teacher. The courts are not free to expand that exception by judicial fiat." *Id.* 90 *N.J.* at 77.

The Appellate Division spoke directly to the point in *Sayreville Education Ass'n v. Sayreville Board of Education*, 193 *N.J. Super.* 424 (App. Div. 1984) The court held that if a regularly appointed teacher has resigned, retired or otherwise terminated his or her employment, then the place which the appointee is filling for the remainder of the year is not the place of the other but rather a vacant place and the statutory exclusion from accrual does not apply. The Court's interpretation of *N.J.S.A.* 18A:16-1.1 is directly applicable to the instant case:

> We construe the authorization of this provision as applying when the services of a substitute teacher are required because of the *temporary absence,* even if protracted, of a regular teacher whose return to duty is *contemplated*. . . . The phrase 'to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee,' clearly implies a temporary arrangement. That is, the 'place' which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. The substitute is appointed to act for the other *during that period.* (emphasis supplied) *Id.*, 193 *N.J. Super.* At 428.

The issue in the instant case is whether petitioner could properly be excluded from accruing time toward tenure once the teacher he was hired to replace returned to the district in another position and the position from which she departed became vacant.

DISCUSSION AND CONCLUSIONS

On March 23, 1999 Jean Hamilton vacated her position as the seventh grade study skills teacher at Overbrook Junior High School when she accepted a position as a Secondary School English teacher at Overbrook Senior High School.

Petitioner applied for, interviewed for and was chosen to fill the position of seventh grade study skills teacher at Overbrook Junior High School, a position in which he had substituted for Jean Hamilton.

No one could continue to contemplate Jean Hamilton's return to the seventh grade position once she assumed the position of High School English Teacher. Her former position

was then vacant, it was not "filled" by petitioner as a substitute teacher, it was filled by petitioner as a regular teacher despite the fact that no ceremony attached to his new status.

I therefore **FIND** and **CONCLUDE** that petitioner acquired tenure on March 24, 2002.

I further **FIND** and **CONCLUDE** that the BOE's failure to retain petitioner for the 2002-2003 year was in violation of his tenure rights.

I **ORDER** the BOE to reinstate petitioner to the full time teaching position he held in the Winslow Township School District or equivalent teaching position within the scope of his teaching certifications effective immediately, and

I **FURTHER ORDER** that respondent BOE pay and provide petitioner with all lost salary, benefits and emoluments due and owed to him as a result of its failure to reemploy him in a full time teaching position for the 2002-2003 school year with interest thereon as provided by law.

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

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

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

2-4-03
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

February 10, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 11 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

WSS

WITNESSES

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

Briefs Attached

OAL DKT. NO. EDU 6403-02
AGENCY DKT. NO. 210-7/02

JOHN CALABRIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner acquired tenure on March 24, 2002, and that the Board's failure to employ him for the 2002-03 school year was a violation of his tenure rights.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/03

Date of Mailing: 3/14/03

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

116-03R

ROBERT RICHARDSON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT.

AND

IN THE MATTER OF THE TENURE HEARING OF ROBERT RICHARDSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

March 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4160-02
(ON REMAND OAL DKT NOS.
EDU 6181-01 & EDU 870-02)
AGENCY DKT. NO. 317-8/01 & 511-12/01

ROBERT RICHARDSON,
Petitioner,
v.
BOARD OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.
AND
IN THE MATTER OF THE TENURE CHARGES OF ROBERT RICHARDSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Robert M. Schwartz, Esq., for petitioner-respondent Robert Richardson

Thomas W. Sumners, Esq., for respondent-petitioner Board of Education (Sumners, George & Dortch, attorneys)

Record Closed: January 31, 2003 Decided: February 3, 2003

BEFORE **JOSEPH LAVERY**, ALJ:

In these consolidated matters, the Board certified tenure charges of unbecoming conduct and insubordination against petitioner-respondent, Robert Richardson, Coordinator of Custodial and Grounds.

PROCEDURAL HISTORY

Petitioner-Respondent Richardson appealed his termination asserting violation of his tenure rights. The matters were transmitted to the Office of Administrative Law for determination on September 18, 2001, with the filing of the first appeal, (*Robert Richardson v. Board of Education of the City of Trenton*, Mercer *County*, OAL Dkt. No. EDU 6181-01) and on March 14, 2002 with the filing of the second appeal (*In the Matter of the Tenure Charges Against Robert Richardson, School District of the City of Trenton*, OAL Dkt. No. EDU 870-02). On March 18, 2002, an Order of Consolidation issued. An Initial Decision issued on March 22, 2002, denying the petition of Richardson and dismissing the consolidated case contesting tenure charges. By decision of the Commissioner of Education, dated May 7, 2002 (OAL Dkt. No. EDU 4160-02) these consolidated matters were remanded to the Office of Administrative Law (OAL) for further fact-finding and expansion of the record to determine whether Richardson was eligible for tenure under the janitor tenure statute, *N.J.S.A.* 18A:71-3 and/or the Veterans Tenure Act, *N.J.S.A.* 18A:38-16.1, to establish his employment rights, if any.

A telephone prehearing conference was scheduled with counsel on June 20, 2002, and as a result of that conference an Order was issued directing the matter proceed to plenary hearing on September 5, 2002. On that date, the hearing was converted to a settlement conference in which there was a potential for resolution of the issues. The matter was adjourned to permit consultation with the Board of Education, which was scheduled to meet on September 17, 2002.

By letter dated October 7, 2002, counsel for the Board advised the undersigned that the Board had agreed in principle with the settlement agreement, and it was anticipated that the matter would be resolved at the Board's next meeting of October 21, 2002.

When no executed settlement agreement was filed, a hearing was scheduled for January 13, 2003, but adjourned since the parties stipulated that the matter had been settled.

THE SETTLEMENT

A Stipulation of Settlement has been prepared by the parties indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

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

February 3, 2003
DATE

JOSEPH LAVERY, ALJ t/a

Receipt Acknowledged:

February 5, 2003
DATE

M. Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 5 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

ROBERT M. SCHWARTZ
ATTORNEY AT LAW
MONROE CENTRE AT FORSGATE
12 CENTRE DRIVE
MONROE, NEW JERSEY 08831
(609) 860-9100

ROBERT RICHARDSON	
v.	OAL DOCKET NO.: EDU6181-01
	AGENCY DOCKET NO.: 317-8/01
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	CONSOLIDATED WITH
	OAL DOCKET NO.: EDU870-02
	AGENCY DOCKET NO.: 511-12-01
	STIPULATION OF SETTLEMENT

The Trenton Board of Education (hereinafter referred to as "Board") with offices located at 108 North Clinton Avenue, Trenton, New Jersey 08609, represented by Thomas W. Sumners, Jr. Esq., of the law firm of Sumners George, and Robert Richardson, whose residence is located at 35 Hampton Court East, Robbinsville, New Jersey 08691, represented by Robert M. Schwartz, Esq., by way of this stipulation of agreement say:

WHEREAS, on or about September 18, 2001, Mr. Richardson initiated a contested case in the Office of Administrative Law with the filing of a Petition of Appeal challenging his summary termination which took effect on July 1, 2001, the matter having OAL Docket # EDU6181-01, and

WHEREAS, the Board initiated the filing of tenure charges against Mr. Richardson having filed the charges with the Commissioner of Education on or about December 21, 2001, with the matter having been filed with the Office of

Administrative Law on or about March 14, 2002, and having OAL Docket # EDU870-02, and

WHEREAS, Mr. Richardson filed a Motion for Summary Judgment seeking to dismiss the tenure charges having OAL Docket Number EDU 870-02; and

WHEREAS, the Commissioner denied Mr. Richardson's Motion for Summary Judgment and determined that any decision with regard to the tenure charges should await the outcome of Mr. Richardson's initial challenge of his dismissal, referencing the matter having OAL Docket Number EDU 6181-01; and

WHEREAS, the Administrative Law Judge denied Mr. Richardson's Motion for Summary Judgment filed in the matter having OAL Docket Number EDU 6181-01; and

WHEREAS, the Commissioner reversed the Administrative Law Judge's decision with respect to the Summary Judgment Motion in the matter having OAL Docket Number EDU 6181-01 and remanded the matter for further hearings before the Office of Administrative Law; and

WHEREAS, both parties appeared before the Administrative Law Judge Joseph Lavery on September 5, 2002 to commence the hearing in this matter; and

WHEREAS, both parties expected the necessity of further hearing dates in this matter, and

WHEREAS, the outcome of this matter was uncertain, and

WHEREAS, both parties were expected to incur further extensive litigation costs, and

WHEREAS, after extensive discussion the parties were able to reach an amicable resolution of the issues in dispute; and

WHEREAS the Board has reviewed the Stipulation of Settlement (hereinafter referred to as "Stipulation") and finds that it is in the best interest of the Board and the taxpayers of Trenton.

NOW THEREFORE, in consideration of the agreements and covenants and conditions contained herein the adequacy and sufficiency which is hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. The Board shall not reimburse Mr. Richardson for any back pay from the effective date of his contract non-renewal to the date of this agreement.

2. The Board agrees to compensate Mr. Richardson in the amount of $65,416.68, equaling ten months of employment at Mr. Richardson's rate of pay during the 2001 – 2002-school term representing the loss of future wages.

3. In consideration for such payment Mr. Richardson, personally and for his estate and/or his heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action, and rights to be employed by the Board and in law or in equity known and unknown that he has or may have against the Board in any and all of its officers, directors, agents, represents, and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives (collectively "releasees"), based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any events related to, arising from, or in connection with, Mr. Richardson's employment and/or

association with releasees. Mr. Richardson specifically waives, releases and gives up any and all claims, demand, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that were asserted or could have been asserted under any Federal and/or State statutes, rules, regulations, common-law, and/or contract, expressly including, but not limited to, any claims (including individual and class action claims) relating to:

- Title VII of the Civil Rights Act of 1964, as amended;
- Sections 1981 through 1982 of Title 42 of the United States Code, as amended;
- The Employee and Retirement Income Security Act of 1974, as amended;
- The Americans With Disabilities Act of 1990, as amended;
- The Age Discrimination in Employment Act of 1967, as amended and the Older Workers Benefit Protection Act, 29 U.S.C. Section 621 –634;
- The Fair Labor Standards Act, as amended;
- The Occupational Safety and Health Act; as amended;
- The Family and Medical Leave Act of 1993;
- The Equal Pay Act, as amended;
- The New Jersey Law Against Discrimination, as amended;
- The New Jersey Minimum Wage Law, as amended;
- The New Wage and Hour Law, as amended;

- Equal Pay Law for New Jersey, as amended;
- The New Jersey Worker Health and Safety Act, as amended;
- The New Jersey Family Leave Act, as amended;
- The New Jersey Conscientious Employee Protection Act, as amended;
- Title 34 of the New Jersey Statutes, Labor and Workers' Compensation;
- Any end to the retaliation provision of any statute or law including common-law;
- Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance, or any provision of any state or federal constitution;
- Any public policy, contract, tort or common-law;
- Any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages); and
- Attorneys fees, litigation costs, all medical bills for physical or psychological treatment (paid or outstanding), and any liens of any nature, all medical bills, for psychological or physical treatment for any injuries arising out of Mr. Richardson's employment with the Board.

4. Mr. Richardson agrees, to the fullest extent permitted by law, not to commence, encourage, facilitate or participate in any action or proceeding for

damages, reinstatement, injunctive or any other type of relief, in any state, federal or local court, or before any administrative agency relating to his employment, based upon any act, event or omission occurring before the effective date of this Stipulation. Nothing in this Stipulation is intended to prevent Mr. Richardson from an action to enforce the Board's obligation as set forth herein. Nothing in this Stipulation is intended to prevent Mr. Richardson from contacting the Equal Employment Opportunity Commission (EEOC); however, if Mr. Richardson signs this stipulation, he will not be able to obtain any relief or recovery in connection with any charge filed with the EEOC.

5. It is expressly understood that neither the execution of this stipulation, nor any other action taken by releasees in connection with this Settlement, constitutes an admission by releasees.

6. This stipulation contains the sole and entire agreement among the parties hereto, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Stipulation.

7. This Stipulation shall be governed by and construed in accordance with the laws of the State of New Jersey.

8. This Stipulation may be executed in counter parts. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction in the State of New Jersey, which the parties

hereby acknowledge and agree to be the Superior Court of New Jersey, venued in Mercer County.

9. Mr. Richardson shall have twenty-one (21) days within in which to consider this agreement and decide whether to agree to its terms, but may voluntarily agree to the terms of this agreement before twenty-one (21) days have elapsed. This agreement shall become binding and be in full force and effect seven (7) days after Mr. Richardson signs it. Mr. Richardson may revoke this agreement for a period of seven (7) days following the day he signs it. Any revocation within this period must be submitted in writing to Thomas W. Sumners, Esq. of Sumners, George & Dortch, PC, 849 West 8th Street, P.O. Box 630, Trenton, N.J. 08604 and must state, "I hereby revoke my acceptance of this Agreement." The revocation must be personally delivered to Mr. Sumners, or mailed to Mr. Sumners, and postmarked within seven (7) days of execution of the Agreement. This Agreement shall not become effective or enforceable until after the revocation period has expired. If the last time of the revocation period is a Saturday, Sunday or legal holiday in New Jersey, then the revocation period shall not expire until the next following day which is not a Saturday, Sunday or legal holiday.

10. Mr. Richardson acknowledges that he has been represented by and has consulted with his attorney throughout the negotiations of this Stipulation and that he has reviewed this Stipulation in detail with his attorney and that he fully understands its requirements and limitations. Mr. Richardson fully expressly states that he is fully satisfied with the representation provided by his attorney.

11. Mr. Richardson hereby states that he is signing this Stipulation voluntarily of his own free will and not under duress or coercion of any kind.

12. This Stipulation shall be construed fairly and according to the plain language of its terms and not for or any party against hereto.

13. If its determined that a specific clause(s) of this Stipulation is/are illegal under Federal or State Law, then the remainder of the Stipulation not affected by such a ruling shall remain in full force and effect.

14. This Stipulation and each of its provision binds the parties to this Stipulation. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns also are bound. This Stipulation is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors and assigns.

15. This Stipulation must be approved by the Board by resolution prior to being effective or final.

16. This Stipulation is subject to the approval of the Commissioner of Education prior to be effective or final.

IN WITNESS WHEREOF, the parties hereto set their hands to the Stipulation as follows:

Robert B Richardson 1-20-03
ROBERT RICHARDSON

Joyce M. Kersey
BOARD OF EDUCATION

The below signed attorneys of record hereby Stipulate and Agree to the Settlement of the above matter without attorney's fees or costs.

ROBERT M. SCHWARTZ

THOMAS W. SUMNERS JR.,

4j

MAR 1 3 2003

TRENTON BOARD OF EDUCATION
RESOLUTION

WHEREAS, Robert Richardson, Petitioner, has filed a Petition of Appeal with the Commissioner of Education, Agency Docket Nos. 317-8/01 and 511-12/01, OAL Docket No. EDU 4160-02 (On Remand OAL Docket Nos. EDU 6181-01 and EDU 870-02), against the Trenton Board of Education, Respondent; and

WHEREAS, the parties agree it is in their best interests to amicably resolve the Petition of Appeal as set forth in the settlement agreement, attached hereto as Exhibit A;

THEREFORE, BE IT RESOLVED on this 21st day of October, 2002, that the Trenton Board of Education agrees to settle the above-mentioned Petition of Appeal as set forth in Exhibit A.

Melvin L. Wyns, Secretary
Trenton Board of Education

Joyce M. Kersey, President
Trenton Board of Education

4K

TRENTON BOARD OF EDUCATION
EXECUTIVE SESSION
BOARD CONFERENCE MINUTES – October 21, 2002

25. [redacted] – Tenure Charges

Attorney Sumners advised that the tenure charges will be considered in executive session at the Board's Public Meeting on 10/28/02.

A motion to adjourn the Executive Session at 10:50 p.m... It was moved by Ms. Eure, seconded by Ms. Slaughter.

A motion was made to open the Public Session at 10:50. It moved by Mr. Shelton, seconded by Ms. Slaughter.

A motion was made to accept the Retirement Agreement. It was moved by Ms. Slaughter, seconded by Ms. Ramos.

ROLL CALL	YES	NO	ABSTAIN
Abdul-Malik Ali	Absent		
Geraldine Eure	x		
Garry R. Feltus	x		
Bernard McMullan	x		
Noriel Peña	Absent		
Abigail Ramos	x		
Donald O. Shelton	x		
Sunnetta Slaughter	x		
Joyce M. Kersey	x		

The Board reviewed the revisions and agreed to vote on the Agreement regarding Robert Richardson. A motion was made to approve the Agreement. It was moved by Ms. Eure, seconded by Dr. McMullan to approve the acceptance of the Agreement.

ROLL CALL	YES	NO	ABSTAIN
Abdul-Malik Ali	Absent		
Geraldine Eure	x		
Garry R. Feltus	x		
Bernard McMullan	x		
Noriel Peña	Absent		
Abigail Ramos	x		
Donald O. Shelton	x		
Sunnetta Slaughter	x		
Joyce M. Kersey	x		

AL

ROBERT RICHARDSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION ON REMAND
AND	:	
IN THE MATTER OF THE TENURE HEARING OF ROBERT RICHARDSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter.* *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/03
Date of Mailing: 3/18/03

* At issue in this consolidated matter was whether petitioner/respondent had achieved tenure under the janitor tenure statute, *N.J.S.A.* 18A:71-3, and/or the Veterans Tenure Act, *N.J.S.A.* 18A:38-16.1. Although settlement of this matter leaves the tenure issue unresolved, the filing of tenure charges by the Board dictates that the settlement terms be reviewed under the standards set forth in *Cardonick*.

148-03E

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

March 21, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 3066-03

AGENCY DKT. NO. 93-3/03

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY

Respondent.

Raymond W. Fisher, Esq., for petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Dennis A. Collins, Esq., for respondent

No appearance by or for William L. Librera, Commissioner of Education, or State Board of Education in regard to the motion for Emergent Relief

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

This proceeding was initiated by the Board of Education of the Borough of Lincoln Park (petitioner) which has a Send-Receive relationship with the Town of Boonton Board of Education (respondent), to resolve the issue of whether the work performed at respondent's high school parking lot constitutes a capital expenditure and,

therefore not includible in tuition costs under the Send-Receive Agreement between the parties, or whether it constituted maintenance and is therefore includible in the cost of tuition. Petitioner seeks an Order determining that the work performed be deemed a capital expenditure under Agreement, and that in the absence of express written consent by petitioner, as required by the agreement, no portion of the expense is attributable to petitioner.

The matter was transmitted to the Office of Administrative Law on March 18, 2003, for determination as a contested case. Oral argument was conducted via telephone conference at the request of the parties on March 19, 2003.

The agreement between the parties dated April 14, 1999 covers a term of seven years and includes a partial list of what constitutes capital expenditures which may not be included in the calculation of tuition without the express consent of petitioner. The listing of capital expenditures does not include repairs to the parking lot. Respondent determined to have work performed on the high school parking lot, the cost of which was approximately $82,000. Petitioner's share, if authorized, would approximate $43,000. Respondent to have sought to include what it deemed to be petitioner's share of the parking lot work included in petitioner's 2003-2004 Annual District Budget Statement. This would mean an adjustment amount in the budget of $320,042. If the parking lot charges were excluded the tuition adjustment would be in the amount of $276.806.

Pursuant to *N.J.A.C.* 6A:23-3.1(f)5, the dispute was submitted to the county superintendent as a mediator. The county superintendent responded by opining that the work was "required maintenance" and that respondent was correct in assessing the charges against petitioner. Petitioner was directed to submit a revised budget, at the higher amount. Petitioner objects to the superintendent's determination, asserting that there is no statute or regulation permitting the inclusion of the cost, which it deems to be capital improvement, into the calculation of tuition, and further, that the agreement between the parties prohibits inclusion of capital expenditures without petitioner's express written consent. Respondent concurs with the superintendent's determination that the work constituted repairs, and asserts that no statute or code categorizes the

repairs as a capital expenditure. The parties agreed that the determination of this issue requires an interpretation of the contract between the parties.

As set forth in *N.J.A.C.* 6A:3-1.6(b), an application for Emergent Relief will be granted only of it meets the following four requirements, pursuant to *Crowe* v. *DeGioia*, 90 N.J. 126 (1986):

(1) The petitioner will suffer irreparable harm if the requested relief is not granted;

(2) The legal right underlying petitioner's claim is settled;

(3) The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

(4) When the equities and interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The first requirement is that a denial of the requested relief will cause irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by money damages. *Id.*, at 132-133. Petitioner concedes that "the matter at issue is primarily a matter of dollars...". Petitioner asserts that it will suffer irreparable harm because an increase in the budget could mean a budget defeat, and that if the budget were to be defeated, depending on the magnitude of the vote, the municipality could well cut the budget further, resulting in programs being cut.

With regard to the approximately $43,000 in costs which respondent is seeking to assess petitioner for, the issue in dispute here is a liquidated sum of money. If, after full hearing, it was determined that, based upon the agreement between the parties, a portion of the cost for the work performed at respondents' high school parking lot is not, in fact, chargeable to petitioner, then that amount could be adjusted between the

parties[1]. With regard to the prospect that the budget might be voted down if this amount were to be as included this year is speculative at best, and no evidence whatsoever was presented to suggest that the budget at either level, with or without the inclusion of the approximately $43,000 in costs would be approved by the voters. Under the circumstances, petitioner has not demonstrated that it would suffer irreparable harm without the requested relief.

The second consideration is whether the legal right underlying petitioners claim is settled. Petitioner articulates that the school law is not instructive and that the controlling language is that of the agreement between the parties, but asserts that from a practical view and an application of common sense principles, the work constituted a capital expenditure rather than a repair. As support for this view, petitioner cites the five year guaranty issued by the contractor as indicative that the work was not a repair, and also cites the substantial cost of the project. Petitioner further asserts that based upon these factors, its auditor Mr. Gallo in his revised report of February 19, 2003, found the work to be a capital expenditure[2]. Mr. Gallo had, in his original report dated December 6, 2002, designated the repair as "properly allocated or to be allowable per the agreement[3]." In his affidavit of March 18, 2003, Mr. Gallo addresses the discrepancy by indicating that prior to rendering his initial report he had believed petitioner had given express written consent for the work. While in theory repairs are expensed and improvements are capitalized, is entirely unclear here, and no testimony was offered, relative to the work actually performed. Petitioner urges that common sense dictates what is a repair and what is a capital expenditure. Whether the work constituted repair or maintenance, or something more, is the issue in controversy, and neither the facts nor the law are well settled. Additional testimony is required. The fact that the parking lot may not require repair on an annual basis does not render the repair a capital expense. Petitioner therefore has not satisfied the requirement that the legal right underlying its claim be "settled". *Crowe*, at 133.

[1] Adjustments are made annually.
[2] There is no foundation for Mr. Gallo's opinion that the cost of the project renders it a capital expense.
[3] Referencing the agreement between the parties.

The third consideration is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. Petitioner asserts that the listing of what constitutes capital expenditures contained within the agreement between the parties on p. 7, is only a partial list, and that it is clear that capital expenditures chargeable to petitioner require prior written approval. Petitioner agrees that resolution of this matter requires interpretation of the agreement between the parties, and asserts that the accountant Mr. Gallo is the best person make this determination. Petitioner concedes that the agreement is not clear on its face. Respondent cites to the Gallo report of December 16, 2002, and the subsequent report of February 13, 2003, and questions the complete about-face in Gallo's view relative to the work done on the parking lot. Respondent asserts that Gallo had full access to all records of respondent and a close working relationship with the business administrator, such that a copy of any such authorization believed to exist could have been sought and would have been provided. Furthermore, the matter was submitted to the county superintendent who concluded that petitioner should pay its share of the repairs to the high school parking lot and directed petitioner to amend its budget statement to reflect inclusion of its share of this cost. Under the circumstances, including the opposing views on the issue provided by the accountant and the lack of testimony relative to those issues, as well as the county superintendents determination, petitioner has not demonstrated a likelihood of prevailing on the merits of the underlying claim.

With regard to the equities and interests of the parties, petitioner asserts that its is unable to certify its budget until this matter is resolved, and that process needs to be concluded no later than March 20, 2003, to meet deadlines for publication and advertising for the March 25, 2003 public budget hearing. Petitioner asserts that when the equities and interests are balance it will suffer greater harm than respondent if the relief sought is not granted. The emergency asserted however, is the alleged inability of petitioner to certify its budget. Petitioner has, in a sense, created this emergency, by declining to follow the directive of the superintendent and include the parking lot project in its annual budget statement. Petitioner can simply forward an amended budget statement to the superintendent for approval and certification. If a credit is determined to be due after a full hearing, the matter can be adjusted at another time. While it may

not wish to submit a budget at the higher amount, petitioner is not unable to certify its budget. Petitioner has brought this emergency on itself.

Accordingly, it is **ORDERED** that petitioner's application for emergency relief is denied.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 20:14B-10.

March 20, 2003
DATE

LESLIE Z. CELENTANO, ALJ

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The Motion for Emergent Relief, the audiotape of the hearing conducted via telephone conference by the Administrative Law Judge (ALJ) of the Office of Administrative Law (OAL) on March 19, 2003, and the Initial Decision and Order of the ALJ denying emergent relief have been reviewed.[1]

Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34.

[1] Neither respondent nor the OAL forwarded a copy of respondent's Answer to this motion to the Commissioner for his review. However, arguments presented by respondent in the telephone hearing conference were considered in reaching the determination herein.

Accordingly, the recommended Order of the ALJ denying petitioner's Motion for Emergent Relief is affirmed for the reasons expressed therein. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3|21|03

Date of Mailing: 3|21|03

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

152-03E

K.C. AND C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

March 26, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 00739-03S
AGENCY DKT. 75-3/03

K.C. and C.C., ON BEHALF OF
MINOR CHILD, J.C.,
v.
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF
LAKEWOOD, OCEAN COUNTY,
Respondent.

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

In this application for emergent relief filed with the Department of Education on March 6, 2003, the parents of a student in the Lakewood School District ("Lakewood") seek a determination that the student's rights were violated when he was first suspended for ten days and then transferred from Lakewood High School to an alternative school placement in the District, known as the Project Opportunity Program, or "POP." At the time of the initial suspension on November 13, 2002, the Assistant Principal of the High School wrote to the parents to advise that their son had been placed on an out-of-school suspension for ten days from 11/12/02 through 11/25/02 because of his alleged involvement in "possession of a weapon" and "assault on a student." The parents were advised in the letter that they could arrange for classroom work and could discuss the matter with Assistant Principal Suarez by calling a listed telephone number.

On November 20, 2002, Principal Anderson wrote to the parents and advised that the Superintendent of Schools would "hold a discipline hearing" on November 25, 2002. The letter continued, "Because of the serious nature of the hearing and because the hearing may have an impact on M's status at Lakewood High School, it is important that you and Stuart attend the hearing."

It does not appear to be in dispute that whatever actually occurred on November 25 before the Superintendent, no formal hearing, with witnesses and examination and cross-examination, occurred. Principal Anderson wrote to the parents on November 25, advising them that "[A]t the superintendent's review hearing on Tuesday, November 25, 2002, it was agreed that J. would enroll in POP for the remainder of the school year;" he could reapply to Lakewood High School in September 2003, and his readmission thereto would be based upon his academic performance, attendance and behavior in the alternate program. In addition, he was forbidden to be on the property of the High School during regular school hours. Since sometime after November 25, J. has attended POP, a school that his parents contend is not sufficiently challenging and offers a limited educational experience for their son.

In their petition for emergent relief, the petitioners argue that the District's Board of Education violated their son's due process rights and seek to overturn the ten-day suspension and the "expulsion of J.C. from Lakewood High School through the end of the 2002-2003 school year." They also seek to have the Board expunge and destroy all records of his suspension and return him to the regular education program at the High School. In support of their claim, they argue that the suspension for ten days was invalid because J. did not receive an informal hearing with the Assistant Principal or the School Principal before that suspension and, "more importantly, his due process rights were egregiously violated when the Superintendent, not the Board of Education, expelled him from school for one year and directed that he attend POP." Further, they contend that even the Superintendent failed to provide the necessary due process as they did not receive in advance of the November 25 hearing a specification of the charges against J., a list of witnesses and a report of what each witness would testify to, and advice that he could either defend himself or bring an attorney with him to the hearing. They claim that at the Superintendent's "hearing," J. was not permitted to defend himself by explaining his side of the story, the opportunity to present witnesses to testify on his behalf, or the opportunity to face and

question the witnesses who made allegations against him. They allege that the Superintendent told J. that he could not know the identity of the witnesses who alleged that he had been involved in an assault.

In response, the Board argues that the initial suspension was not in excess of ten days and further, J. was not "expelled," from the District. At most he was transferred to an alternative placement within the District, to a program run under District contract by an outside contractor, Sylvan Learning Center. Students therein are district students, receive a Lakewood diploma and even are able to take courses at the High School which are not offered at POP, although there is no claim that J. either could or does take any such course(s) at the High School. At hearing, the District's counsel asserted that the student's rights under *Goss v. Lopez*, 419 *U.S.* 565, 95 *S.Ct.* 729, 42 *L.Ed.*2d 725 (1975) were honored, albeit he conceded that at no time was the student presented in advance of any hearing with the names of witnesses and information as to the what they would testify to.

Despite the determination on November 25, 2002, excluding J. from the High School and directing that he attend POP, the petitioners herein did not file any challenge to the initial suspension or the subsequent exclusion from the High School for the remainder of the school year until early March 2003. The clear focus of their concern at this late date is the continuing exclusion of J. from the High School and his attendance at POP. That situation did not result from an expulsion, as they sometimes assert in their argument. J. was never "expelled" from the District, he was instead ordered transferred to another alternative educational unit within the District program, albeit one run under a contract for the District. Thus the case does not implicate the legal standards that govern an expulsion.

Additionally, after questioning the attorneys it appears that while the charges against the student were assault and possession of a weapon (a sharpened screwdriver), there was never a contention that the assault that purportedly occurred involved either the open display of or the use of the weapon. Under these circumstances, *N.J.S.A.* 18A:37-2.2, which addresses the case of a pupil who commits an assault on another student "with a weapon, on any school property," does not seem to apply, at least as written. That statute and the corollary regulations contained at *N.J.A.C.* 6A:16-5.6, dictate a procedure that involves removal of the student "immediately" from

the school's regular education program and placement in an alternative education program, and then, a hearing before the board of education no later than thirty days following the day the pupil is removed from the regular education program, a hearing at which the student's guilt of the charges is to be determined, and which results, if the finding is not guilty, with a return to the regular education program. If the student is found guilty, the removal to the alternative program can continue, but not for more than one calendar year. *N.J.A.C.* 6A:16-5.6. The chief school administrator is empowered to determine when the pupil is prepared to return to the regular education program "in accordance with regulations established by the Commissioner of Education." See *N.J.A.C.* 6A:16-5.6 (g). Importantly, an appeal of the district's determination must be made to the Commissioner within 90 days of the board's decision. *N.J.A.C.* 6A:16-5.6 (e) 4.

In determining whether emergency relief can be provided, the standards established in the seminal case of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) are applied. The petitioner must establish that (1) there is a show that irreparable harm will result if the injunction requested is not granted; (2) there is a demonstration that there is a reasonable probability of success on the merits; and (3) the relative hardship to the moving party outweighs the hardship to the other side. The Commissioner has the authority to overturn a local school board's decision if it is arbitrary and capricious.

In this case, the moving party has not demonstrated that it has a reasonable likelihood of success on the merits. Initially, although no party raised the issue in their papers or at argument, it must be noted that the petition for emergent relief was filed more than 90 days after the November 25 letter that incorporated the "agreement" that J. would attend POP and be excluded from the High School. *N.J.A.C.* 6A:3-1.3 (d) requires that any petition for relief filed with the Commissioner "shall" be filed "no later than the 90th day from the receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." While at oral argument counsel for the petitioners contended that they did not immediately appeal their son's transfer to either the Board or, (although not addressed specifically, but nevertheless more significantly, as regards the 90-day rule), to the Commissioner, because they were not aware of their rights, such reason is not generally sufficient to overcome the extremely strong policy that requires that appeals of local

action to the Commissioner must be filed no later than ninety days after the appealing party is aware or should have been aware of the action appealed from. As noted, the same 90-day requirement is incorporated in the regulations governing appeals of local board action in the case of a student removed from general education for an assault with a weapon. I see no reason to think that the rule is not likewise applicable to a case such as this, where the removal from general education is for an assault committed on school property, one that occurred when the student also happened to have in his possession a weapon, albeit one that he did not display or use during the assault. The parents surely knew as of November 25 that he was to be transferred. As such, as the 90-day requirement is jurisdictional, any chance for relief in this appeal is unlikely at best. Indeed, it could be argued that the emergent relief petition could, or indeed should, be dismissed on this ground alone, without any consideration of the merits of the case. Nevertheless, as the parties have not addressed that concern and there are other reasons for concluding that the standards for emergency relief have not been satisfied, I will resolve the emergent relief petition without reliance upon the 90-day rule. However, the issue is noted for the parties in regard to any further proceedings that might occur.

While the petitioners have repeatedly characterized their son's transfer from Lakewood High School to POP as an "expulsion," in fact, no expulsion occurred. After serving the ten-day suspension, the student was allowed to continue to receive his education in a school maintained by the Lakewood School District. He was not denied an education, although in his parents' opinion the course of study at POP does not measure up to that which their son received at the district's high school. An in-district transfer accomplished for disciplinary reasons does not implicate the Federal constitutional concerns that a suspension or expulsion do. There is no federal constitutional issue presented by a transfer within district from one facility to another. *Nevares v. San Marcos Consolidated Independent School District,* 111 *F.*3d 25 (5th Cir. 1997); *Zamora v. Pomeroy*, 639 *F.*2d 662 (10th Cir. 1981). To the extent that the New Jersey Constitution guarantees that student receive a thorough and efficient education, there has been no preliminary showing that the education offered at POP, even if, as petitioners' advance, not as good as the high school's, fails the State's constitutional test. While the circumstances that surround the initial suspension might cause some concern, to the extent the parents seek an emergency order restoring their son to the high school, they have not demonstrated that his removal there from and transfer to POP violated constitutional protections. Further, they have

not made a preliminary case that his placement in POP has caused him any irreparable harm, or that his continued placement there will work such harm pending a determination of the merits of this matter in a plenary hearing.

In addition to the above, it must be noted that since the time of the initial transfer to POP, the student has been adjudicated by the Family Court. He came before the Court in response to two dockets, one resulting from the assault and weapons charge that arose from the incident that sparked his suspension and tranfer; the other from an assault with a knife upon his brother which apparently occurred shortly after these events and did not occur on school property. The Family Court adjudication led to pleas of guilt on charges related to each assault. Importantly, the Court ordered that the petitioner's son was to have "no contact with the victim." (The petitioners agree that the reference in the Disclosure of Juvenile Information to School form introduced in evidence is to the victim of the assault on school property, not to the student's sibling.) As the parents want their child returned to Lakewood High School, which the victim also attends, it is at best questionable that the Commissioner would overturn the local determination that effectively limits the likelihood of contact between this now adjudicated student and the victim, at least on school property. Thus again, the likelihood of success on the merits is not significant. Indeed, even if it were more likely than not that the Commissioner would return the child to the High School, at least as regards this emergency petition that seeks his return prior to a plenary hearing on the case, the balancing required by the third prong of *Crowe* weighs more in favor of denying emergent relief than in favor of granting it.

For the reasons noted, I **CONCLUDE** that the petitioners have failed to satisfy the standards established for obtaining emergent relief. Their petition is therefore **DENIED**. If the petitioners nevertheless seek to have a plenary hearing, the parties will be expected to address the 90-day issue. Counsel for the petitioners shall notify counsel for the Board and myself within five days as to whether the petitioners intend to proceed. If they do, he shall file a response as to the effect of the 90-day rule on the continued validity of the petition within ten days of his letter. Counsel for the Board may then reply within five days. A ruling on the issue will be presented shortly thereafter.

This order on application for emergency relief may be adopted, modified or rejected by **THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

March 17 2003
DATE

JEFF S. MASIN, ACTING CHIEF, ALJ

mjm

OAL DKT. NO. EDU 00739-03S
AGENCY DKT. NO. 75-3/03

K.C. AND C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law (OAL) on March 14, 2003, and the Initial Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the Order denying emergent relief, as he concurs with the ALJ's determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3|26|03

Date of Mailing: 3|28|03

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

153-03

153-03

THERESA PIATKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

March 31, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7405-00
AGENCY DKT. NO. 216-6/00

THERESA PIATKOWSKI,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON,

Respondent.

Alan S. Porwich, Esq., for petitioner

Charlotte Kitler, Esq., for respondent

Record Closed: February 10, 2003 Decided: February 11, 2003

BEFORE **THOMAS E. CLANCY,** ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 10, 2000 for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.A.C.* 52:14F-1 *et seq.*

During the pendency of the case at the OAL, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND** (a) they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1.1 and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

2/11/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

February 14, 2003
DATE

M. Kathleen Duncan (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 20 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

FEINTUCH, PORWICH & FEINTUCH
26 Journal Square
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

THERESA PIATKOWSKI, Petitioner vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT. NO. EDU 07405-00 Agency Ref No. 216-6/00 STIPULATION OF SETTLEMENT

THIS MATTER having been brought before the office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with Charlotte Kitler, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the Division of Workers' Compensation ruling on the length of petitioner's temporary disability in Theresa Piatkowski vs. Jersey City Board of Education, C.P. No. 2000-41511, and for good cause being shown,

IT IS on this 10th day of February, 2003,

corrections by
Thomas E. Clancy ALAJ

STIPULATED AND AGREED that Respondent shall restore all Petitioner's sick days deducted from Petitioner's sick leave bank from March 2, 2000 through March 1, 2001.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: ~~December , 2002~~ 2/6/03

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: ~~December~~ 1/28/03, 2002

OAL DKT. NO. EDU 7405-00
AGENCY DKT. NO. 219-6/00

THERESA PIATKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3|31|03

Date of Mailing: 3|31|03

154-03

154-03 SEC

IN THE MATTER OF ABDI GASS, :

CHESILHURST BOARD OF EDUCATION, :

CAMDEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(c) and (e) of the School Ethics Act by serving as "borough consultant" to the Borough of Chesilhurst, but functioning as the Borough's financial officer while he was a member of the Board and by continuing employment with the Borough while remaining on the Board. Moreover, respondent flagrantly ignored the Commission's prior decision cautioning him that participation in budget matters would violate the Act. After considering the nature of the charges and recognizing that respondent resigned from the Board, the Commission recommended the most severe available penalty, censure.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent censured as a school official found to have violated the School Ethics Act.

March 31, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C10-02**
ABDI GASS,	:	
CHESILHURST TOWNSHIP	:	
BOARD OF EDUCATION,	:	**DECISION ON VIOLATION**
CAMDEN COUNTY	:	
	:	

PROCEDURAL HISTORY

The above-captioned matter arises from a complaint that was filed on May 13, 2002 by Chesilhurst Board of Education (Board) member Wadia Alwan. Therein, she alleged that Abdi Gass violated N.J.S.A. 18A:12-24(c), by serving as "borough consultant" to the Borough of Chesilhurst, but functioning as the Borough's financial officer while he was a member of the Board. She also alleged that Mr. Gass violated N.J.S.A. 18A:12-24(d) by continuing employment with the Borough while remaining on the Board. Third, she alleged that Mr. Gass violated N.J.S.A. 18A:12-24(g) by representing the Chesilhurst Borough Council's position in the defeated budget negotiations process contrary to the Board's budget presented by the Chief School Administrator (CSA). Last, she alleged that he violated two Board policies by not supporting the adopted budget and supporting budget cuts that were not prepared by the CSA and the Business Administrator.

At its meeting of September 24, 2002, the School Ethics Commission found probable cause to credit the allegations that Mr. Gass violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when, as a member of the Chesilhurst Board of Education (Board), he voted in favor of the budget and participated in the defeated budget negotiations process while he was employed by the Borough of Chesilhurst as a consultant and N.J.S.A. 18A:12-24(g) when he presented the budget cuts advocated by Borough Council to the CSA and the Board. The Commission did not find probable cause to credit the allegations that he had an inherent conflict of interest in violation of N.J.S.A. 18A:12-24(d) by serving on the board and being employed by the Borough or that his violation of board policies violated the Act.[1] The Commission found the material facts to be undisputed regarding the conduct on which it found probable cause and invited Mr. Gass to submit a written statement to the Commission by January 6, 2003, setting forth why he should not be found in violation of N.J.S.A. 18A:12-24(c) and (g) of the Act.

Mr. Gass submitted a timely written statement to the Commission arguing that it was not a violation for him to vote on the budget before it was defeated and that there was no direct evidence that he participated in discussions on the budget after it was defeated.

[1] In its probable cause decision, the Commission found that it did not have the authority to enforce Board policies, but said that the policies supported the charges upon which it found probable cause.

At its meeting of January 28, 2003, the Commission disagreed and found Mr. Gass in violation of the Act and recommended a penalty of censure since it was the highest penalty that it could recommend against a former board member. [2]

FACTS

Based on the pleadings, the documents submitted and the testimony presented, the Commission found the following facts to be undisputed.

At all times relevant to the allegations in this complaint, Abdi Gass was a member of the Chesilhurst Board of Education. Also, at all times relevant to the allegations in this complaint, Abdi Gass was an appointed consultant to the Borough of Chesilhurst. As Borough Consultant, he has received up to $18,000 per year. Mr. Gass has served in this capacity for approximately nine years. The minutes of the January 5, 2002 meeting of the Chesilhurst Borough Council show that he was to be appointed as Financial Consultant, but the resolution to do so was tabled. He was appointed as Borough Consultant on January 10, 2002. Mr. Gass holds a Municipal Finance Officer (MFO) certificate. No employees in the Borough hold such a certificate, including the Chief Financial Officer (CFO). The CFO's resume shows that her background up until 2001 was in banking, not municipal finance. Mr. Gass assists her in the performance of her duties since she is new to the position.

Mr. Gass set forth that his role with the Borough "has been primarily to ensure that computer systems, data processing, and the backing up of data are properly maintained and effectively managed so that the operation of the Borough will not be undermined." He also assists the CFO in running annual sewer bills and the bill list from the computer system and helps her to ensure the proper posting of transactions to the system. Mr. Gass stated that one of the primary responsibilities of the CFO is to assist the Mayor and the governing body in the annual budget development process. However, the CFO's resume showed that she had no prior experience with the preparation of a municipal budget. Mr. Gass testified that the independent auditor has accomplished this task, as well as the preparation of the annual financial statements and the supplemental debt statement. Mr. Gass denied being the Borough's financial consultant.

At the March 12, 2002 meeting of the Board, Mr. Gass voted to approve the proposed 2002-2003 School District Budget in the amount of $3,178,167.50 (local tax levy $979,763.00) and to submit it to the county office for approval. The motion passed by a vote of five to zero. On March 25, 2002, the Board held a budget meeting. At that meeting, after the CSA presented the budget as approved on March 12, 2002, Mr. Gass proposed a resolution to reduce the local tax share to $849,763.00. Mr. Gass voted in favor of his motion, but his motion failed by a vote of three in favor and four against. A second resolution to adopt the budget as approved on March 12th with a general fund tax

[2] The Commission was advised that Mr. Gass resigned from his position on the Board at the Board's October 8, 2002 meeting.

levy of $976,581.00 succeeded with a vote of four in favor and three against. Mr. Gass voted against the motion.

The April election resulted in the defeat of two incumbents who were supported by Wadia Alwan. It also resulted in the defeat of the budget. Specifically, the budget was defeated by a vote of 47 in favor and 186 against. On April 11, 2002, the county office distributed a defeated budget packet to the District. Mr. Gass became Board Vice President at the April 23, 2002 reorganization meeting. By memorandum dated April 26, 2002, the CSA set forth $100,000 in proposed cuts from the defeated 2002-03 budget. He noted that the cuts would take the District below the Thorough and Efficient range (T&E) so the budget would be automatically reviewed by the Commissioner of Education. The staff reductions that the CSA proposed were only $12,000 of the $100,000 in cuts.

On April 29, 2002, at the request of the newly elected Board President Mary Ellen Tillmon, Mr. Gass attended a meeting with Ms. Tillmon and the CSA. The CSA informed the Board by memorandum of April 29, 2002 that the purpose of the meeting was to review the budget cuts proposed by Mr. Gass and Mrs. Tillmon. In Mr. Gass' proposed budget cuts, he set forth a total of $150,000.00 in budgetary reductions in personnel including elimination of the basic skills teacher position, elimination of the administrative secretary position, elimination of music, art and physical education and the elimination of two teacher aides and one cafeteria aide. These were in addition to almost $100,000 in non-personnel budgetary reductions for a total of $250,000 in cuts.

On April 30, 2002, the Board held a special meeting to discuss the budget. The minutes of that meeting provided by Ms. Alwan set forth:

> The Board voted to submit the $250,000.00 budget cuts Mr. Gass and Mrs. Tillmon submitted to the CSA on Monday, April 29th. Most Board members stated they did not get a chance to review said cuts and discussion was not permitted.

The Commission learned that these were not the official minutes approved by the Board, but the official minutes also do not reflect that the Board discussed the proposed cuts at that meeting. The Board voted to forward Mr. Gass' budget cuts in the amount of $250,000 to the Borough Council for their approval. Mr. Gass abstained and the motion passed by a vote of four in favor and two against.

Also on April 30, 2002, the Board met with the Borough Council regarding the budget. On May 9, 2002, the Borough Council held a meeting and adopted a resolution to certify the taxes to the County Board of Taxation in the amount of $726,581.00, which it said reflected the $250,000 budgetary reductions proposed by the Board and approved by the Council. Attached to the resolution was the line item memorandum prepared and presented to the CSA by Mr. Gass and Mrs. Tillmon.

Interestingly, on April 22, 2002, the Borough Council President had sent to the Board's CSA a letter setting forth a proposed schedule of meetings with the Board to

discuss the defeated school budget. Therein, he proposed a meeting of May 2, 2002, the purpose of which was stated to be:

> [F]or the Governing Body to consider the budget reductions proposed by the school board. The Council would like to see a budget reduction of at least $250,000. of which the school board had already identified in its last board meeting a reduction of $150,000. which did not have any negative impact on the educational program. The council is suggesting that the board undertake a comprehensive examination of its 2001-2002 budget to determine the amount of projected fund balance as of June 30, 2002 – (The latest financial reports indicate an appropriation balance of $145,000. and that all salaries are encumbered.) The board should consider eliminating non-mandated programs such as music, physical education, and art. The Board should also consider leasing one small bus to transport some of its own special edu. students to reduce cost.

A prior ethics complaint against Mr. Gass in 1998 charged him with violating the School Ethics Act in connection with his serving on the Chesilhurst Board of Education and holding a position as consultant with the Borough. The Commission issued a decision on November 24, 1998 finding no probable cause and dismissing the complaint, *In the Matter of Abdi Gass*, C13-98 (November 24, 1998). Although the Commission found no probable cause, it set forth that, because of his role as Borough Consultant, he would have a conflict of interest regarding budget matters. Therefore, the Commission advised Mr. Gass to abstain from discussions on the Board's budget and to recuse himself from participating in matters involving the Borough to the extent that the interests of the Board and the Borough may diverge. The Commission stated that "Failure to adhere to this restriction may result in further proceedings consistent with this opinion."

Mr. Gass provided many facts concerning the factions on the Board and the fact that Ms. Alwan's faction became the minority as a result of the April 22, 2002 election. The Commission considered these facts in rendering its determination.

ANALYSIS

The Commission first found probable cause to credit the allegation that Mr. Gass violated N.J.S.A. 18A:12-24(c), which provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

In its prior opinion, *In the Matter of Abdi Gass, supra*, the Commission specifically advised Mr. Gass that he had an indirect financial involvement with the Borough due to his position as Borough Consultant and therefore he would violate the Act if he were to participate as a Board member in budget discussions. Based on the undisputed facts set forth above, Mr. Gass voted on the budget on March 12, 2002. He made a motion to lower the budget and voted against the budget that he had previously supported on March 25, 2002. In addition, he submitted proposed budget cuts to the CSA, attended a meeting with the CSA and Mrs. Tillmon. Further, according to Mr. Gass' own witness, he presented the revised budget with the cuts to the Borough Council at the April 30, 2002 meeting. The Commission finds that, not only did Mr. Gass act in clear contravention of its prior decision regarding Mr. Gass, but it concludes that he acted in his official capacity in a matter in which he had an indirect financial involvement that might reasonably be expected to impair his objectivity in violation of N.J.S.A. 18A:12-24(c).

The Commission also found probable cause that he represented the Chesilhurst Borough Council's position in a matter pending before the Board in violation of N.J.S.A. 18A:12-24(g). The Council's position was contrary to the budget presented by the CSA, which was initially adopted as the Board's budget as reflected in the Board minutes of March 12 and 25, 2002, and later revised by the CSA's memorandum of April 26, 2002 after the defeat of the budget in the election. N.J.S.A. 18A:12-24(g) provides:

> No school official...shall represent any person or party other than the school board or school district in connection with any cause, proceeding, application or other matter pending before the district in which he serves or in any proceeding involving the school district in which he serves or, for officers and employees of the New Jersey School Boards Association, any school district. This provision shall not be deemed to prohibit representation within the context of official labor union or similar representational responsibilities.

After the Board's budget was defeated in the April election, the CSA should have proposed cuts for the Board to consider. Chesilhurst Board Policy F3113 sets forth that the CSA and business administrator are responsible for formulating the annual budget. If the cuts that the CSA proposes are favorable to the Board, then the cuts would be presented to the Borough Council for consideration. Instead, the Borough Council President's letter of April 22, 2002 to the CSA sets forth the Borough's proposed cuts of $250,000 including cuts to what he calls "non-mandated" programs such as music, physical education and art. In the same letter, the Council suggested that the Board undertake a comprehensive examination of its 2001-2002 budget and stated that the amount of projected fund balance as of June 30, 2002 was $145,000 and that all salaries were encumbered, according to the latest financial reports. This information regarding the projected fund balance, which the Council set forth, had not even been discussed or delivered to the Council as of that date. Prior to the April 22, 2002 letter, the CSA had not set forth any cuts that he proposed to make in response to the defeat of the school budget. He did not do so until April 26, 2002 when he set forth $100,000 in cuts that did not include any cuts to the programs that the

Borough proposed. Mr. Gass and Mrs. Tillmon then met with the CSA, and, amazingly, the cuts of $250,000 that the Borough proposed in its April 22, 2002 letter, eliminating music, physical education and art programs, became the resulting budget from that meeting. Mr. Gass presented those cuts to the Board at its April 30, 2002 meeting, where the Board approved them without discussion. Chesilhurst Board Policy F3100 requires that the Board support the adopted budget, after the legally required budget hearing is held and after the county superintendent approves it. The Board did not support the adopted budget as required by F3100 by approving $250,000.00 in cuts. Mr. Gass then presented the cuts to the Council at the April 30, 2002 Borough Council meeting with the Board. The Council then approved the cuts that went way beyond what the CSA was willing to make. Based on the foregoing, the Commission concludes that Mr. Gass represented the Borough Council in a matter pending before the Board in violation of N.J.S.A. 18A:12-24(g).

DECISION

For the foregoing reasons, the Commission concludes that Mr. Gass violated N.J.S.A. 18A:12-24(c) and (g).

PENALTY

The Commission has found that Mr. Gass flagrantly ignored the Commission's prior decision cautioning him that participation in budget matters would violate the Act. He fully participated in the approval of the budget both before and after its defeat by the voters. Therefore, the Commission would have recommended that the Commissioner of Education remove Mr. Gass from his position on the Chesilhurst Board of Education. However, because he abruptly resigned from the Board after the Commission's finding of probable cause at its meeting of September 24, 2002, the highest penalty that the Commission can impose is a censure. The Commission therefore recommends that the Commissioner of Education impose a penalty of censure.

This decision, having been adopted by the Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C10-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations that Mr. Gass violated N.J.S.A. 18A:12-24(c) and (g) of the School Ethics Act; and

Whereas, the Commission reviewed the written submission of Mr. Gass in response to the finding of probable cause; and

Whereas, the Commission now concludes that respondent violated the School Ethics Act and believes that removal would be the appropriate penalty for the reasons set forth, but cannot impose removal because Mr. Gass resigned from the Board;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Abdi Gass in violation of the Act and recommending that the Commissioner of Education impose a penalty of censure.

Paul C. Garbarini, Chairperson

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on January 28, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 54-2/03

IN THE MATTER OF ABDI GASS,	:	COMMISSIONER OF EDUCATION
CHESILHURST BOARD OF EDUCATION,	:	DECISION
CAMDEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Abdi Gass, former member of the Chesilhurst Board of Education, violated *N.J.S.A.* 18A:12-24(c) and (g) of the School Ethics Act, and recommending a penalty of censure have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Respondent submitted no comments.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner concurs with the Commission that the appropriate sanction for respondent's flagrant violations would have been removal; however, in light of respondent's abrupt resignation from the Board, the Commissioner agrees that censure is the appropriate penalty for respondent in this matter. In so ruling, the Commissioner is satisfied from the record before him that, in recommending a penalty for the violations it found, the Commission fully considered the nature of the offenses and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Abdi Gass be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3|31|03

Date of Mailing: 4|01|03

* This decision, as the Commissioner's final determination regarding penalty in this matter may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

155-03

RICHARD POLNY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4422-02

AGENCY DKT. NO. 180-6/02

RICHARD POLNY,

Petitioner,

v.

CITY OF NEW BRUNSWICK,

BOARD OF EDUCATION,

MIDDLESEX COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, LLC, attorneys)

George F. Hendricks, Esq., for respondent (Hendricks and Hendricks, attorneys)

Record Closed: February 11, 2003 Decided: February 18, 2003

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 8, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

2/18/03
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/20/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cmo

OXFELD COHEN, PC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDUOR 04422-02S
Agency Ref. No. 180-6/02

RICHARD POLNY,

Petitioner,

-vs-

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK,

Respondent.

STIPULATION OF SETTLEMENT

The within matter having been amicably resolved between the parties, it is hereby agreed as follows:

1. The Petitioner and the Respondent agree that Petitioner's appropriate placement on the salary guide is at a position two steps above his current placement;

2. Upon approval of this agreement by the Commissioner of Education, the Petitioner will be immediately moved two steps up on the salary guide from his placement on the salary guide at the time of said approval;

3. Immediately upon the Respondent placing the Petitioner at a place two steps up on the salary guide from his placement at the time of the approval of this agreement by the Commissioner of Education, the Petitioner will be paid at his new step;

4. The Petitioner hereby withdraws his petition in this matter with prejudice, contingent upon approval of the stipulation of settlement by the Commissioner of Education and compliance by the Respondent with the terms set forth in Paragraph Nos. 2 and 3 of this agreement;

5. This Agreement constitutes the entire agreement of the parties with respect to the matters dealt with herein.

OXFELD COHEN, PC
Attorneys for Petitioner
By:

NANCY I. OXFELD, ESQ.

Dated: 2/19/03

HENDRICKS & HENDRICKS
Attorneys for Respondent
By:

GEORGE F. HENDRICKS, ESQ.

Dated:

OAL DKT. NO. EDU 4422-02
AGENCY DKT. NO. 180-6/02

RICHARD POLNY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|02|03

Date of Mailing: 4|02|03

156-03

GEORGE ANN CARMICHAEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4021-01

AGENCY DKT. NO. 139-5/01

GEORGEANN CARMICHAEL,

Petitioner,

v.

BOARD OF EDUCATION OF TRENTON,

MERCER COUNTY,

Respondent.

Michael C. Damm, Esq., for petitioner (Selikoff & Cohen, PA, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George & Dortch, attorneys)

Record Closed: February 11, 2003 Decided: February 11, 2003

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 12, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

Feb. 11, 2003
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

February 19, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 20 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

SELIKOFF & COHEN, P.A.
Suite 314
307 Fellowship Road
Mt. Laurel, New Jersey 08054-1233
(856) 778-6055
Attorneys for Petitioner

GEORGE ANN CARMICHAEL,

Petitioner,

v.

TRENTON BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF THE STATE OF
NEW JERSEY
OAL Docket No. EDU 4021-01
Agency Docket No. 139-5/01

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between the Petitioner GeorgeAnn Carmichael ("Carmichael") and the Respondent Trenton Board of Education ("Board").

WHEREAS, on or about May 1, 2001, Carmichael filed a Petition of Appeal captioned *GeorgeAnn Carmichael v. Trenton Board of Education*, Docket No. 139-5/01, seeking the return of certain sick days over the period of October 4, 2000 through February 14, 2001 pursuant to *N.J.S.A.* 18A:30-2.1 in connection with a work injury occurring on July 24, 2000; and

WHEREAS, the Board filed an Answer to the Petition dated May 24, 2001, denying the allegations; and

WHEREAS, the parties having conducted a full and complete investigation of all the evidence, and the parties having had an opportunity to explore a means of resolving this dispute in a manner consonant with the public interest; and

WHEREAS, this Agreement is the end product of the investigation conducted and discussions with the parties and is intended to dispose of the issues in controversy based upon the mutual understandings set forth below;

NOW THEREFORE, it is agreed as follows:

1. The Petitioner Carmichael hereby agrees to dismiss with prejudice the Petition of Appeal, OAL Docket No. EDU 4021-01, Agency Docket No. 139-5/01, seeking the return of sick days for the period of October 4, 2000 through February 14, 2001 arising out of a work injury occurring on or about July 24, 2000 and hereby fully and completely releases the Board from any and all claims pertaining to that return of sick leave issue;

2. The Board agrees to restore to Carmichael's sick leave bank the number of sick days utilized by her during the period of October 4, 2000 through February 14, 2001 inclusive. Salary payments made to her during that time shall be considered as having been made pursuant to N.J.S.A. 18A:30-2.1;

3. This Agreement shall be final and binding upon Carmichael and the Board on final approval of the Commissioner of Education;

4. Both parties have read the terms of this Agreement and have had the opportunity to discuss it with counsel, and acknowledge that they are executing this Agreement of their own volition, with the full understanding of its terms, and without coercion. By signing this Agreement, each signatory represents that she or he is a party to or has been duly authorized by a party to sign on the party's behalf. The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures;

5. The parties hereto agree that they and their officers, agents, and administrators are bound by a covenant of good faith and fair dealing with respect to this Agreement;

6. The parties recognize the right to a trial before the Office of Administrative Law and independent consideration of the case by the Commissioner of Education. The parties are waiving their right to a trial and agree to the proposed settlement as set forth above. Carmichael recognizes that the dismissal of the Petition of Appeal through settlement is final and that the case cannot be litigated. The parties have made the decision to resolve this case knowingly and voluntarily in recognition that this proposed settlement is subject to the approval of the Commissioner of Education.

Intending to be legally bound hereby, Carmichael and the Board through its authorized representative execute the foregoing Agreement on the date(s) indicated below.

WITNESS:

Michael C. Damm

GEORGE ANN CARMICHAEL
DATED: 12/12/02

WITNESS:

Thomas W. Sumners Jr

TRENTON BOARD OF EDUCATION

BOARD SECRETARY
DATED: 1/23/03

OAL DKT. NO. EDU 4021-01
AGENCY DKT. NO. 139-5/01

GEORGE ANN CARMICHAEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|02|03

Date of Mailing: 4|02|03

* The proposed agreement was approved by the respondent Board of Education, as indicated by a resolution submitted to the record at the request of the Director of Controversies and Disputes.

157-03

157-03

IN MATTER OF THE TENURE HEARING :
OF JOHN E. BENNETT, SCHOOL DISTRICT :
OF THE CITY OF ASBURY PARK, :
MONMOUTH COUNTY. :
_____ :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board certified tenure charges of unbecoming conduct and other just cause against respondent elementary school teacher and sought his dismissal.

The ALJ concluded the matter was moot and ordered the petition dismissed since respondent voluntarily resigned.

In the course of the tenure proceedings, respondent admitted to engaging in a sexual relationship with minor A.C., the conduct underlying one of the charges. Thus, the Commissioner could not consent to dismissing the charges as moot, notwithstanding that respondent resigned. The Commissioner rejected the Initial Decision and remanded the matter to the OAL for further proceedings. The Commissioner directed that a copy of this decision be forwarded to the State Board of Examiners.

April 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 6139-01

AGENCY DKT. NO. 328-8/01

IN THE MATTER OF THE TENURE HEARING OF JOHN E. BENNETT, SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, AGENCY DKT. NO. 328-8/01,

---

Nicholas Celso, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Marcie L. Mackolin, Esq., for respondent (Chamlin, Rosen, Uliano & Witherington, attorneys)

Record Closed: February 6, 2003 Decided: February 18, 2003

BEFORE **STEVEN C. REBACK,** ALJ:

On or about August 20, 2001, tenure charges against the respondent John E. Bennett were filed with the Commissioner of Education alleging that Bennett should be dismissed from his tenured position as an elementary school teacher employed by the Asbury Park Board of Education, pursuant to *N.J.S.A.* 18A:6-10. The charges are essentially couched in an assertion that Bennett was guilty of conduct unbecoming and other just cause. Thereafter, on or about September 6, 2001, Bennett responded to the tenure charges and, thereafter, on or about

September 14, 2001, the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On or about February 6, 2003, it was brought to my attention that a motion to render this matter moot had been made by counsel for Bennett and, for obvious reasons, no response was ever forthcoming. The essence of the motion is that Bennett, pursuant to his own attorney's affidavit, voluntarily resigned from his teaching position with Asbury Park effective November 27, 2001.

Based on the foregoing, it is my conclusion that petitioner no longer wishes to proceed and it is **ORDERED** that this Petition be **DISMISSED.**

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

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

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

2/18/03
DATE

Steven C. Reback
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/20/03
DATE

M Kathleen Jameson
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 2003

J. J. Mazzi
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

CHAMLIN, ROSEN, ULIANO & WITHERINGTON
268 NORWOOD AVENUE
PO BOX 38
WEST LONG BRANCH, NEW JERSEY 07764
732-229-3200
ATTORNEYS FOR JOHN BENNETT

	:	STATE OF NJ
IN THE MATTER OF	:	OFFICE OF ADMINISTRATIVE LAW
JOHN BENNETT	:	OAL DKT: EDUTH-06139-015
	:	AGENCY REF: 328-8/01
	:	
	:	ORDER
	:	

THIS MATTER having been brought before the Court on Motion of Chamlin, Rosen, Uliano & Witherington, attorneys for defendant, and the Court having read the papers filed on behalf of the defendant and opposition thereto, and for good cause shown:

IT IS on this 6th day of Feb , ~~2002;~~ 2003

ORDERED that the issues of the within matter are deemed moot, for the reason that the Asbury Park Board of Education is seeking dismissal of John Bennett from his teaching position, wherein John Bennett resigned from his teaching position effective November 27, 2001; and it is further

ORDERED that a copy of the within Order be served upon all parties within 30 days.

[signature] ALJ

OAL DKT. NO. EDU 6139-01
AGENCY DKT. NO. 328-8/01

IN MATTER OF THE TENURE HEARING	:	
OF JOHN E. BENNETT, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF ASBURY PARK,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

The record of this matter and Initial Decision of the Office of Administrative Law (OAL) have been reviewed. For the reasons set forth below, the Initial Decision of the Administrative Law Judge (ALJ) is rejected and this matter is remanded to the OAL for further proceedings.

This matter was brought before the Commissioner by way of tenure charges certified by the Board on August 21, 2001. Those charges, brought by the Superintendent of Schools, allege that John E. Bennett, a second grade teacher, committed various acts which constitute unbecoming conduct and/or other just cause for dismissal. Specifically, it is averred that on or about June 9, 2001, respondent was arrested by the Asbury Park Police for: possession of a controlled dangerous substance (CDS), namely marijuana, pursuant to *N.J.S.A.* 2C:35-5(b)(11); possession of a CDS with intent to distribute, pursuant to *N.J.S.A.* 2C:35-5(b)(11); possession of a CDS with the intent to distribute and/or sell such substance within 500 feet of a public housing project, pursuant to *N.J.S.A.* 2C:35-7.1(a); and possession of a CDS with intent

to distribute and/or sell such substance within 1000 feet of a public school, pursuant to *N.J.S.A.* 2C:35-7.[1]

Additionally, respondent was charged with engaging in a course of conduct of fraternizing with minor females outside the scope of his official duties, constituting unbecoming conduct and other just cause for dismissal. Specifically, the Superintendent attests that in or about September 2000, and other times thereafter, respondent engaged in sexual contact, including, but not limited to, sexual intercourse, with A.C., a 16-year-old female student attending public high school within the Asbury Park School District; brought A.C. to his private residence for purposes unrelated to his official duties; accompanied A.C. to a motel for purposes unrelated to his official duties; met A.C. at the home of R.C., 14-year-old female high school student, for purposes unrelated to his teaching duties; and accompanied A.C. and three other female high school students to a movie for purposes unrelated to his official duties. (Sworn Tenure Charges of Unbecoming Conduct and/or Other Just Cause Against John E. Bennett, at 1-7)

Following transmittal of this matter to the OAL, respondent resigned from his teaching position, effective November 27, 2001. After respondent's motion for dismissal, the ALJ issued an Initial Decision recommending that the matter be dismissed as moot.

Upon careful examination of the record, the Commissioner notes with concern a Petition for Order to Show Cause filed by the Board of Education of the City of Asbury Park before the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6(a)(3).[2] The Superintendent therein attests that Mr. Bennett was arrested for the sexual assault of A.C., a 16-year-old female

[1] The record does not indicate the outcome of the criminal proceedings associated with these drug charges.

[2] There is no indication in this record what action the State Board of Examiners has taken relative to the petition.

student at that Asbury Park High School, on December 22, 2000, after which he was suspended with pay from his teaching position, pending final disposition of the sexual assault charge. The Superintendent also avers,

> Although the criminal charge for sexual assault was ultimately dismissed, ***Mr. Bennett admitted, in his discovery responses in connection with tenure charges brought against him, to engaging in a sexual relationship with A.C. which has continued to date.*** (Petition for Order to Show Cause, December 10, 2001 at 3) (emphasis added)

Under these circumstances, where there is compelling evidence of an admission, obtained in the course of tenure proceedings,[3] of the very conduct underlying one of the charges, the Commissioner cannot consent to dismissing the charges as moot, notwithstanding that the teaching staff member has unilaterally resigned.[4]

Accordingly, the Initial Decision is rejected for the reasons expressed herein. The

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[3] The Commissioner notes that tenure proceedings are expedited by law and, indeed, the discovery process must begin immediately upon the referral of a tenure case to the OAL, which, in this instance, was on or about September 14, 2001. (*See N.J.S.A.* 52:14B-10.1a; Initial Decision at 2.)

[4] *Cf., In the Matter of the Tenure Hearing of Irvin Kotkin*, 95 *N.J.A.R.*2d (EDU) 431, wherein respondent's retirement from his position *after* his hearing at OAL, but *prior* to the issuance of an Initial Decision by the ALJ, did not render the *charges* moot, thereby requiring their dismissal. The Commissioner therein recognized the serious nature of the charges which must be viewed in light of his concern and obligation regarding the safety and integrity of the schools statewide "and the fact that an individual's retirement from one district does not necessarily preclude subsequent employment in other school districts of the state." The Commissioner, therefore, found that "in matters of this nature, [he] cannot permit an individual's retirement to effectively allow him to sidestep adjudication of such charges on their merits.***" *Kotkin, supra,* at 438; *see, also, In the Matter of the Tenure Hearing of Jerry Barshatky, School District of the Freehold Regional High School District, Monmouth County*, State Board decision May 1, 1996, wherein the State Board determined that tenure charges, already certified and litigated against the respondent, should not be dismissed as moot following respondent's retirement. Rather, the State Board found that although the matter did not involve a settlement or withdrawal of the tenure charges, respondent's motion to dismiss the charges as moot, based upon his unilateral retiring following the completion of the tenure hearing, should be subjected to no less scrutiny than a proposed settlement or withdrawal of tenure charges, which may be granted by the Commissioner only upon a finding that the settlement or withdrawal is in the public's interest. *Barshatky, supra,* slip. op. at 4.

Commissioner hereby remands this matter to the OAL for adjudication of the charges on the merits. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 4|03|03

Date of Mailing: 4|03|03

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

158-03

158-03E

SEMAN-TOV, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS AND BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

April 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
MOTION FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 844-03
AGENCY DKT. NO. 84-3/03

SEMAN-TOV, INC.,
Petitioner,
v.
MONMOUTH COUNTY
SUPERINTENDENT OF SCHOOLS
& CITY OF LONG BRANCH
BOARD OF EDUCATION,
Respondents.

Lawrence H. Shapiro, Esq., for petitioner (Ansell, Zaro, Grimm & Aaron, attorneys)

Allison Colsey Eck, Deputy Attorney General, for respondent Monmouth County Superintendent of Schools (Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

Peter Sokol, Esq., for respondent Long Branch Board of Education (McOmber & McOmber, attorneys)

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

STATEMENT OF THE CASE

This case involves transportation services for the 2002-03 school year provided by petitioner Seman-Tov, Inc., to respondent City of Long Branch Board of Education (BOE). Bidding and contracts for transportation services between boards of education and providers are subject to school laws, including Department of Education regulations; such contracts are subject to approval by the county superintendents of schools; and the regulations state that a contract that fails to meet the requirements of the regulations "shall be set aside." See N.J.S.A. 18A:39-2; N.J.A.C. 6A:27-9.1 to -13.5; see particularly N.J.A.C. 6A:27-9.1(b). In this case, respondent Monmouth County Superintendent determined that the bidding process for the BOE's and petitioner's "contract" for transportation services failed to comply with the regulations and he directed the BOE to repeat the process of bidding and contracting.

Petitioner alleges that it planned its business in reliance on the "contract" with the BOE, that loss of the contract would devastate it financially, and that a change of provider so late in the school year would be disruptive to the pre-kindergarten (pre-K) children it transports. Petitioner points out that the Superintendent provided to it no notice and no opportunity to participate in his determination and direction. Petitioner claims that the Superintendent's determination should be reversed and vacated and that its "contract" with the BOE should be deemed effective. Petitioner submits that (if the bidding and contracting process failed to comply with the school laws) it would agree to a contract amended to include lawful requirements. In the alternative, petitioner alleges that all of the BOE's contracts for transportation services for the 2002-03 school year failed to comply with the school laws and it claims that all of the BOE's transportation services contracts should be ordered subject to rebidding. However, the Superintendent submits that, since the bidding process relating to petitioner's services failed to comply with the school laws, the BOE must repeat the process.

This decision is on petitioner's motion for emergent relief, restraining the Superintendent from requiring the rebidding and restraining the BOE from repeating the rebidding. The respondent BOE consents to the restraint. The Superintendent submits that the petitioner has failed to satisfy the usual requirements for emergent relief, so that the motion must be denied.

PROCEDURAL HISTORY

The subject matter of this case was part of superior court litigation, J & M Keelen Transportation Corp. v. Seman-Tov and Seman-Tov v. James Keelen, No. Mon C 361-02 (Ch. Div.), wherein the petitioner's third-party complaint named the Superintendent as a third-party defendant. Since this case involves a controversy and/or dispute arising under the school laws (over which the Commissioner of Education has jurisdiction), the Hon. Clarkson S. Fisher, Jr., J.S.C., decided that this subject matter should be transferred to the Commissioner. See N.J.S.A. 18A:6-9. Consistent with Judge Fisher's decision, on March 12, 2003, petitioner filed its petition, verification, exhibits, etc., with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on March 17, 2003. N.J.S.A. 52:14B-2(b). On March 24, 2003, the Superintendent's papers in opposition to the motion were filed in the OAL. On March 25, 2003, the motion was argued in the OAL, Trenton.

FINDINGS OF FACT

The record to date is summarized below.

Prior to the 2002-03 school year, the BOE advertised for bids for contracts to provide transportation services for most of its routes. Pursuant to the "bulk bids" method, the low bidder was awarded all of the bids, subject to the bid specifications. During this period, J & M Keelen Transportation Corp. (Keelen) was often the successful low bulk bidder and the BOE and Keelen entered into contracts for most of the transportation routes. P-H.

The BOE alleges that during the 2001-02 school year there were substantial problems involving Keelen's service, e.g., on two occasions, a child was left on a bus and later found wandering in an apartment complex, resulting in litigation against the BOE; on another occasion a child was left on a bus in Keelen's bus yard; on other occasions, buses arrived late at their prescribed locations. Consequently, for the 2002-03 school year, the BOE advertised for bids for transportation services by individual bus routes. P-H.

Petitioner and Keelen were competitors in the 2002-03 school year bidding process and among the transportation services for which the BOE advertised for bids were those for transportation of pre-K children relative to the Joseph M. Ferraina Early Childhood Learning Center (Ferraina Center).

On or about April 8, 2002, the BOE opened the bids for transportation services for the 2002-03 school year. Keelen alleged that petitioner's bid bond relative to the Ferraina Center transportation services was less than the amount required. The BOE did not disqualify petitioner and, instead, it advertised for another set of bids. Since then, Keelen and petitioner have had further conflict, as detailed below. P-1; P-D; P-G; P-H.

On April 29, 2002, the BOE opened the second set of bids. James Keelen, president of Keelen, alleges that he notified Peter Genovese, the BOE's business administrator and Archie Greenwood, the BOE's assistant superintendent of schools, that he objected to the award of the Ferraina Center transportation services contract to petitioner because petitioner had failed to include a certification that its employees would undergo drug and alcohol screening. The BOE responded that, because petitioner had less than 100 employees, it was exempt from that requirement. Keelen also alleged that petitioner had submitted a certificate showing only $1,000,000 in insurance coverage, instead of the required $3,000,000. The BOE later notified Keelen that petitioner did have the $3,000,000 coverage. In letters to the BOE, Keelen's attorney objected to the award to petitioner, alleging that, in violation of laws governing drivers and aides, the petitioner's employees included "convicted felons." P-H. The BOE notified Keelen that it would award the contract to petitioner and (later, by letter dated September 12, 2002) the BOE advised Keelen's attorney that, if he believed that petitioner had violated the law, he should report his belief to the county prosecutor. P-G; P-H.

Since the start of the 2002-03 school year, petitioner has provided the Ferraina Center transportation services. Petitioner's buses stop at the children's houses (instead of at street corners) and petitioner's drivers and aides have become familiar with the children's appearances and names, where they live and the schools to which they are to be transported. Morris Swed, petitioner's manager, alleges that petitioner, having allocated its resources to provide the services for the Ferraina Center routes, refrained from submitting bids in response to advertisements for

bids for transportation services for other routes and that the petitioner hired employees and maintained equipment for the Ferraina Center routes. P-1; P-D; P-G; P-M.

On or about November 20, 2002, Keelen filed a Superior Court complaint naming as defendants the petitioner, Avi Nagar, petitioner's president, and the BOE. In Count I, Keelen alleged that, beginning in or about the spring of 2002, petitioner illegally offered cash without deductions for withholding taxes, etc., to solicit Keelen's employees, including long-term drivers, constituting tortious interference with its business and damaging it irreparably, for which it demanded an injunction. In Count II, Keelen alleged that the BOE has given "special benefits" to petitioner relative to its competition for contracts with the BOE (P-A):

(a) Keelen alleged that the BOE has allowed the petitioner to operate buses without aides, despite bid requirements for same.

(b) Keelen alleged that the BOE has allowed petitioner to provide services with defective equipment.

(c) Keelen alleged that the BOE has allowed petitioner to ignore bid requirements relative to sizes of buses.

(d) Keelen alleged that the BOE has required bus companies other than petitioner to maintain off-street locations in the City of Long Branch, which has an ordinance prohibiting parking school buses on the street overnight, but allowed petitioner, which has no such off-street locations, to park its buses overnight with no consequences.

(e) Keelen alleged that, in September and October 2002, the BOE awarded petitioner busing contracts despite its improper completion of bid documents and despite Keelen's protest.

(f) Keelen alleged that, consistent with bid documents, the BOE required other bidders to set up their own runs, but that it excused petitioner from the requirement and that it set up runs for petitioner.

(g) Keelen alleged that, in October 2002, the BOE improperly requested quotes on an emergency basis for transportation services without formal bid compliance (and thereafter awarded a contract to petitioner although Keelen had provided the lowest quote).

(h) Keelen alleged that the BOE has required school bus service providers, including petitioner, to maintain $3,000,000 in insurance coverage, and despite its request for a copy of petitioner's certificate of insurance, the BOE has refused to provide it.

(i) Keelen alleged that, during or about October 2002, without obtaining the required quotes from competitor bus companies, the BOE granted direct contracts on an emergency basis to petitioner.

On November 20, 2002, in the Superior Court litigation, Judge Fisher issued an Order to Show Cause requiring the petitioner to show why the above-described contract should not be declared null and void. P-B.

Until December 2002, the BOE did not provide contracts to successful transportation services bidders. Consistent with law, the contracts (including that sent to petitioner) included as a standard paragraph, "It is understood and agreed by the parties hereto that this agreement shall be without force or effect until it shall have been approved as to form by the County Superintendent of Schools." RS-2. Mr. Keelen alleges that, because the contracts were incomplete with numerous blank spaces, he returned those sent to him to the BOE unsigned and he requested that the Monmouth County Superintendent of Schools review all the contracts to confirm that they comply with relevant school laws. P-G; see, e.g., RS-2; see also N.J.S.A. 18A:39-2.

In December 2002, the BOE submitted the contract for the Ferraina Center transportation services for the 2002-03 school year to the Superintendent, Michael Maddaluna. RS-1. The Superintendent determined that the BOE's bid documents, including the bid specifications, failed to comply with the school laws (RS-1):

(a) Consistent with N.J.A.C. 6A:27-9.3(d)(2), bid specifications shall provide for any adjustment to the contract price due to a change in routes and, consistent with N.J.A.C. 6A:27-9.3(e)(1)(i), the bid sheet shall include a separate cost for adjusting the contract. However, the BOE's bid sheet stipulated that no charge for changes to the contract would be made and did not provide for adjustment of price based on changes to the contract contained on the bid sheet.

(b) Consistent with N.J.A.C. 6A:27-1.1, relative to insurance, bid specifications should include "combined single limit per occurrence," but the BOE's bid specifications did not include that phrase.

(c) N.J.A.C. 6A:27-9.5(b) provides that the amount of the bidder's guarantee shall be a minimum of 5 percent of the bid, not to exceed $50,000, but the BOE requested a bid guarantee of 10 percent of the contract amount, not to exceed $100,000.

(d) Contrary to N.J.A.C. 6A:27-9.3, the BOE's specifications appear to request bids on a per vehicle basis, its bid sheet did not contain route numbers or a provision for individual route costs, and its bid sheet did not describe routes by specification or language which would require the successful bidder to provide transportation along the safest, most direct route to the destination.

Consequently, by letter dated December 17, 2002, the Superintendent directed the BOE to repeat the bidding process (relating to the Ferraina Center transportation services). P-H.

On December 23, 2002, in the superior court litigation, Judge Fisher entered a Consent Order, ordering the following: 1. Keelen's (amended) complaint's Count V (relating to the BOE's September 2002 request for quotes on an emergency basis for a preschool bus route to begin October 7, 2002) was dismissed; 2. the BOE awarded to Keelen a contract for "JFB2," a new route established after the start of the 2002-03 school year for Ferraina Center transportation services (not the route in issue here); 3. the Order to Show Cause was dismissed as resolved; 4. the agreements set forth in paragraphs 1, 2 and 3, being in aid of settlement, were not to be

admitted in any forum for any purpose; and 5. the dismissal did not dispose of the balance of Keelen's complaint. P-A; P-C.

On or about January 2 or 3, 2003, the BOE notified the petitioner that, as a result of Keelen's objection and complaints to the form of contracts Keelen had been awarded, it would repeat the bidding process for a contract for the above-described transportation services for the Ferraina Center, and, on January 7, 2003, the BOE's advertisement appeared for bids to be submitted and opened on January 21, 2003. P-1; P-D.

In January 2003 the petitioner learned of the Superintendent's directive that the bidding process relating to the Ferraina Center transportation services should be repeated and, in the superior court litigation, petitioner filed a counterclaim and third-party complaint against Keelen. Petitioner alleged that Keelen's "prodding and complaints" had caused the Superintendent to direct that the process be repeated, Keelen had tortiously interfered with its business interests, its equipment had been vandalized, and Keelen had harassed its principals and officers. P-J. Mr. Swed alleges that the same allegedly "deficient" bidding preceded contracts that were awarded to Keelen and/or others for other transportation services, but the BOE had not been directed to repeat the rebidding for those contracts. Mr. Swed certified that, given petitioner's planning its operations, hiring employees, etc., based on the Ferraina Center transportation services contracts, the loss of contracts would probably cause the layoffs of its employees and would be devastating to its financial condition and petitioner requested an order to show cause, temporarily restraining the BOE from accepting bids for the Ferraina Center transportation services, or orders requiring rebidding for all of the BOE's 2002-03 transportation services contracts. P-1; P-D; P-J.

On January 17, 2003, Judge Fisher issued an order that enjoined the BOE from accepting or approving any bid for Ferraina Center transportation services; allowed the BOE to extend time for receiving bids to February 14, 2003; and enjoined the BOE from canceling or otherwise terminating the contract with petitioner for such services. P-E.

The BOE submitted bid specifications dated January 31, 2003, for the Ferraina Center transportation services and for the elementary school routes for the 2002-03 school year and, by

letter dated February 3, 2003, the Superintendent notified the BOE that he had found all documentation in order and that the specifications meet lawful requirements. P-N.

On February 6, 2003, Judge Fisher heard argument relative to the petitioner's third-party complaint, request for injunctive relief, etc. Hearing of the involvement of the Superintendent of Schools, Judge Fisher deferred a decision on the petitioner's requests for relief to allow the Superintendent to be brought into the case. Petitioner named the Superintendent as an additional third-party defendant, alleging that the Superintendent's directive resulted from selective enforcement and claiming that he wrongfully failed to afford petitioner due process in the directing of rebidding. Petitioner demanded an injunction, requiring the Superintendent to approve the Ferraina Center transportation services contract, damages, etc. P-J.

Contrary to the Superintendent's above-described February 3, 2003, letter, in his February 27, 2003, certification filed in the superior court, he wrote that, in several respects, the Ferraina Center transportation bid specifications (for bids to be opened March 7, 2003) failed to comply with regulations governing the bidding process. P-K.

In Mr. Greenwood's March 5, 2003, certification filed in the superior court, he certified that the BOE is reviewing and reformulating the specifications to comply with school laws; if such rebidding goes forward, the date for opening bids must be extended (from March 7, 2003); and, if the BOE holds a special meeting for this purpose, it would not award contracts until April 2003 and the services pursuant to the contracts would not begin until approximately April 15, 2003, i.e., only two months before the end of the period of the subject contracts for the 2002-03 school year. The BOE has, by way of its February 24, 2003, resolution, expressed its concern about the effect of a new provider's employees not familiar with pre-K children, their stops and schedules substituting for the petitioner, whose employees are familiar with the children, etc., and stated further that it opposes rebidding so late in the school year. P-N.

Judge Fisher has referred to the Commissioner of Education issues raised in petitioner's third-party complaint against the Superintendent, i.e., whether the Ferraina Center transportation services bids complied with school laws and whether, as the Superintendent directed, there must be rebidding, whether the rebidding should be enjoined, etc. See N.J.S.A. 18A:6-9; N.J.S.A.

18A:39-1, -2; N.J.A.C. 6A:27-9.1. Consequently, the Superintendent has demanded dismissal of the superior court third-party complaint as against him and the petitioner does not oppose this, so long as it is without prejudice.

The BOE is now in the process of preparing specifications, etc., relative to bids for contracts for transportation services for the 2003-04 school year.

Relative to Keelen's allegation that the Ferraina Center transportation services bids and contracts did not, as required, provide for expansion and/or reduction of routes as circumstances may require, Mr. Swed represents that petitioner would agree to a contract amended to include such a provision. P-1; P-D.

CONCLUSIONS OF LAW

Public contracts laws are intended to encourage competition, guard against favoritism, improvidence, extravagance or corruption and obtain the best economic result for taxpayers. See Pucillo v. Mayor of New Milford, 73 N.J. 349, 356 (1977); Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 409-10 (1975); In re On-Line Games Contract, 279 N.J. Super. 566, 589 (App. Div. 1995); A & S Transp. Co. v. Bergen County Sewer Auth., 133 N.J. Super. 266, 276 (Law Div.), aff'd, 135 N.J. Super. 117 (App. Div. 1975); Pied Piper Ice Cream v. Essex County Park Comm'n, 132 N.J. Super. 480 (App. Div. 1975); In re DBC Project No. A0716-00, 303 N.J. Super. 384 (App. Div. 1997).

Consistent with N.J.S.A. 18A:1-1, N.J.S.A. 18A:4-15, N.J.S.A. 18A:39-1, -21, and N.J.S.A. 18A:70-18, the Department of Education has promulgated regulations governing student transportation, including contracting for transportation services and regulations, duly promulgated within an agency's power, have the force and effect of law. N.J. Const. art. V, § 4, ¶ 6; State v. Atlantic City Elec. Co., 23 N.J. 259, 270 (1957); see N.J.A.C. 6A:27-1.1 to -13.5.

The regulations provide that bid specifications are drawn for purposes of competitive bidding and that any contract that fails to meet the regulations "shall be set aside." N.J.A.C.

6A:27-9.1(b), emphasis added. And boards of educations' contracts for transportation services are subject to approval by the county superintendent of schools. N.J.S.A. 18A:39-2.

To succeed in a motion for a temporary restraint and interlocutory injunction, the movant must show, among other things, that, when the case is fully heard, it will probably prevail in its claim and that, if the relief is not granted, it will suffer immediate and irreparable harm, i.e., that money damages would not be adequate compensation. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

The Superintendent has cited specific regulations that he has determined that the BOE's bidding process has failed to comply with. In the record to date, I do not see that the petitioner has proven that the bidding process has satisfied the regulations, so that the Superintendent's determination can be found to be incorrect and his direction to the BOE restrained. The petitioner alleges that all of the BOE's other transportation contracts also fail the regulations, but this does not exempt its "contract" from the requirement that it "shall be set aside." N.J.A.C. 6A:27-9.1(b).

Relative to the petitioner's allegation that it has been subject to selective enforcement, it has alleged no invidious discrimination as a basis for same. The general rule is that a public entity is not precluded or estopped from enforcing a law merely because certain persons have been permitted to violate it without prosecution, and a defendant who alleges invidious selective enforcement in support of an estoppel defense bears the burden of proof of such allegation. Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 75 (1974); see also Byron-Marasek v. Department of Envtl. Protection, EFG 4386-99, Initial Decision (April 26, 2000), adopted, Comm'r (June 8, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>, aff'd, No. A-6065-99T3 (App. Div. June 28, 2001) (where the applicant for a permit to keep tigers contended that the Division of Fish & Wildlife applied regulatory standards more strictly to her than to other applicants and where, since there was no evidence of invidious or arbitrary discrimination, the administrative law judge, citing State v. Boncelet, 107 N.J. Super. 444, 453 (App. Div. 1969), rejected the contention, writing that the fact that a law was not fully enforced against others does not give a defendant a right to violate it. The Commissioner, citing Oyler v. Boles, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), affirmed, noting that the applicant had proven no

impermissible classification based on race, religion, sex, etc.) I also do not see a basis for application of N.J.A.C. 6A:3-1.3(d) (requiring that a petition to initiate a contested case for the Commissioner's determination be filed no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by a district board of education, individual party or agency which is the subject of the requested contested case hearing) to bar or restrain a superintendent from enforcing school laws.

Relative to the petitioner's allegation that it will suffer immediate and irreparable financial harm, I do not see that it has provided sufficient detail and, in any event, financial losses are normally not acceptable as irreparable, given the claim for damages that can be brought in such circumstances. (The petitioner has claimed damages in its petition, but has cited no authority for such an award in this administrative case and I know of no such authority. This case is limited to a determination of whether there was compliance or noncompliance with school laws and orders that may be entered to require compliance with those laws.)

Given these circumstances, I do not see that the petitioner has met its burden relative to the allegation that when the case is fully heard it will probably prevail, and I do not see that it has met its burden relative to the allegation that if the restraint is not ordered, it will suffer immediate and irreparable harm.

ORDER

Consistent with the above, I **DENY** the motion for emergent relief.

The parties may serve discovery requests, and a telephone conference to discuss the progress of the case and a hearing date will be set.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

November 26, 2003
DATE

JOHN R. TASSINI, ALJ

EXHIBITS

For Petitioner:

P-1 Petition & Verification of Morris Swed

P-A J & M Keelen Trans. Corp. v. Seman-Tov et al., No. Mon. C 361-02 (Ch. Div.), Amended Verified Complaint, filed November 20, 2002

P-B J & M Keelen Trans. Corp. v. Seman-Tov et al., Order to Show Cause, November 20, 2002

P-C J & M Keelen Trans. Corp. v. Seman-Tov et al., Consent Order, December 23, 2002

P-D J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, No. Mon C 361-02 (Ch. Div.), Certification of Swed

P-E J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Order to Show Cause with Temporary Restraints, January 17, 2003

P-F J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Seman-Tov's letter brief, January 14, 2003

P-G J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Certification of Keelen

P-H J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, BOE's Certification of Greenwood with exhibits

P-I J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Letter order of Hon. Clarkson S. Fisher, Jr., J.S.C., February 6, 2003

P-J J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Defendants' (Seman-Tov's & Nagar's) Amended Answer, Affirmative Defenses and Counterclaim/Third-Party Complaint, February 12, 2003

P-K J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, DAG's Transmittal letter, February 28, 2003; Letter brief in response to order to show cause, February 28, 2003; Certification of Maddaluna, February 27, 2003; etc.

P-L J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Seman-Tov's letter brief, March 5, 2003

P-M J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Supplemental Certification by Greenwood, February 24, 2003

P-N J & M Keelen Trans. Corp. v. Seman-Tov et al. and Seman-Tov et al. v. James Keelen, Certification of Greenwood, March 5, 2003 with exhibit

P-O J & M Keelen Trans. Corp. v. Seman-Tov and Seman-Tov et al. v. James Keelen, Order (unexecuted, undated)

For Respondent Monmouth County Superintendent of Schools:

RS-1 Certification of Maddaluna, February 27, 2003 (same as in "P-K" above)

RS-2 State of New Jersey Department of Education, Bureau of Pupil Transportation, Pupil Transportation Contract, BOE and Seman-Tov, September 1, 2002, to June 30, 2003, unexecuted; State of New Jersey Department of Education, Office of Pupil Transportation, Personal Surety Bond for Pupil Transportation Contracts, dated December 13, 2002

For Respondent Board of Education:

None

OAL DKT. NO. EDU. 844-03
AGENCY DKT. NO. 84-3/03

SEMAN-TOV, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS AND BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

The Order of the Administrative Law Judge (ALJ) in this emergent matter has been reviewed. Upon such review, the Commissioner adopts the Order denying emergent relief, as he concurs with the ALJ's determination that petitioner has not satisfied the requirements necessary for the granting of such extraordinary relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. As contemplated by the ALJ, this matter shall proceed to hearing on its merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4|03|03

Date of Mailing: 4|03|03

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

160-03

I.P., on behalf of minor child, N.B.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

April 7, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1597-02
AGENCY DKT. NO. 443-10/01

I.P. ON BEHALF OF N.B.Z.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Respondent.

I.P., petitioner *pro se*

Anthony D'Elia, Esq., for respondent

Record Closed: February 19, 2003 Decided: February 19, 2003

BEFORE **MARGARET M. MONACO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves an appeal by petitioner I.P. on behalf of N.B.Z. from a residency determination by respondent Board of Education of the City of Clifton (the "Board"). On January 16, 2002, the Board filed an Answer to Petition (with Counterclaim). The Department of Education, Bureau of Controversies and Disputes, subsequently transmitted the matter to the Office of Administrative Law (OAL) where, on February 5, 2002, it was filed for a hearing and determination as a contested case. Following petitioner's failure to appear at the hearings scheduled for April 23, May 31, and August 21, 2002, and the Board's submission of an affidavit in support of its counterclaim, petitioner contacted the undersigned's office. A telephone conference with petitioner and the Board's attorney was held on November 8, 2002, during which the matter was

rescheduled to be heard on February 10, 2003. Petitioner and counsel for the Board appeared at the OAL on February 10, 2003 and engaged in discussions toward an amicable resolution of the matter. The undersigned was advised that a settlement had been reached and the parties submitted an agreement indicating the terms of the settlement, subject to approval by the Board. Counsel for the Board subsequently forwarded a resolution adopted by the Board approving the settlement terms, which the undersigned received on February 19, 2003. The aforesaid agreement and resolution are attached hereto and incorporated herein by reference.

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

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

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

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

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

February 19, 2003
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

2/21/03
DATE

Kathleen Duncan /ps
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 24 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

I.P. o/b/o NB & V. CBoE
OAL DKT# GDU 1597-02

Both parties appearing and Petitioner waiving representation, the parties agree as follows:

Idalia Pina SS# 155-86-4815

1. Petitioner recognizes she has a right to a hearing in this matter and hereby waives that and agrees to settle as follows:

(a) Petitioner shall pay the Clifton Board of Ed $30/month for 60 months, payable to the Clifton Board of Education c/o Karen Perkins, B.A., Clifton Bd., 745 Clifton Ave, Clifton N.J. 07011;

(b) Payments are due on 1st of each month beginning March 1, 2003;

(c) Should Petitioner Breach this Agreement, Board of Education may obtain a Judgment, ex parte, with notice to Petitioner via ordinary mail at her address Currently: 553 Summer Ave. Newark

N.J. 07104) in the amount of $4,600.00* (less credits for payments received) plus reasonable attorney's fees and costs of suit incurred in obtaining and executing upon this judgment; and J.P. and

(d) This Agreement is contingent upon the Board of Education approving this agreement at the meeting of February 12, 2003.

All other claims/counterclaims shall be dismissed

Idalia Pino
IDALIA PINO
2/10/03

2/10/03

*Plus interest allowed by law retroactive to date of settlement and J.P.

JANE MORE

I JANE MORE ACCURATELY TRANSLATED TO MRS IDALIA PINO EVERYTHING ~~TO~~ THAT OCCURRED TODAY AND SHE FULLY UNDERSTANDS.

BOARD OF EDUCATION

CLIFTON, NEW JERSEY

SECTION
RESOLUTION

WHEREAS the Board of Education has determined that it is in the best interests of the Board to settle the pending appeal captioned I.P. on behalf of N.B. Z.vs. C.B.O.E.

NOW THEREFORE BE IT RESOLVED that this Board of Education agree to the terms of the settlement as follows:

1. Petitioner shall pay the Board $ 30.00 per month, payable on the lst day of each month beginning March 1, 2003 for 60 months.

2. Should Petitioner breach this agreement, the Board may obtain a Judgment, ex parte, with notice to Petitioner via ordinary mail in the amount of $4,600.00 (less credits for payments received) plus reasonable attorney's fees and costs of suit incurred in obtaining and executing upon the Judgment along with interest allowable under law retroactive to the date of settlement.

3. All claims/counterclaims shall be dismissed.

Introduced by John M. Traver

Seconded by Jana G. Lockwood

BOARD OF EDUCATION
CLIFTON, NEW JERSEY 07013 03 MAR 24 PM 1:54
RESOLUTION #2/12/03 - D

APPROVAL TO SETTLE PENDING APPEAL
"IP ON BEHALF OF NBZ VS. THE CLIFTON BOARD OF EDUCATION"

WHEREAS, the Clifton Board of Education has determined that it is in their best interest to settle the pending appeal "IP on Behalf of NBZ vs. the Clifton Board of Education";

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education agrees to the terms of settlement as follows:

Petitioner will pay the Board thirty dollars ($30.00) per month, payable on the first day of each month beginning March 1, 2003 for sixty (60) months. Should petitioner breach this agreement, the Board may obtain a civil judgement in the Superior Court of New Jersey ex-parte with notice to petitioner via ordinary mail in the amount of four thousand six hundred dollars ($4,600.00), less credit for payments received, plus reasonable attorney's fees and cost of suit incurred in obtaining and executing upon the judgement along with interest allowable under law retroactive to the date of settlement. All other claims and counterclaims shall be dismissed.

Introduced by Joan M. Traier

Second by James A. Leeshock

DATE: February 12, 2003

VOTE: YES: Bernstein,Demikoff,Hakim,Kolakowsky,Kolodziej,Leeshock,Smith & Traier
ABSENT: Kurnath

ATTEST:

Karen L Perkins
Secretary/Business Administrator

PRESIDENT Marie L. Hakim

Certified to be true copy.

Karen L Perkins

Secretary, Clifton Board of Education

3d

OAL DKT. NO. EDU 1597-02
AGENCY DKT. NO. 443-10/01

I.P., on behalf of minor child, N.B.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the Settlement Agreement as the final decision in this matter. In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement presented to the Commissioner for his review prior to receiving approval from the Commissioner.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|07|03

Date of Mailing: 4|07|03

160-03

161-03

JOANNE ALESSIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

April 7, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01530-98

AGENCY DKT. NO. 3-1/98

JOANNE ALESSIO,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY COUNTY OF HUDSON,

Respondent.

Alan S. Porwich, Esq., for petitioner (Feintuch, Porwich & Feintuch

Charlotte Kitler, General Counsel, for respondent

Record Closed: February 10, 2003 Decided: February 20, 2003

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 4, 1998, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Consent Order.

Having reviewed the contents of the attached Consent Order, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Consent Order meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

2/20/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

February 25, 2003
DATE

M. Kathleen Duncan (tr)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

JOANNE ALESIO, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 3-1/98 OAL Dkt. No. EDU 1530-98 CONSENT ORDER FOR ADDED SICK DAYS

WHEREAS, a petition was timely filed before the Commissioner of Education, seeking benefits pursuant to N.J.S.A. 18A:30-2.1 for petitioner's absences from work from November 20, 1997 which were alleged to be due to injuries from an accident at work on that day; and

WHEREAS, the petitioner also filed a petition with the New Jersey Division of Workers' Compensation(C.P. No. 97-044111) for benefits pursuant to the Workers' Compensation Law, N.J.S.A. 34:15-7 et seq. for the accident at work on November 20, 1997; and

WHEREAS, the petition filed with the Commissioner of Education was placed on inactive status, in accordance with the direction of the State Board of Education in *Tompkins v. Hamilton Bd. of Educ.*, 11 N.J.A.R. 520, 534 (State Bd. 1987), until the Judge

of Compensation rendered a decision on whether the petitioner was temporarily disabled from the accident at work on November 20, 1997, and the duration of any such period of temporary disability; and

WHEREAS, the Judge of Compensation has ruled that the petitioner was entitled to temporary disability for the period from November 24, 1997 through December 19, 1997;

NOW, THEREFORE, consistent with the ruling of the Judge of Compensation,

IT IS, on this 14th day of February 2003,

ORDERED that respondent Jersey City School District shall add seventeen (17) sick days to the petitioner's sick bank for the 17 days of absence during the period from November 24, 1997 through December 19, 1997 which the Judge of Compensation found were due to temporary disability from injury from an accident at work on November 20, 1997.

Thomas E. Clancy
Administrative Law Judge

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE ORDER

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner
By: ALAN S. PORWICH

DATED: 2/3/03

CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 2/10/03

OAL DKT. NO. EDU 01530-98
AGENCY DKT. NO. 3-1/98

JOANNE ALESSIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|07|03

Date of Mailing: 4|07|03

#164-03E

NEW JERSEY LUCKY TOURS *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

April 9, 2003

JOHN H. WATSON, JR.
ATTORNEY AT LAW
63 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017
(973) 674-8717
ATTORNEY FOR RESPONDENT
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION

NEW JERSEY LUCK TOURS; ET. AL.	BEFORE THE COMMISSIONER
	STATE OF NEW JERSEY
PETITIONERS	DEPARTMENT OF EDUCATION
vs.	AGENCY Docket No:96-3/03
	OAL DOCKET NO: EDU3247-03
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION	
	ORDER DENYING STAY
RESPONDENT	

The matter being opened to the Court by Dennis Cummins, Jr., Esq., attorney of the petitioners, Lucky Tours et. al. in the presence of John H. Watson, Jr., attorney of the Respondents, Essex County Educational Services Commission, on March 31, 2003 before the Honorable Elinor R. Reiner, Judge Administrative Law, and the Court having considered the petition for emergent relief and the certifications attached thereto and the answer to the petition for emergent relief and certifications filed on behalf of the defendant, and having heard the arguments of the respective counsel, and consider the applicable law, and it appearing that the

petitioners failed to prove that they would suffer irreparable harm, and that the petitioner failed to prove that they would be successful on the merits, and that the petitioners failed to prove a violation of the Open Public Meeting Act and that money damages was the appropriate remedy, if any, and for good cause shown; And for the reasons expressed on the record, and there being no objection to the form of this order

It is on this 2ND day of April 2003, Ordered that the petitioner's application for emergent relief and the temporary restraints therein is hereby denied as of March 31, 2003.

Elinor R. Reiner

ELINOR R. REINER, ALJ

Dated:

OAL DKT. NO. EDU 3247-03
AGENCY DKT. NO. 96-3/03

NEW JERSEY LUCKY TOURS *ET AL.*,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, along with the audiotape of the hearing conducted at the Office of Administrative Law (OAL), and the Order denying emergent relief signed by Administrative Law Judge (ALJ) Elinor R. Reiner have been reviewed.

Upon such review, the Commissioner affirms the recommended Order as he concurs with the ALJ's hearing determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

On April 7, 2003, petitioners submitted what they purport to be "a fresh application for restraints on a different subject area [from] that [which] is now presently before the Commissioner's office." Such application is based on a performance bond, retroactive to September 2002, covering all of the routes of the petitioners, having just been issued. The Commissioner determines that the petitioners' *new* application does nothing to alter the result in this matter as it remains true, as found by the ALJ, that, at the important times in this matter, petitioners did not have a performance bond as required by respondent.

Accordingly, the within applications for emergent relief are denied and the temporary restraints granted by me by letter order dated March 20, 2003 are hereby lifted. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/09/03

Date of Mailing: 4/09/03

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

166-03

RICHARD E. VINCENTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5137-02

AGENCY DKT. NO.: 2002-200

RICHARD E. VINCENTI,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF PATERSON,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner

Jack Gillman, Esq., for respondent
(Hanly & Ryglicki, attorneys)

Record Closed: February 21, 2003 Decided: February 21, 2003

BEFORE **JEFFREY A. GERSON**, ALJ:

On May 24, 2002, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. The matter was scheduled for hearing on February 4, 2003 but was adjourned because the parties agreed to settle the matter. On January 21, 2003, the parties submitted a letter indicating the terms of settlement. A copy is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

2/23/03
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

February 25 2003
DATE

M. Kathleen Gemeau (tw)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 27 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

IT IS HEREBY AGREED by and between Richard E. Vincenti, the

FEB 21 P 13 AM '03

Petitioner, and the Paterson State-Operated School District, in full settlement of EDUOR 05137-02N as follows:

1. The District shall reinstate eleven (11) sick days to Vincenti's accumulated sick days, i.e. his sick bank, representing eleven days between and including February 14 through and including March 5, 2002.

2. Upon approval of this settlement by the Administrative Law Judge and the Commissioner of Education, this Petition of Appeal shall be deemed dismissed with prejudice.

3. This settlement shall not impact Vincenti's claim for additional sick days to which he claims entitlement pursuant to the school laws in a matter to be determined by the Workers' Compensation Courts.

4. The terms of the settlement in Agency Docket No.: 257-8/99 shall remain in full force and effect.

Dated: February 4, 2003

/S/ Lynden Smith
Lynden Smith

/S/ Richard E. Vincenti
Richard E. Vincenti

3. This settlement shall not impact Vincent's claim for additional sick days to which he ~~is~~ entitlement claimed pursuant to the school laws in a matter to be determined by the Workers' Compensation Courts.

4. The terms of the settlement in Agency Dkt. No. 257-8/99 shall remain in full force and effect.

Lyndon Smith

Dated: Feb. 4, 2003

Lyndon Smith

Richard Vincent

LAW OFFICES
OXFELD COHEN, P.C.
50 COMMERCE STREET
NEWARK, NEW JERSEY 07102-4003

SANFORD R. OXFELD *
ARNOLD SHEP COHEN *
NANCY I. OXFELD *
DENZIL R. DUNKLEY **
GAIL OXFELD KANEF *

* MEMBER OF NJ & NY BARS
** MEMBER OF NJ, PA & FL BARS

(973) 642-0161
FAX (973) 802-1055
OXFELDCOHEN.COM

FEB 21 0 13 AM '03

February 14, 2003

Hon. Jeffrey A. Gerson, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

RE: Richard E. Vincenti vs. State-Operated School District of Paterson
OAL Docket No.: EDUOR 05137-02N
Our File No.: 2002-200

Dear Judge Gerson:

I enclose herein an executed settlement agreement in this matter. If it meets with your approval, will you kindly forward it to the Commissioner of Education.

Respectfully yours,
OXFELD COHEN, LLC
By:

Sanford R. Oxfeld

SRO:stw
Enclosure
cc: Jack Gillman, Esq.
Richard E. Vincenti
Bob Arzt, NJEA
(All w/encl.)

2c

OAL DKT. NO. EDU 5137-02
AGENCY DKT. NO. 85-3/02

RICHARD E. VINCENTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|11|03

Date of Mailing: 4|11|03

* The proposed agreement was approved by the State District Superintendent, as indicated by a conformed signature page subsequently submitted to the record at the request of the Director of Controversies and Disputes.

167-03

J.A. AND M.C., on behalf of minor child, M.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning relatives challenged the Board's residency determination that M.A. did not reside in the District for a portion of the school year. The Board, recognizing the family's financial situation, sought tuition reimbursement for only 41 school days from November 2002 to February 2001.

The ALJ found that M.A., the daughter of J.A. and niece of M.C., was not a legal resident of the District during a portion of the time she was in attendance at Belleville High School. M.C. and M.A. admitted that M.A. did not reside in Belleville for a time but as of February 2002, M.A. became a legal resident of Belleville when custody was granted to her aunt, M.C. She remained a resident when legal custody was transferred to her grandmother. The ALJ ordered petitioners to pay the District $1,999.98, the tuition owed for only 41 school days of the nonresident attendance.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

April 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5138-02

Agency Dkt. No. 99-4/02

J.A. and M.C. o/b/o minor child, M.A.,

Petitioners,

v.

BOARD OF EDUCATION OF BELLEVILLE,

ESSEX COUNTY,

Respondent.

No appearances by or on behalf of Petitioners

Joseph A. DeFuria, Esq., for Respondent
(Gaccione, Pomaco & Beck, attorneys)

Record Closed: January 21, 2003 Decided: February 21, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

STATEMENT OF THE CASE

This school residence case was transmitted to the Office of Administrative Law (OAL) by the Department of Education on May 24, 2002 at the request of the petitioners who challenged the determination by the respondent, Belleville Board of Education, that the minor child, M.A., daughter of J.A. and niece of M.C., was not a legal resident of the school district during a portion of the time she was in attendance at Belleville High

School. Hearings scheduled to take place in November 2002 were adjourned and rescheduled for January 21, 2003. On that date counsel for the Board appeared, together with the Superintendent of Schools. No appearance was made by or on behalf of J.A. or M.C. and the undersigned waited until 11:00 a.m. before convening the hearing. Notices of the time and place of hearing were sent to both J.A. and M.C., together with letters both from the undersigned and from counsel for the Board reiterating the date, time and place of the hearing. Nonetheless, as noted, no appearances were made by either petitioner. Thus, their petition will be dismissed.

Testimony with respect to a counterclaim by the Board for tuition owed was offered by the Superintendent of Schools, Joseph Ciccone. He is familiar with the background circumstances as follows. At the end of the 2000-2001 school year, report cards were sent to the address given by M.A. in Belleville where she purportedly resided. However, her report card was returned to the school district as "undelivered." Thereafter, Board employees reached M.A.'s aunt, petitioner M.C., who admitted the student lived with her father (J.A.) in Newark, not in Belleville. When Ciccone then met with the student, a 16-year-old sophomore at Belleville High School, she confirmed she did not reside in Belleville. Thus, he determined she should be removed from the school district and directed to attend Barringer High School in Newark where she then lived. Soon thereafter, the instant petition was filed and M.A. continued to attend school in Belleville.

According to Ciccone, although the student was not a legal resident of Belleville at the beginning of the 2001-2002 school year in September 2001, he determined in light of the family's financial situation not to request tuition reimbursement for any period prior to the end of November 2001 when the district first learned M.R. was not living in Belleville. Thus, tuition reimbursement is sought for 41 days only, five (5) school days in November, fifteen (15) school days in December, and twenty-one (21) school days in January 2002. As of February 2002, the child became a legal resident of Belleville when custody was granted to M.C., her aunt (Exhibit R-2). Subsequently, at the end of July 2002, legal custody was transferred from M.C. to the child's paternal grandmother, Z.S. (Exhibit R-1). That change did not impact upon the residence issue.

Thus, the Board seeks tuition reimbursement for the forty-one (41) school days between the latter part of November 2000 and the beginning of February 2001, during which time the student was not a resident of Belleville. According to Ciccone, since the daily rate for nonresident attendance was $48.78 per day, the total tuition reimbursement sought is $48.78 x 41 days, or $1,999.98. Again, although the pupil was a nonresident while attending Belleville High School in September, October and most of November 2000 as well, the Board has chosen not to pursue tuition reimbursement for that additional time period.

It is undisputed that between the beginning of school in September 2000 and the beginning of February 2001, M.A. was not a legal resident of Belleville since it was not until early February 2001 that legal custody was given to M.C., the student's aunt. Prior to that time, she lived with her father, J.A., who resided in Newark. Since the Board has chosen to assess tuition for only 41 school days of the nonresident attendance, the total due and owing because of the nonresident attendance is, as indicated, $1,999.98. Thus, it is **ORDERED** that tuition reimbursement in that amount be paid to the school district in such manner and as a result of an order of whatever forum appropriately may require the same.

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

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

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

February 21, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

February 25 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

WITNESSES:

For Respondent
Joseph Ciccone

Exhibits:

R-1 Superior Court of New Jersey, Chancery Division, Family Part Civil Action Order in Docket No. FD-07-4066-02, July 31, 2002

R-2 Superior Court of New Jersey, Chancery Division, Family Part Civil Action Order in Docket. No. FD-07-4066-02V, February 5, 2002

OAL DKT. NO. EDU 5138-02
AGENCY DKT. NO. 99-4/02

J.A. AND M.C., on behalf of minor child, M.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that M.A. was not properly domiciled in the respondent's District until February 2002 and, therefore, was not entitled to a free public education in that District until that time.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein and the Commissioner directs that petitioners remit to the Board tuition in the amount of $1,999.98.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4|11|03

Date of Mailing: 4|11|03

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

IN THE MATTER OF DENISE SCHMIDT, :

BERLIN BOROUGH BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, CAMDEN COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission determined that respondent former Board member violated *N.J.S.A.* 18A:12-24(e) of the School Ethics Act for copying and distributing to certain school staff, using school equipment, a letter that contained false and demeaning information regarding fellow Board members. After considering the nature of the charge, the Commission recommended a penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

April 14, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C01-02**
DENISE SCHMIDT,	:	
BERLIN BOROUGH BD. OF EDUCATION	:	
CAMDEN COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

The above-captioned matter arises from a complaint against former Berlin Borough Board of Education (Board) member Denise Schmidt alleging that Ms. Schmidt violated N.J.S.A. 18A:12-24.1(e), (f) and (g) of the Code of Ethics for School Board Members in the School Ethics Act when she distributed a letter that contained false and demeaning information regarding fellow board members. Ms. Schmidt filed an answer denying that she distributed the letter or committed any violation of the School Ethics Act.

At the Commission's October 29, 2002 meeting, Ms. Schmidt appeared, along with Mark Houck and Donna Heaton for the complainants. All parties appeared pro se. In its public meeting of October 29, 2002, the School Ethics Commission found probable cause to credit the allegation that Ms. Schmidt violated N.J.S.A. 18A:12-24.1(e) and (f) of the School Ethics Act when, as a member of the Board, she copied and distributed to certain school staff, using school equipment, a malicious document regarding four other Board members. The Commission found the material facts to be undisputed regarding the conduct on which it found probable cause and invited Ms. Schmidt to submit a written statement within 30 days setting forth why she should not be found in violation of N.J.S.A. 18A:12-24.1(e) and (f) of the Act.

Ms. Schmidt submitted a timely response and the Commission addressed this matter at its meeting of January 28, 2003. At that time, the Commission found Ms. Schmidt in violation of N.J.S.A. 18A:12-24.1(e) and recommended a penalty of reprimand.

FACTS

Based on the pleadings, the documents submitted and the testimony presented, the Commission believes that the following facts are undisputed. At all times relevant to the allegations in this complaint, Denise Schmidt and the complainants were members of the Berlin Borough Board of Education. Ms. Schmidt's term as a Board member ended in April 2002. . As of the writing of this decision, two additional complainants were no longer members of the Board.

On or before April 21, 2001, a letter was directed to "Residents of Berlin Borough" that contained derogatory remarks about four members of the Board who are complainants in this matter. The letter was copied to Mayor and Council, New Jersey School Boards and the Camden County Superintendent. Ms. Schmidt received the letter at her home. Mark Houck received a copy of the letter at his home as did some of the other complainants. On or about April 25, 2001, Ms. Schmidt went to the Board office in connection with a meeting involving a member of her family. Ms. Schmidt testified that the superintendent asked her to make copies of the letter; however, the complainants produced a statement from the superintendent denying that he asked Ms. Schmidt to make copies of the letter or that he even knew that she was making copies of the letter. Whether Ms. Schmidt was asked to make copies by the superintendent as she states or whether she made copies on her own initiative, she admitted to making at least two copies of the letter and providing them to members of the superintendent's secretarial staff. Ms. Schmidt eventually paid the Board for having made six copies, which equates to three copies of the two-page letter.

ANALYSIS

The Commission dismissed the charge that Ms. Schmidt violated N.J.S.A. 18A:12-24(g), but found probable cause that your conduct violated N.J.S.A. 18A:12-24.1(e) and (f) of the Code of Ethics. N.J.S.A. 18A:12-24.1(e) provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Ms. Schmidt set forth in her response to the finding of probable cause that she does not believe that her copying of the letter in the Board office compromised the board. She argues that she followed board policy and did not give her personal opinion or discuss the letter with any person other than the superintendent. Thus, she urges the Commission to find that her conduct was not such that it may have compromised the Board. The Commission finds that the letter was so disparaging of the Board members that to give it to staff members who may not have received it by other means that it could compromise the Board in decreasing its credibility among the staff and the public that it serves. By copying the letter and distributing it, Ms. Schmidt had the potential to compromise the Board by spreading the letter to staff such that Ms. Schmidt violated N.J.S.A. 18A:12-24.1(e) of the School Ethics Act.

The Commission next found probable cause that Ms. Schmidt's conduct violated N.J.S.A. 18A:12-24.1(f) of the Act. It provides:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or the gain of friends.

In its probable cause decision, the Commission did not find the first part of N.J.S.A. 18A:12-24.1(f) to be applicable to the present matter, but found the provision that a board

member must refuse to use the schools for personal gain or the gain of friends to apply to these facts. The Commission found probable cause to credit the allegation that Ms. Schmidt used the schools for personal gain by making copies of the letter in question on school equipment and distributing it to members of the school district staff during school hours. The Commission found the fact that Ms. Schmidt paid to have three copies of the letter made to be an admission that Ms. Schmidt used school equipment to make three copies of the letter. The Commission also found that Ms. Schmidt distributed the letter among members of the staff who would not necessarily have received it otherwise, since it was addressed to the residents of Berlin Borough. However, Ms. Schmidt disputes that what she did could be viewed as using the schools for personal gain. She denies any knowledge of the identity of the authors of the letter and therefore denies that she did anything to gain personally or financially. After reviewing the written submission of Ms. Schmidt, the Commission finds that there is insufficient evidence of personal gain to find her in violation of N.J.S.A. 18A:12-24.1(f). She paid for the copies that she made and the Commission is unsure what she gained by distributing the letter to members of the staff. Therefore, the Commission now dismisses the charge that Ms. Schmidt violated N.J.S.A. 18A:12-24.1(f). .

DECISION

For the foregoing reasons, the Commission concludes that Ms. Schmidt took private action that may compromise the Board in violation of N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board members. The Commission does not find that she used the schools for personal gain or the gain of friends and dismissed the charge that she violated N.J.S.A. 18A:12-24.1(f). Because it was never alleged that Ms. Schmidt had any involvement with the writing or mailing of the disparaging letter, but rather that she made and distributed copies in the board office, the Commission recommends that the Commissioner of Education impose a sanction of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, Ms. Schmidt may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini /c
Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C01-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the information obtained from its investigation; and

Whereas, at its meeting of January 28, 2003, the Commission found that Denise Schmidt violated N.J.S.A. 18A:12-24.1(e) of the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission requested that its staff prepare a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of February 25, 2003, the Commission reviewed the draft decision and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on February 25, 2003.

Lisa James-Beavers
Executive Director

IN THE MATTER OF DENISE SCHMIDT, :

BERLIN BOROUGH BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, CAMDEN COUNTY. : DECISION

:

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Denise Schmidt, former member of the Berlin Borough Board of Education, violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board members in the School Ethics Act, and recommending a penalty of reprimand have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Respondent did not submit any comments.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the

reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied from the record before him that, in recommending a penalty for the violation it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4|14|03

Date of Mailing: 4|14|03

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

168-03

PATRICIA HABERTHUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

April 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8085-99

AGENCY DKT.NO. 190-7/99

PATRICIA HABERTHUR,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,

Respondent.

Steven P. Weissman, Esq., for petitioner (Weissman & Mintz, attorneys)

Lane J. Biaviano, Jr., Esq., for respondent

Record Closed: February 18, 2003 Decided: February 21, 2003

BEFORE: **BEATRICE S. TYLUTKI**, ALJ

STATEMENT OF THE CASE

This matter concerns the allegation of the petitioner that she had been improperly terminated from her non-tenured position as Business Administrator and Board Secretary. The petitioner alleges that her termination was in violation of her employment contract, and that the Board's action as to her termination was in violation of the Open Public Meeting Act, the New Jersey School Budget Law, the New Jersey Wage and Hour Law, the Conscientious Employee

Protection Act and other provisions of Title 18A. The matter was transmitted to the Office of Administrative Law on September 13, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –13. The parties informed me that they expected a lengthy hearing, the submission of briefs as well as the possibility of the appeal after the final decision, and that in order to avoid this time-consuming litigation, they were able to agree on a monetary settlement as reflected in the written agreement, which is attached and fully incorporated herein. (J-1)

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

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

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

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

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

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

February 21, 2003
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ, t/a

Receipt Acknowledged:

February 25, 2003
DATE

M. Kathleen Deneen (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 26 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/jck

EXHIBITS

Jointly Submitted

J-1 Stipulation of Settlement

OAL DKT. NO. EDU 8085-99
AGENCY DKT. NO. 190-7/99

PATRICIA HABERTHUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.[1]

Upon review, and in consideration of nature and circumstances of this matter, the Commissioner approves the settlement terms and adopts the settlement as his final decision. The Commissioner notes, however, that the settlement sets forth terms that were to be effectuated prior to approval of the settlement by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1.[2] He, therefore, reminds the parties that they acted at their peril in acting without Commissioner approval and cautions them, and other litigants whose controverted matters have been duly transmitted to the OAL, against effectuation of any settlement prior to its submission to, and approval by, the Commissioner.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|11|03
Date of Mailing: 4|11|03

[1] The proposed agreement was approved by the respondent Board of Education, as indicated by a resolution included within the record of this matter.

[2] Additionally, Term 1 of the Stipulation of Settlement includes a typographical error, providing for payment on January 15, 2002 rather than January 15, 2003, as clearly intended.

170-03

IN THE MATTER OF THE TENURE HEARING OF JOHN KOERNER, SCHOOL DISTRICT OF THE CITY OF UNION CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

April 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9295-02

AGENCY DKT. NO. 314-10/02

IN THE MATTER OF THE TENURE HEARING OF JOHN KOERNER, SCHOOL DISTRICT OF THE CITY OF UNION CITY, HUDSON COUNTY

Mitzy Gales-Menendez, Esq., for petitioner
(Chasan, Leyner, Bariso & Lamparello, attorneys)

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

Record Closed: February 6, 2003 Decided: February 21, 2003

BEFORE: **ELINOR R. REINER,** ALJ

On or about October 3, 2002, the Union City Board of Education (petitioner) certified a charge of incapacity to perform his job function due to chronic and excessive absenteeism against John Koerner, a tenured attendance officer employed by petitioner. On October 18, 2002, respondent filed an answer denying the charge and asserting certain affirmative defenses. On October 25, 2002, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on November 8, 2002, and a telephone prehearing conference was held on November 19, 2002. At that time, the issues were isolated, and a hearing scheduled for January 21 and 22, 2003 at the OAL. Prior to the scheduled hearing, the parties advised that a settlement had been reached, and the hearing was adjourned.

The parties have agreed to settle this matter and have filed a Settlement Agreement and Release, letter of resignation and Board of Education Resolution approving the settlement, which are attached and incorporated herein.

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

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

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

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

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

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

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

February 21, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

2/26/03
DATE

M. Kathleen Dunscomb
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

SETTLEMENT AGREEMENT AND RELEASE

This Agreement is made and entered into as of this 21 day of January, 2003, by and between the Union City Board of Education (hereinafter referred to as "the Board") and John Koerner (hereinafter referred to as "Mr. Koerner").

WHEREAS, Mr. Koerner is a tenured attendance officer in the employ of the Board; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Koerner; and

WHEREAS, it is in the best interests of the parties and public to enter into this Agreement;

NOW THEREFORE, in consideration of the mutual promises of the parties,

IT IS on this _____ day of January, 2003, agreed:

1. In return for the Board's compliance with this Agreement, Mr. Koerner agrees to:

(a) Immediately submit to the Board his irrevocable resignation from his tenured position and employment with the Board, effective as of the date of the approval of this Agreement by the Commissioner of Education. The irrevocable letter of resignation shall be in the form annexed hereto as Attachment "A" and shall be held in escrow pending execution of this

Agreement by Mr. Koerner and the Board, and pending approval of this Agreement by the Commissioner of Education.

(b) Permanently and irrevocably waive and relinquish any and all rights to tenure, seniority, recall or employment with the Board, effective the date of the Commissioner of Education's approval of this Agreement.

(c) Pending the Commissioner's approval, the Board does not have to resume salary payments on January 23, 2003, in accordance with *N.J.S.A.* 18A:6-14.

2. In return for Mr. Koerner's compliance with this Agreement, and the Commissioner of Education's approval, the Board agrees:

(a) To dismiss the tenure charges it brought against Mr. Koerner with prejudice. The Board further agrees that it will not initiate any other actions against Mr. Koerner, based on any knowledge or information it has up to now.

(b) That because Mr. Koerner is resigning to settle tenure charges brought against him, which could result in his dismissal from employment, it will not contest or challenge any application for unemployment benefits made by Mr. Koerner.

(c) Pending approval of this Agreement by the Commissioner of Education, Mr. Koerner shall be free to seek other employment of his choice and the Board agrees that it will not interfere with Mr. Koerner's attempts to obtain other employment. Requests from prospective employers to the Union City Board of Education will be released only as permitted by law under the

Open Public Meetings Act and Executive Orders 9 and 11, and any other proscribed law, rule, regulation or executive order.

3. Koerner releases and gives up any and all claims and rights that he may have against the Board including, but not limited to, any claim of liability, damages or attorneys' fees arising out of this matter. This release includes all claims, including those of which the parties to this Agreement are not aware and those not mentioned in this Agreement. This release applies to all claims resulting from anything that has happened up to now.

In addition to releasing any and all claims and rights set forth above, Koerner also specifically releases the following claims:

(a) Any and all claims including those for back pay, back benefits, seniority or attorneys' fees.

(b) Any and all claims which were brought or could have been brought or arising:

i) Under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States;

ii) Under the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.*, which, among other things, prohibits retaliatory action against an employee under certain specified conditions;

iii) Under the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13:13A-1 *et seq.*;

iv) Under Title VII of the Civil Rights Act of 1964, as amended, 42 *U.S.C.* § 2000e *et seq.*, or the Civil Rights Act of 1991, as amended, which, among other things, prohibits discrimination in employment on account of a person's race, color, religion, sex or national origin;

v) Under the Age Discrimination in Employment Act of 1967, as amended, 29 *U.S.C.* § 621 *et seq.* ("ADEA"), which, among other things, prohibits discrimination in employment on account of a person's age;

vi) Under the Americans with Disabilities Act of 1990, as amended, 42 *U.S.C.* § 12101 *et seq.*, which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

vii) Under the Family and Medical Leave Act of 1993, as amended 29 *U.S.C.* § 2601 *et seq.*, or New Jersey Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, which, among other things, entitles certain employees to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition.

viii) Under the Rehabilitation Act of 1973, as amended, 29 *U.S.C.* § 701 *et seq.*, which, among other things, prohibits discrimination in employment by federal contractors against individuals with disabilities.

ix) Under the Employee Retirement Income Security Act of 1974, as amended, 29 *U.S.C.* § 1001 *et seq.*, which, among other things

regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

x) Under the Older Workers Benefit Protection Act, 29 *U.S.C.* § 621 *et seq.*, which, among other things amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age; and

xi) under any Federal or State statute, rule or regulation or common law or under any employment contract, including the Collective Bargaining Agreement between the Board and the Union City Education Association for back pay, back benefits, seniority, attorneys' fees or any other claim.

Mr. Koerner does not release or waive any rights or claims he may have pursuant to *N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1. Mr. Koerner warrants and represents that he is not aware of any such claims.

4. Except as specified herein, for his obligations pursuant to this Agreement, the Board hereby releases and discharges Mr. Koerner and any and all of his agents, contractors, representatives, predecessors, successors and assigns, as well as his heirs, executors, and administrators, from liability on or for all claims, demands, cause of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, presently known, which the Board may have had or now has, for any reason whatsoever on account or arising out of or in consequence of its employment relationship with Mr. Koerner.

5. The parties agree that the resolution of this matter upon the terms set forth herein is both in their interests and in the public interest for the following reasons:

(a) To avoid disruption of the school district by requiring employees to testify in these proceedings, and

(b) To avoid a lengthy, expensive hearing on the charges and any possible appeals.

6. This Agreement shall be interpreted, construed and enforced pursuant to the laws of the State of New Jersey.

7. This Agreement shall not in any way be construed as an admission by the Board or Mr. Koerner of any liability, or of any improper or wrongful acts, whatsoever; and the Board and Mr. Koerner specifically disclaim any liability for any wrongful or unlawful acts whatsoever.

8. Both Mr. Koerner and the Board expressly acknowledge, represent and warrant that the terms and provisions of this Agreement are the only consideration for signing this Agreement; that no other promise or agreement of any kind has been made to or with any person or entity whatsoever to cause the signing of this Agreement; and that in executing this Agreement, Mr. Koerner does not rely and has not relied upon any representation or statement made by any of the Board's agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

9. The undersigned representatives of the Board hereby acknowledge that they agree to the terms and conditions of this Agreement, subject to the final ratification by the Board.

10. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

11. Nothing in this Agreement shall be deemed to constitute past practice or precedent as to the rights or liabilities of any Board employee, other than Koerner.

12. Mr. Koerner expressly acknowledges, represents and warrants that he has carefully read this Agreement and has fully reviewed and discussed its terms with his attorneys; that Mr. Koerner fully understands this Agreement's terms, conditions and significance; and that Mr. Koerner has executed this Agreement voluntarily, knowingly and with the advice of his representative.

13. This Agreement sets forth the entire understanding and agreement between the parties and shall be binding upon the parties and their respective successors, heirs and assigns. All prior negotiations, agreements and understandings are superseded hereby.

14. If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent be deemed invalid or unenforceable, the remainder of this Agreement or the application of any term or provision to persons or circumstances other than those to which it is held invalid or unenforceable shall not be affected thereby, and each term and

provision of the Agreement shall be valid and enforceable to the fullest extent permitted by law.

15. Both parties acknowledge that their agreement to dismiss the tenure charges is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgements, as well s Mr. Koerner's resignation, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this agreement.

16. The parties to this Agreement understand and agree that all terms herein are confidential and are not to be released to any person not a party to this Agreement, subject to the provisions of the Open Public Records Act.

UNION CITY BOARD OF EDUCATION

By: _____
, President

Attest: _____
, Board Secretary

_____
John Koerner

Dated: 1/21/03

Attest: _____

John Koerner
410 46th Street
Union City, NJ 07087
January , 2003

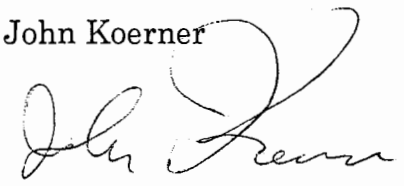
Carl Johnson, Board Secretary
Union City Board of Education
3912 Bergen Turnpike
Union City, NJ 07087

Dear Mr. Johnson:

Pursuant to the terms of the Agreement between the Union City Board of Education and myself, I hereby submit my irrevocable resignation from the position of teaching staff member, effective the date of the approval of such Agreement by the Commissioner of Education. This resignation is expressly conditioned upon the Board approving the Agreement and making payment pursuant thereto and shall be null and void if the terms of that Agreement are not met. This resignation is otherwise irrevocable.

Very truly yours,

John Koerner



/ls

15

RESOLUTION PRESENTED AT A PUBLIC MEETING
OF THE UNION CITY BOARD OFEDUCATION
HELD ON January 30, 2003

UNION CITY BOARD OF EDUCATION
RESOLUTION AUTHORIZING THE SETTLEMENT OF TENURE CHARGES OF CERTAIN EMPLOYEE

WHEREAS, on August 28, 2002, Tenure Charges ("Charges") due to chronic and excessive absenteeism, together with a Statement of Evidence and supporting exhibits were filed against a certain employee; and

WHEREAS, the Board and the employee have amicably resolved the differences between them and have agreed to settle the tenure charges.

NOW, THEREFORE, BE IT RESOLVED by the Board that:

1. The aforesaid recitals are incorporated herein as though fully set forth at length.
2. The Settlement Agreement and Release dated January 21, 2003 is hereby approved.
3. The Board President, Superintendent, and Board Secretary are hereby authorized to execute any and all documents and to take any and all actions necessary to complete and realize the intent and purpose of this Resolution, including the execution of a Settlement Agreement and Release.
4. This Resolution shall be effective immediately.

Certified to be a true and correct copy of a resolution adopted by the Board of Education at its meeting held on January 30, 2003.

CARL JOHNSON

BOARD SECRETARY

SEAL

LAW OFFICES

CHASAN, LEYNER, BARISO & LAMPARELLO
A PROFESSIONAL CORPORATION

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(1904-1988)

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ROBERT A. KAYE△
RALPH J. LAMPARELLO△*+
PETER F. BARISO, JR.*
CINDY NAN VOGELMAN
JOHN V. MALLON◇*
STEVEN L. MENAKER+
THOMAS R. KOBIN△

KIM R. ONSDORFF◇
DONNA J. SOVA
JULIEN X. NEALS△
JOHN M. LAGO*
ROBERT A. CAPPUZZO△
WALTER H. SCHNEIDER, JR.
JOHN L. SHAHDANIAN II△
JORDAN S. FRIEDMAN△
MITZY GALIS-MENENDEZ
THOMAS A. MORRONE
WILLIAM B. FOTI
GEORGEA K. TARACHAS□
MICHAEL A. OPPICI
CATHERINE G. GINGELESKIE
TALI R. SADI△

△ N.J. & N.Y. BARS
◇ N.J. & PA. BARS
□ N.J. & MI. BARS

* CERTIFIED CIVIL TRIAL ATTORNEY
+ CERTIFIED CRIMINAL TRIAL ATTORNEY

February 4, 2003

Hon. Elinor R. Reiner
Administrative Law Judge
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Hearing of John Koerner,
School District of the City of Union City
OAL Docket No. 314-10/02
Our File No. 06001-0057

Dear Judge Reiner:

Enclosed you will find the following with regard to the above-referenced matter:

1. Settlement Agreement and Release;

2. Copy of letter of resignation;

3. Union City Board of Education Resolution Approving the Settlement of Tenure Charges of Certain Employee.

Thank you for Your Honor's courteous attention to this matter.

Respectfully,

MITZY GALIS-MENENDEZ
For the Firm

MGM:sd
Enc.
c: Gregory T. Syrek, Esq.

3K

OAL DKT. NO. EDU 9295-02
AGENCY DKT. NO. 314-10/02

IN THE MATTER OF THE TENURE HEARING OF JOHN KOERNER, SCHOOL DISTRICT OF THE CITY OF UNION CITY, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record, Settlement Agreement and Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|14|03

Date of Mailing: 4|14|03

171-03

TOWNSHIP OF EASTAMPTON AND EASTAMPTON TOWNSHIP PLANNING BOARD,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL, BURLINGTON COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, OFFICE OF SCHOOL FACILITIES FINANCING,	:	
RESPONDENTS.	:	SYNOPSIS

Petitioning Township and Planning Board sought reversal of respondent Board's and respondent State's approval of a site for the construction of athletic fields, alleging the selected site was inappropriate and contrary to *N.J.S.A.* 40:55D-31. The Commissioner rejected the decision of the ALJ remanding this matter to the Office of School Facilities Financing and, because the Commissioner concluded that the approval at issue had expired rendering the matter moot, he dismissed the petition without prejudice to the Board resubmitting its application for approval for purchase of the land at issue pursuant to *N.J.A.C.* 6A:26-7.1. The Commissioner rejected the ALJ's conclusion that the determination of the Office of School Facilities Financing was procedurally defective for failing to meet judicial and Administrative Procedure Act standards for quasi-judicial determinations of State administrative agencies.

In January 2003, the State Board granted a motion by the Board to supplement the record with exhibits it claimed proved it had complied with the pertinent regulation by acquiring the DAC Farm site within 18 months of approval by the Bureau of Facility Planning Services. The State Board approved a settlement agreement with respect to issues in this appeal and remanded this matter to the Commissioner for the limited purpose of determining whether the approval of the Board's plan to construct athletic fields on the DAC Farm site had expired in light of supplemented documents and, therefore, whether the approval granted to the Board by the Office of School Facilities Financing was still valid.

The Commissioner found that, pursuant to *N.J.A.C.* 6:22-2.1, the approval of the Board's application to construct athletic fields on the DAC Farm site by the Office of School Facilities Financing was still valid.

April 14, 2003

the County would continue with the exchange of the DAC Farm property and the Lumberton property. (*Id.* at 3)

At the time of approval by the Office of School Facilities Financing, the controlling regulation, *N.J.A.C.* 6:22-2.1(f), provided, as follows:

> If a local district board of education does not have authority to acquire the land by bond referendum, an approved lease-purchase agreement or other statutory means within 18 months from the date of approval of a school site by the Division, the local district board of education shall resubmit the information required *** for consideration and approval before any action is taken to conduct a bond referendum, purchase, lease-purchase or otherwise acquire the site.

The exchange of properties was effectuated by the closing, giving title of the DAC Farm property to the Board on May 14, 2002. (Board's Exhibit I) The Board avers that the delay in closing was caused by: 1) petitioners' appeal of the Office of School Facilities Financing approval of the DAC Farm site; 2) the Board's many changes to its athletic field plans in an attempt to satisfy petitioners' concerns; and 3) the requirement, pursuant to *N.J.S.A.* 40A:12-13, that the County hold public hearings on the property exchange. (Board's Brief at 2)

Notwithstanding the delay in the transfer of title of the DAC Farm property, upon a thorough review of the documentation submitted by the Board, the Commissioner is in complete agreement with the parties that the Board's actions were in compliance with *N.J.A.C.* 6:22-2.1(f), noted above. In support thereof, the Commissioner adopts the Office of School Facilities Financing's reasoning that:

> [T]he Agreement evidences the fact that the parties intended to exchange the properties no later than April 1999 which is within eighteen months of the February 11, 1999 approval from the Department. Similarly, although a bond referendum was not required to provide money to acquire the land since there was an

even exchange of property, the referendum does evidence voter approval for expenditures to develop and improve the DAC site for use as athletic fields. Therefore, based upon the evidence provided, Rancocas did acquire the property within eighteen months of the date of the Department's February 11, 1999 approval, and thus the approval is valid. (Office of School Facilities Brief at 5)

Accordingly, pursuant to *N.J.A.C.* 6:22-2.1, the Commissioner finds that the approval of the Board's application to construct athletic fields on the DAC Farm site by the Office of School Facilities Financing is still valid.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: ~~4/14/03~~

Date of Mailing: 4-16-03

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

187-03

KENNETH WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9443-01
AGENCY DKT. NO. 397-9/01

KENNETH WILLIAMS,

Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF WAYNE, PASSAIC COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Stephen R. Fogarty, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: February 10, 2003 Decided: March 7, 2003

BEFORE **RICHARD McGILL,** ALJ:

Kenneth Williams filed a petition with the Commissioner of Education to contest a determination by the Board of Education of the Township of Wayne to withhold his increment for the 2001-02 school year. Respondent filed an answer, and the matter was transmitted to the Office of Administrative Law on November 1, 2001, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and subsequently submitted a written Stipulation of Settlement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Mar 7, 2003
DATE

Nina McGill
RICHARD MCGILL, ALJ

Receipt Acknowledged:

March 11, 2003
DATE

B. Kathleen Shannon
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 13 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
(201) 791-3432 Telecopier
Attorneys for Respondent
Wayne Township Board of Education
Our File No.: 208

KENNETH WILLIAMS, Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, Respondent.	:	OAL Docket No.: EDU 9443-01N Agency Ref. No.: 397-9/01 STIPULATION OF SETTLEMENT

THIS STIPULATION OF SETTLEMENT is made by and between the Board of Education of the Township of Wayne, with offices located at 50 Nellis Drive, Wayne, New Jersey 07470 (hereinafter referred to as the "Board")

A N D

Kenneth Williams, residing at 572 Upper Montclair Avenue, Upper Montclair, NJ 07043 (hereinafter referred to as "Williams").

W I T N E S S E T H

WHEREAS, Williams was employed in the Wayne Township School District since in or about July 1989 serving in the capacity of Supervisor of Community Programs with tenure; and

WHEREAS, on or about June 25, 2001, the Board took action by a recorded roll call majority vote of its full membership to withhold Williams' employment and adjustment increments for the 2001-2002 school year, in the amount of $2,697, upon concluding there were serious deficiencies in his leadership and management over the Alternative High School, Extended Day Program and the Adult School; and

WHEREAS, on or about September 26, 2001, Williams filed a Petition of Appeal with the State of New Jersey, Department of Education, Commissioner of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-9443-01N and Agency Ref. No. 397-9/01, alleging that the Board's action to withhold his employment and adjustment increments was arbitrary, capricious and in retaliation to Williams' persistence that the Board recognize the additional duties he was assigned, pay him accordingly, and/or provide him with the required assistance; and

WHEREAS, on or about October 17, 2001, the Board filed an Answer to the Petition of Appeal and Separate Defenses, claiming that the Board's actions were not arbitrary, capricious or unreasonable and were, in all respects, proper and requested that the Petition of Appeal be dismissed with prejudice; and

WHEREAS, on or about July 1, 2002, Williams' annual salary for the 2002-2003 school year was reduced by the prior withheld amount of $2,697; and

WHEREAS, Williams voluntarily resigned from all employment with the Board on or about September 13, 2002; and

WHEREAS, Williams has denied and continues to deny the allegations contained in the Board's reasons for withholding his employment and adjustment increments for the 2001-2002 school year and nothing contained in this Stipulation of Settlement shall be interpreted as an admission of guilt or wrongdoing by Williams for any purpose; and

WHEREAS, the parties having agreed to amicably resolve their differences, it is hereby stipulated and agreed that this matter shall be settled upon the following terms:

1. The Board shall pay Williams, within thirty (30) days of the full execution of this Stipulation of Settlement, Two Thousand Four Hundred Fifty Dollars ($2,450) of the amounts previously withheld from his salary for the 2001-2002 and 2002-2003 school years, less all applicable taxes and deductions at the source of wages. The payment to Williams of Two Thousand Four Hundred Fifty Dollars ($2,450) shall constitute the entire monetary settlement of the matters encompassed by this Stipulation of Settlement.

2. In exchange for the promises and undertakings set forth in Paragraph 1 above, the sufficiency of which is hereby acknowledged, Williams shall execute a General Release in the form

annexed hereto as Exhibit A. Williams expressly acknowledges that this Stipulation of Settlement and the General Release are intended to extinguish and waive all claims which he may have against the Board, its members, officers, employees, administrators, agents, servants and representatives, resulting from anything which has happened up to the date of the execution of the General Release, and which were or could have been asserted, including those claims unknown to Williams.

3. Williams hereby acknowledges that the execution of this Stipulation of Settlement and the General Release which accompanies it shall absolutely bar any claim, action or suit against the Board, its members, officers, employees, administrators, agents, servants and representatives.

4. Nothing in this Stipulation of Settlement or the documents referenced herein shall preclude either party from bringing an action to enforce performance of any term of this Stipulation of Settlement, should there be a default in performance.

5. Williams specifically releases all claims which were or could have been asserted by him in the action entitled Kenneth Williams v. Board of Education of the Township of Wayne, Passaic County, filed with the State of New Jersey, Department of Education, Commissioner of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-9443-01N and Agency Ref. No. 397-9/01 and Williams further stipulates to the dismissal of the within action with prejudice.

6. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

7. All terms of this Stipulation of Settlement are deemed material. This Stipulation of Settlement may not be altered, amended, modified or revoked, except by an instrument executed in writing by the parties.

8. The parties recognize that each has been represented by legal counsel and that they sign this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein. This Stipulation of Settlement shall be subject to the laws of the State of New Jersey.

The foregoing terms and provisions are hereby agreed to and accepted:

WITNESS:

JAMES P. VERBIST
Board Secretary/Business Administrator

DATED: 1/23/03

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE

BY: _____
CATHERINE HERMAN
Board President

DATED: 1/23/03

WITNESS:

ROBERT M. SCHWARTZ

DATED: Jan 3, 2003

KENNETH WILLIAMS

DATED: 12/31/02

RELEASE

This Release, dated , 2002, is given

BY the Releasor(s)

KENNETH WILLIAMS

referred to as "I",

TO BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, and its officers, employers, administrators, agents, servants and all other persons, firms or corporations who or which are or might be liable in the premises from any and all claims which I have or might have against them.

referred to as "You".

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. Release. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I specifically release the following claims:

More particularly any and all claims arising out of the employment relationship between Kenneth Williams and the Wayne Township Board of Education, which are the subject matter of a Petition of Appeal filed with the State of New Jersey, Department of Education, Commissioner of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-09443-01N and Agency Ref. No. 397/9/01, and including, but not limited to, any cause of action pursuable before any state or federal court or agency, any pension claim(s) arising with the New Jersey Division of Pensions and Teachers' Pension and Annuity Fund, or grievance through a collective negotiations agreement, which allege a violation of the Older Workers' Benefits Protection Act, 29 U.S.C. 621, et seq., or any other federal or state statutory provision, administrative regulation or other act that has the force and effect of law.

This Release does not apply to any rights which Kenneth Williams may have under the terms of the Stipulation of Settlement between Kenneth Williams and the Wayne Township Board of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-09443-01N and Agency Ref. No. 397/9/01.

2. Payment. I have been paid a total of $ 2,450.00 and other good and valuable consideration as more specifically set forth under the terms of the Stipulation of Settlement between Kenneth Williams and the Wayne Township Board of Education, pending in the Office of Administrative Law, bearing OAL Docket No. EDU-09443-01N and Agency Ref. No. 397/9/01, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

_____ _____

(Seal) KENNETH WILLIAMS
NOTARY PUBLIC

STATE OF NEW JERSEY)
SS:
COUNTY OF)

BE IT REMEMBERED that on this _____ day of _____ 2002, before me personally appeared Kenneth Williams, who I am satisfied is the person mentioned in and who executed the within Release and who knows the contents thereof and thereupon I acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

_____

(Seal)
NOTARY PUBLIC

Prepared By:

Stephen R. Fogarty, Esq.

3F

OAL DKT. NO. EDU 9443-01
AGENCY DKT. NO. 397-9/01

KENNETH WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/08/03

Date of Mailing: 4.16.03

* By way of reminder, however, notwithstanding that the within settlement agreement states that the two Board members who signed it did so with the authorization of the Board, the record of settlement agreements should contain a copy of the Board resolution evidencing such authorization. Also, all settlement agreements should be signed by the Board attorney, who is the Board's duly authorized representative in litigation.

CHRISTINE GILLESPIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning teacher alleged the District failed to pay her full salary without loss of sick time for work-related injury, pursuant to *N.J.S.A.* 18A:30-2.1, notwithstanding a workers' compensation order declaring this time compensable.

The ALJ found that the petition was untimely filed. Petitioner filed her petition September 2001 seeking the return of sick days from September 2000 to November 2000, well beyond the 90 days of receipt of notice of the District's action. Thus, the ALJ concluded that petitioner's appeal was substantially out of time under the 90-day rule.

The Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner did note that petitioner's efforts to resolve the claim through negotiation with the District were irrelevant and did not negate the fact of receipt of adequate notice nor did they toll the running of the time limits for filing the petition. The petition was dismissed as untimely filed.

April 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 09448-01N

AGENCY DKT. NO. 377-9/01

CHRISTINE GILLESPIE,

Petitioner,

v.

STATE-OPERATED DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Joseph M. Gillespie, Esq., for petitioner

Cherie L. Adams, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: January 8, 2003 Decided: February 24, 2003

BEFORE: **JEFF S. MASIN,** ACTING CHIEF ALJ:

Christine Gillespie ("Gillespie"), a teacher employed by the respondent school district ("Newark"), suffered a work-related injury on September 4, 1998, and has been unable to work since that time. This dispute with her employer revolves around the issue of sick days, and the impact of workers compensation benefits and statutory enactments upon accumulated and yearly sick leave allowances. In short, Ms. Gillespie seeks the return of forty-two sick days which she claims were wrongfully taken from her during the period from September 5 through November 2, 2000, a period when she was absent for what has been determined to be the result of temporary disability, as decided by an order entered in the Division of Workers Compensation.

Ms. Gillespie filed her appeal with the Commissioner of Education on September 24, 2001, and amended that filing on September 26, 2001. The Commissioner transferred the case to the Office of Administrative Law on November 1, 2001. On September 19, 2002, the respondent filed a Motion for Summary Decision. Petitioner replied to the motion on October 24, 2002, and the parties then exchanged further written arguments. Oral argument was held by telephone on December 4, 2002. Final written comments were generated by the discussions at oral argument and by subsequent filings the record on the motion closed on January 8, 2003.

It is undisputed that as of September 4, 1998, Ms. Gillespie had accumulated fifty-five sick days. The contract between the district and the Newark Teachers Union provided for a teacher such as petitioner to receive at the beginning of the new school year fifteen (15) sick days, ten (10) non-cumulative sick days and three (3) personal days. Thus, had Ms. Gillespie been able to work during the 1998-99 school year and if she did not need to use any sick days during that school year, she would have entered the next school year in September 1999 with seventy accumulated sick days.

On March 8, 2000, Honorable Fred H. Kumpf, Judge of Workers' Compensation, issued an Order which, among other things, provided that the respondent Newark Public Schools System pay Ms. Gillespie temporary disability from September 4, 1998, less credits for temporary payments made pursuant to contract. A further Order for Temporary Disability was entered by Judge Kumpf on September 13, 2000. On September 22, 2000, Judge Kumpf ordered, "Temporary disability shall continue to be paid until petitioner is seen by Dr. Massingill and pending his determination as to whether additional temporary disability is due."

N.J.S.A. 18A:30-2.1 provides that

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive

> a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.
>
> b. Leave taken by an employee pursuant to subsection a. of this section shall constitute satisfactory service as provided pursuant to N.J.S. 18A:29-14 and any other provision, statutory or contractual, relating to employment, adjustment or other increments and shall not constitute inefficiency or other good cause for the withholding of an employment or adjustment increment. . . .

In response to the petition, the respondent first argues that the petition must be dismissed for failure of the petitioner to abide by the so-called "90-day rule." *N.J.A.C.* 6a:3-1.3 (D). Alternatively, while agreeing that during her first year of absence from work while on temporary disability, September 1998 through the start of the next school year in September 1999, the effect of subsection a. of this legislation means that Ms. Gillespie was to be paid her full salary less that money she received from Workers' Compensation benefits and that none of Ms. Gillespie's then accumulated fifty-five days of sick time could be charged for her absences during that school year, the respondent argues that once the petitioner remained out of school in September 1999, even if, as Judge Kumpf determined, her absence resulted from a temporary disability, the statute no longer bars the Board from charging Ms. Gillespie's then existing accumulation of sick days while at the same time paying her full salary for those current and accumulated sick days. Since her number of days absent during the 1999-2000 school year substantially exceeded her accumulation of sick days as of September 1999, her available sick days were exhausted during that school year. Additionally, the Board contends that despite her status under Workers' Compensation Law as a temporarily disabled employee, the respondent did not continue to accumulate additional sick days as of the start of school in September 1999, as the protection granted by *N.J.S.A.* 18A:30-2.1 is limited to one year. Thus, the Board argues that Ms. Gillespie's accumulation of sick days existing as of the start of school in September 1999, was the fifty-five days carried forward and fifteen days she was entitled to as of September 1998, a total of seventy. The fate of the sick days that she would receive upon the beginning of the school year in September 1999, at least for purposes herein the annual fifteen (15) sick days that

were permitted to be carried over from year to year (as opposed to the ten (10) non-accumulative sick days) is, to the Board's understanding of the case, not dispositive.

The 90-Day Rule

N.J.A.C. 6A:3-1.3(d) provides that a petitioner filing an appeal from the action or inaction of a board of education must file a petition "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . ." More specifically, subsection 1. of section (d) provides that "[A]ny petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 must file a petition within 90 days of receipt of the notice of the district board's action, or of the action of the district boards' agent, which has the effect of denying such benefits, notwithstanding that the Commissioner may hold the petition in abeyance pending determination of the Division of Workers' Compensation as to whether the underlying injury is work-related."

The respondent argues that the petition was filed on September 24, 2001, and since the period for which the return of sick days is sought runs from September 4, 2000, through November 2, 2000, Ms. Gillespie is "undoubtedly" out of time. Petitioner counters that timeliness is properly measured from June 26, 2001, the last day of the 2000-2001 school year. September 24, 2001, was the 90th day thereafter and thus the appeal was timely.

The Board contends that Ms. Gillespie knew that she was being charged sick days during the time in question, September through November 2, 2000. In fact, in a letter dated October 16, 2000, she requested that the payroll department complete a report so that she would be charged with sick days on 28 days running from September 5 through October 13, 2000. In her response papers dated December 27, 2002, while apparently questioning the status of the District's Risk Manager to make any binding decision, petitioner appears to acknowledge that she "was well aware that she was being charged sick days during identified period," and that "on October 16, 2000, after six weeks of school, six weeks of being A.W.O.L., six weeks without payments from Allied Risk Services, Inc., [she] submitted medical certificates to be paid for her sick days." Payroll records submitted by the Board show that Ms. Gillespie was charged for sick time starting on September 5 through November 2. Indeed, petitioner has submitted a letter dated

October 26, 2000, addressed to Ms. Valerie Wilson, Executive Director, Office of Operation, Newark Public Schools. In that letter the petitioner referenced Judge Kumpf's September 22, 2000, Order which "explicitly extends my benefit period until I am examined by the Districts's doctor." Ms. Gillespie then refers to her benefits having been terminated by Mr. Hale as of September 1, 2000, and relates that as a result of his actions, she was charged sick days "during a court ordered period of temporary disability." She then requests that Ms. Wilson "[P]lease correct the situation and have my days returned to me." She also noted that "[T]he district has 45 days from September 22, 2000 court order to correct this situation that Mr. Hale was allowed to create and return any sick days that I have been charged during September and October."

Given these facts, the Board claims that as Ms. Gillespie was well aware that her sick days had been charged, the ninety-day period in which she could have challenged that charge began to run from either November 3, 2000, or at the latest, as of the date of the next pay period thereafter. In either case, the ninety days expired long before she filed her petition in September 2001.

Ms. Gillespie retorts that as there was never any Newark school board or board administrator decision or order that notified her that her request to have her sick time reinstated had been denied or directed her that, despite her position that her absences could not be charged against sick days, she had to utilize her sick days. She questions the status and authority of the Risk Manager to make any decisions on these issues or, at a minimum, argues that the Risk Manager's actions in early Fall 2000 are insufficient to serve as the starting date for the 90-day appeal period. She also refers to her letter to the Essex County Superintendent of Schools dated March 27, 2001, in which she advises the Superintendent of her attempt to have her sick days returned by the Newark School District and her letter to Ms. Wilson, dated July 17, 2001, in which she again refers to her repeated requests to have the 42 sick days returned to her and requests that if her request for reinstatement of the sick days cannot be fulfilled that the reason for the denial be placed in writing and provided to her. These letters demonstrate that the School District never did issue any formal order or directive that should properly be deemed the point at which to start the running of the 90-day period. Finally, she provides a letter dated July 27, 2001, received from Roland Armando Alum, Policy and Planning Associate with the Department of Education's Office of State-operated School Districts. In that letter Mr. Alum notes that in

response to petitioner's request of July 19, 2001, regarding her requests to the Newark Public Schools, that the Office had determined that "your concerns are best handled at the district level," and, further, "The New Jersey Department of Education has been assured that officials at the Newark Districts Central Office are processing your requests consistent with district policies." This letter suggests that the local district was still, as late as July 2001, not yet prepared to issue a decision on the long-standing request for the reinstatement of the 42 sick days. Thus, given all of these factors, petitioner argues that the appeal filed in September 2001 was within time under the 90-day rule.

The 90-Day Rule expresses a public policy that favors a measure of repose to school districts, stabilizing the relationship between teachers and administration. It allows for the proper and efficient administration of the school laws. The Rule has been upheld as a "fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws." *Kaprow v. Bd. Of Ed. Of Berkeley Township*, 131 *N.J.*, 572, 582 (1993). The significant factor used in measuring the start of the 90-day period is "adequate notice." The party presenting a claim must have received some form of notice adequate to alert "the individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period . . . [T]he notice requirement should effectuate concerns for individual justice by not triggering the limitations period until [the petitioner has been alerted to the existence of facts that would be adverse to it]. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 48 (1956). The form of notice deemed adequate to place someone on notice of adverse action can be either formal, such as a letter from the secretary of the Board of Education informing the petitioner that someone else has been given her job, *Kaprow, supra.*, or informal, such as the issuance of a check that does not contain a salary increase (*North Plainfield Ed. Ass'n. v. Bd. of Ed. of North Plainfield Borough*, 96 *N.J.* 587 (1984)). In a case dealing with the treatment of sick days in the context of workers' compensation, *Molinari v. Bd. of Ed. of the Borough of Hopatcong* (EDU 3174-97), (Initial Decision), (November 13,1997), http://lawlibrary.Rutgers.edu/oal/search.html.>*adopted Comm'r.* (December 29, 1997), ALJ Diana Sukovich determined that the petitioner "was

obligated to file his claims with the [Department of Education] within 90 days of the date on which he first became aware that the Board was treating the days in question as sick leave, even if the respondent did not send written notification of such to petitioner." *Ibid.*

While the law does recognize that there are some extremely limited instances where the enforcement of the 90-day rule should be waived in the interests of public policy, such as where important and novel constitutional questions or matters of important public rather than private interests are in need of adjudication or where there are informal or *ex parte* determinations of legal questions by administrative officials, in general, the rule has been strictly enforced. *Brunetti v. Borough of New Milford*, 68 *N.J.* 576, 586 (1975); *Bland-Carter v. State-Operated School District of the City of Newark*, (EDU 1505-00, Initial Decision, (July 21, 2000), http://lawlibrary.Rutgers.edu/oal/search.html., *adopted Comm'r* (September 11, 2000)(refusing to relax the 90-day rule when the petitioner filed outside of the time limitation where genuine personal problems of the petitioner occurred during the first part of the ninety day period and the petitioner returned to work several weeks before the ninetieth day).

Based upon the facts presented herein, I **CONCLUDE** that Mrs. Gillespie was required to appeal any action that charged her sick days within ninety days of her awareness that this charge was being made. Certainly many months before she filed her appeal she knew that, whatever the circumstances or the proprieties that had led to her submitting her October 16 letter and asking that her sick days be charged, the charge had been made. If she disagreed with this action, if she felt that she was being improperly made to seek to utilize sick days in violation of the law, she could and should have requested review of this long before she did. I **CONCLUDE** that her appeal is substantially out of time under the ninety-day rule and must therefore be **DISMISSED**. However, despite this conclusion, it is best to rule on the appeal on its merits as well, so as to fully dispose of the issues before review by the Commissioner.

Ms. Gillespie contends that during a period of disability that has been recognized by an order of a Workers' Compensation Judge, no employee can be charged for any sick leave.

Under Workers' Compensation law, an employee who is granted Temporary Disability may receive such benefits for up to 400 weeks. The maximum benefit awarded under TDI is

well below an employee's full salary. In considering the purpose of *N.J.S.A.* 18A:30-2.1, the Appellate Division has characterized the statute as providing a benefit that is expressly intended to "complement workers' compensation benefits for [a] strictly limited period." *Forgash v. Lower Camden County School District*, 208 *N.J. Super.* 461 (App. Div. 1985). Thus, while the statute does require that a board whose employee is out of work due to a work-related disability for which he or she is receiving workers' compensation benefits pay that employee's *full* salary without charging against any of the employee's annual or accumulated sick leave, the statute expressly limits that requirement to a period of one calendar year. Thereafter, if the employee must remain out of work due to the continuing disability, the statute does not mandate that the board pay the full salary. Instead, once the calendar year has passed, the statutory scheme provides that the employee can continue to receive the workers' compensation payments of less than full salary. However, if after the end of the one year statutory period, the employee is allowed by the Board to receive her full salary, then it appears that the still disabled employee must utilize such time as she may have, such as annual and accumulated sick time, to cover her days of absence, at least to the extent of the percentage of time over and above the percentage of her salary she receives as a TDI benefit. Once the employee has exhausted these sick days, in the absence of any other factors, the employee would then receive only the workers' compensation benefits that he or she was entitled to as a result of the disability. However, the Legislature has provided that if an employee suffers an absence due to illness or injury that exceeds that employee's annual and accumulated sick leave, then the Board, acting pursuant to discretion authorized by *N.J.S.A.* 18A: 30-6, may authorize payment of such employee's salary, less the cost of a substitute if one is employed or the estimated cost of a substitute if one is not employed. In addition, *N.J.S.A.* 18A:30-7 allows the board, again acting pursuant to its discretion, to grant sick leave within limits above the minimum sick leave. Nowhere in the statutes is there any suggestion that if an employee is required by a workers' compensation disability to remain out of work for more than one calendar year, that the employee, who will then have exhausted the salary benefit provided by *N.J.S.A.* 18A:30-2.1, can then avoid utilizing his or her accumulated and annual sick leave to cover absences and thereby receive his or her full salary, until the total of the annual and accumulated sick days are themselves exhausted. A reading of this provision does not suggest that the one year limitation is only intended to limit the scope of the board's responsibility to pay full salary or wages, and not to limit the prohibition against charging an employee's continued absence against his or her sick time, annual and accumulated. Despite the

petitioner's insistence that Judge Kumpf's finding somehow serves as a shield against the Board charging her absences against her sick time even while paying her full salary, she has produced no statute or regulation or case that so holds.

Based upon a reading of the statutes and cases and the briefs presented, I **CONCLUDE** that the Board of Education rightfully charged Ms. Gillespie for her absences and does not owe her any sick days to be credited to her for the period from September 5 through November 2, 2000. In fact, the record reflects that she received full pay for these days. She has no viable complaint for credit for any sick days for this period. Therefore, it is **ORDERED** that the petition be **DISMISSED** on its merits.

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

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

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

February 24, 2003
DATE

JEFF S. MASIN, ACTING CHIEF, ALJ

Receipt Acknowledged:

March 4, 2003
DATE

M. Kathleen Duncan (Ca)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 7 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:
From brief dated 9/19/02:

Exhibit A	Workers' Compensation Orders dated 8/11/99, 3/8/00, 9/13/00, and 9/22/00
Exhibit B	Memo dated 11/16/01 from Dorothy Hatcher to To Whom It May Concern
Exhibit C	Note dated 10/18/00 signed by K. Giffer with attachments
Exhibit D	Paycheck data
Exhibit E	Paycheck data
Exhibit F	Paycheck data
Exhibit G	Earnings Record Report dated 8/14/02

From 11/26/02 response letter:

Exhibit A	*The Sunday Star-Ledger*, 1/23/00 Education article, *The Fifty-Eight Million Dollar Newark Board of Education Deficit*
Exhibit B	Letter dated 3/28/00 from Michelle E. Reevey to Ms.. Christine Gillespie with attachments
Exhibit C	Letter dated 7/26/01 from Salvatore J. Cirigliano to Legretha Wingo with enclosure
Exhibit D	Payroll information and W2 2000 for Christine Gillespie

FOR THE RESPONDENT:
From Brief in Opposition to Summary Judgment Motion:

Exhibit A	Workers' Compensation Orders dated 8/11/99, 3/8/00, 9/13/00, and 9/22/00
Exhibit B	Memo dated 11/16/01 from Dorothy Hatcher to To Whom It May Concern
Exhibit C	Note dated 10/18/00 signed by K. Giffer with attachments
Exhibit D	Paycheck data
Exhibit E	Paycheck data
Exhibit F	Paycheck data
Exhibit G	Earnings Record Report dated 8/14/02
Exhibit H	Payment Detail Screen, Newark Public Schools

From Reply Brief:

Exhibit A	Job Data Screens
Exhibit B	W2 Wage and Tax Statements for 1998, 1999, 2000 & 2001
Exhibit C	Copies of paycheck

From letter brief of 12/27/02:

Exhibit 1	Memo dated 12/1/99 from Christine Gillespie to Ms. Holt
Exhibit 2	Letter dated 10/26/00 from Christine Gillespie to Ms. Valerie Wilson
Exhibit 3	Letter dated 3/27/01 from Christine Gillespie to Mr. Anthony Marino
Exhibit 4	Letter dated 7/17/01 from Christine Gillespie to Ms. Valerie Wilson
Exhibit 5	Certified Receipt dated 7/24/01
Exhibit 6	Letter dated 7/27/01 from Roland Armando Alum to Ms. Christine Gillespie
Exhibit 7	Letter dated 7/30/01 from Christine Gillespie to Ms. Valerie Wilson
Exhibit 8	Department of Personnel Job Specification 07390, Risk Manager

From response to supplemental correspondence:

Exhibit A Copy of *Schwartz v. Dover Public Schools*, 180 *N.J. Super.* 222, 434 *A. 2d* 645 (1981)

Exhibit B Copy of Agreement between the Newark Public Schools & the Newark Teachers Union Local 481, A.F.T./AFL-CIO, Teacher – Clerk, July 1, 2000-June 30, 2003

OAL DKT. NO. EDU 09448-01N
AGENCY DKT. NO. 377-9/01

CHRISTINE GILLESPIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner filed exceptions on March 21, 2003. Even assuming, however, that the exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4, which they were not,[1] petitioner may not make submissions to the record on her own behalf, having already elected to be represented by counsel, *N.J.A.C.* 1:1-5.1. All submissions in this matter must be accomplished by and through such legal counsel, absent notification to the Bureau of Controversies and Disputes that petitioner is no longer represented by an attorney. Therefore, petitioner's exceptions were not considered by the Commissioner in rendering his decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that the within petition is untimely, pursuant to *N.J.A.C.* 6A:3-1.3(d), since there can be no question on this record that petitioner was, in October of 2000, alerted "to the existence of facts that might equate in law

[1] The Initial Decision was mailed to the parties on March 7, 2003 and the exceptions were filed on March 21, 2003, *via facsimile*, outside the 13-day period prescribed by regulation.

with a cause of action and was sufficient to enable her to pursue a claim, thereby triggering the ninety-day filing period of *N.J.A.C.* [6A:3-1.3(d)]," *Susan Beshaw v. Board of Education of the Borough of Oakland, Bergen County,* State Board decision February 4, 1998, slip. op. at 4, *aff'd* Appellate Division March 23, 1999, A-3985-97T5. Furthermore, as stated by the New Jersey Supreme Court in *Kaprow, supra,* attempts to resolve a claim through negotiation with the local board of education are irrelevant. Such efforts do not negate the fact of receipt of adequate notice nor do they toll the running of the time limits for filing a petition of appeal. Neither does the Commissioner find cause to relax the 90-day rule in this matter.

Accordingly, the Petition of Appeal is dismissed.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/14/03

Date of Mailing: 4/16/03

[2] Since this matter is dismissed on procedural grounds, the Commissioner does not reach to the ALJ's discussion on the merits of petitioner's claims.

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

189-03

C.S., on behalf of minor child, N.S., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE CITY OF SOMERS POINT, ATLANTIC COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent appealed the Board's determination to expel her son for a whole year due to an alleged assault on a teaching staff member.

The ALJ found that the Board of Education presented credible evidence that it afforded N.S. his due process rights; that the expulsion was not arbitrary, capricious or unreasonable; and that petitioner was given every opportunity to present evidence in the defense of her son and failed to do so. The ALJ concluded that the Board acted properly in expelling N.S. Moreover, he was afforded Home Instruction. Petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

April 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 342-03

AGENCY DKT. NO. 32-1/03

C.S., o/b/o, N.S.,

Petitioner,

v.

SOMERS POINT BOARD OF EDUCATION, ATLANTIC COUNTY,

Respondent.

C.S., petitioner, *pro se*

Lewis Greco, Esq., for respondent

Record Closed: February 21,2003 Decided: February 24, 2003

BEFORE **LILLARD E. LAW**, ALJ, t/a

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, C.S., seeks emergency relief from an action by the Somers Point Board of Education (Board) to expel her son, N.S., from its schools as a consequence of Ness's alleged assault against a teaching staff member in the employ of the Board, in violation of *N.J.S.A.* 18A:37-2.1. Petitioner contends she did not understand the nature of the Board's expulsion hearing concerning her son, N.S.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The emergency hearing was originally scheduled to be held on February 18,2003. Due to a severe snow storm, the Atlantic County Civil Courthouse was closed and the matter was rescheduled to be heard on February 21, 2003.

Oral Argument by the parties was heard on petitioner's application for emergency relief on February 21, 2003.

BACKGROUND FACTS

N.S., petitioner's son, is an eighth grade pupil in the Board's Jordan Road School. The schools under the direction and control of the Board only operate up to grade eight. Thereafter, their pupils move into the ninth grade not under the control of the Board. N.S. and another pupil are alleged to have been engaged in an altercation within the school on Wednesday, December 4, 2002. It is further alleged that when a teaching staff member attempted to intervene in the altercation, N.S. repeatedly kicked the teacher and caused bodily injury to the teacher.

ORAL ARGUMENT OF THE PARTIES

Petitioner's argument:

Petitioner admits N.S. was engaged in the altercation with another pupil in the Board's school. She contends the Jordan Road School Principal advised her of the altercation by way of a telephone call on December 4,2002, and imposed a 20 day suspension from school upon N.S. Subsequently, petitioner arrived at the Jordan Road School and was then advised of the alleged assault and injuries upon the teacher by N.S. Petitioner found the principal's statement unacceptable contending, among other things, that such information should have been addressed during the original telephone call. Petitioner contacted the Superintendent of Schools on December 6, 2002, to express her belief that N.S. should not be suspended from school for a period of 20 days. Petitioner asserts the Superintendent advised her that N.S. would be suspended from school for a period often days, rather than the 20 days imposed by the school's principal.

Petitioner insisted she be granted a hearing on the ten day suspension. Petitioner contends that the other pupil involved in the altercation with N.S. had a history of violation of school rules and was issued only a ten day suspension. Petitioner, who admits she did not witness the altercation, asserts that N.S. engaged in the fight only to defend himself. She further asserts the teacher grabbed N.S. by the neck and that N.S. could not catch his breath. Petitioner asserted that the school's principal pressed charges against N.S. following the assault upon the teaching staff member. Petitioner contends that the Board has treated N.S. harshly and unjustly. She contends that N.S. wants to return to school and graduate with his eighth grade classmates.

Petitioner admits she was advised of an expulsion hearing before the Board and had the right to be represented by legal counsel. She admits she did not retain legal counsel and appeared *pro se*. Nor did petitioner call any witnesses which, she contends, would have rebutted the Board's witnesses. Petitioner asserts she did not understand the scope or nature of the Board's expulsion hearing.

Petitioner did not call any witnesses, nor have them appear, at the herein emergency hearing.

The Board's argument:

The Board offered two exhibits, which were marked R-1 and R-2 in evidence. R-1, a letter, dated December 10, 2002, addressed to petitioner from the Superintendent states, in part, as follows:

> As discussed in our phone conversation today, please be advised that Somers Point Board of Education has scheduled a hearing for Thursday, December 19th at 8:00 p.m. in the Jordan Road School Library to determine if your son [N] should be expelled from the school district or otherwise disciplined. He is not to attend school in the district until after the Board makes a decision in this matter. I have had Mr. Miller arrange to have your child placed on home instruction immediately. The charges against your son are as follows:
>
> On Wednesday, December 4, 2002, your son got into a fight with another student. During the course of the fight 8th grade teacher Mr. Delusion was repeatedly kicked and punched by your son.

> At the time of the hearing you and your son have the right to be represented by legal counsel of your choice, the right to cross-examine witnesses on your son's behalf, the right to present witnesses on your son's behalf and the right to have compulsory process by subpoena to compel attendance of witnesses to testify.
>
> At the time of the hearing the Board will hear the witnesses and consider the anticipated testimony described below (The Board listed its five witnesses and a description of their individual testimony which is not repeated here). At the time of this hearing the Board will also consider your son's academic and discipline records and the results of a Child Study Team screening. If the charges against you son are sustained to the satisfaction of the Board of Education, the Board may recommend that your son be expelled from Jordan Road School. The hearing will be conducted in closed session of the Board.
> (R-l in Evidence)

The Board argues that after petitioner was advised of her and her son's rights; she agreed to proceed with the hearing without legal counsel. The Board heard the evidence of the charge against N.S. Thereafter, the Board deliberated the evidence before it and determined that it was in the best interest of the school to expel N.S. and place him on home instruction for the remainder of the 2002-2003 school year.

Subsequent to the Board's action, the Superintendent addressed a letter to petitioner, dated December 20,2002, which states as follows:

> Please be advised, at the Board of Education meeting last evening, December 19,2002, the Board of Education judged that your son is guilty of assaulting a teaching staff member and has expelled him from school for the rest of the school year. Your son is placed on Home Instruction and will continue in that program. Should you have any questions, please feel free to call me. (R-2 in Evidence).

The Board argues that it honored all of N.S. procedural due process safeguards. It carefully considered all of the evidence before it and its actions were neither arbitrary, capricious or unreasonable. It also argues that petitioner has failed to meet a condition for the award of emergency relief; *i.e.,* the likelihood of successfully prevailing on the merits of the matter.

DISCUSSION

Having considered the arguments of the parties and having reviewed the evidence, the statutes and decisional law, the undersigned spread upon the hearing record the following summary.

The causes for the suspension or expulsion of a pupil from the public schools are found at *N.J.S.A.* 18A:37-2. The statute at *N.J.S.A.* 18A:37-2.1 addresses the issue of an assault by a pupil upon a teaching staff member, and provides, in part, as follows:

> a. Any pupil who commits an assault, as defined pursuant to N.J.S.2C:12-1, upon a teacher... .acting in the performance of his duties and in a situation where his authority to so act is apparent, or as a result of the victim's relationship to an institution of public education of this State, not involving the use of a weapon or firearm, shall be immediately suspended from school consistent with procedural due process pending suspension or expulsion proceeding before the local board of education. Said proceedings shall take place no later than 30 calendar days following the day on which the pupil is suspended. The decision of the board shall be made within five days after the close of the hearing....
> (Emphasis supplied)

I **FIND** and **CONCLUDE** the Board presented credible evidence it afforded N.S. all of his Fourteenth Amendment Due Process Rights, as evidenced by Exhibit R-l, and its subsequent expulsion hearing. *R.R. v. Board of Ed Of Shore Regional High School Dist.* 109 *N.J. Super.* 337 (Chan. Div. 1970). Petitioner offered no credible evidence to the contrary. Petitioner was given every opportunity to present evidence in the defense of her son and failed to do so. Petitioner fully understood the consequences of the board's expulsion proceedings.

In the matter of *K.L. v. Board of Education of Matawan/Aberdeen High School District*, 91 *N.J.A.R.* Id (EDU) 74 (1991), it was determined that the expulsion of a pupil for assaulting a teaching staff member was not arbitrary, capricious or unreasonable. In the matter of *L.B. v. Elizabeth Board of Education,* 95 *N.J.A.R.* 2flf (EDU) 110, pupil's assaultive conduct upon pupils, teachers and administrators in the schoolhouse was ground for his expulsion from the board of education's schools.

I **FIND** and **CONCLUDE** the Board has presented sufficient evidence for it to expel N.S. from its school for his assault upon a teaching staff member. *M.G. v. Monmouth Regional High School*, 91 *N.J.A.R. 2d* (EDU) 38. N.S. has not been deprived of an education as evidenced by the Board having afforded him Home Instruction for the remainder of the 2002-2003 school year. Therefore, no irreparable harm has been visited upon N.S.

ORDER

Accordingly, it is **ORDERED** that the action by the Board is hereby **SUSTAINED**. It is **FURTHER ORDERED** that petitioner's application for Emergency Relief is hereby **DENIED** and **DISMISSED**.

This Initial Decision on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

24 February 2003
DATE

Lillard E. Law
LILLARD E. LAW, ALJ t/a

/lam

OAL DKT. NO. EDU 342-03
AGENCY DKT. NO. 32-1/03

C.S., on behalf of minor child, N.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF SOMERS POINT, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The Initial Decision of the Office of Administrative Law (OAL) on petitioner's application for emergent relief in the above-captioned matter was filed with the Commissioner on February 24, 2003. Upon review of that decision, it appeared that the Administrative Law Judge (ALJ) had made findings and conclusions sufficient to constitute a recommendation on the merits of the underlying appeal, as well as on the application for emergent relief. Therefore, petitioner was requested by the Director of the Bureau of Controversies and Disputes to advise whether she believed further proceedings at the OAL were necessary to resolve her appeal, and was additionally afforded an opportunity to submit exceptions to the Initial Decision pursuant to *N.J.A.C.* 1:1-18.4. No communication of any kind ensued in response to the Director's request, which was acknowledged as received by petitioner via certified mail on February 28, 2003.

Accordingly, the Commissioner deems the Initial Decision in this matter to be the ALJ's recommendation on the merits of petitioner's claim, and, reviewing it on

that basis along with the record of proceedings, the Commissioner fully concurs with the analysis and conclusions of the ALJ.

Accordingly, the Initial Decision of the Office of Administrative Law is adopted for the reasons expressed therein, and the Petition of Appeal dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/03

Date of Mailing: 4/16/03

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

190-03

J.J., on behalf of minor child, J.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

April 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 6554-02

AGENCY DKT. NO. 254-8/02

J.J. O/B/O J.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

J.J., petitioner, *pro se*

Jeffrey F. Belz, Esq., for respondent (Reed Smith Shaw & McClay, LLP, attorneys)

Record Closed: November 18, 2002 Decided: March 19, 2003

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 26, 2002, for a hearing pursuant to *N.J.S.A.* 52:14F-1 to -13.

Respondent, having filed the attached letter withdrawing its answer denying that J.J. resided within the respondent School District and its Counterclaim seeking judgment against

petitioner for tuition expenses, I **CONCLUDE** that the matter is no longer a contested case before the Office of Administrative Law and it is **DISMISSED with PREJUDICE.**

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

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

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

March 18, 2003
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

March 21 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 24 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

Tmp

JEFFREY F. BELZ

Attorney At Law
605 W. Route 70
Cherry Hill, NJ 08002
856-216-1220
Fax 856-216-1559

Member NJ & PA Bar

November 12, 2002

Office of Administrative Law
Attn: Honorable Anthony T. Bruno, A.L.J.
9 Quakerbridge Plaza
CN 049
Trenton, New Jersey 08625

RE: J.J. o/b/o J.J. v. Board of Education of the Township of Ewing
OAL DKT. NO. EDU 6554-02

Dear Judge Bruno:

Please be advised that the Board of Education of the Township of Ewing withdraws its Answer and Counterclaim in the above referenced matter.

By way of copy of this correspondence to the Petitioner, I am advising her of the Board's action to allow J.J. to continue her education in the Ewing District.

Thank you for your assistance in this matter.

Very truly yours,

JEFFREY F. BELZ

JFB/djg

cc: Ms. Jeanette Johnson
Timothy R. Wade, Ed.D., Superintendent
David Mikalauskas, Attendance Officer

190-03
OAL DKT. NO. EDU 6554-02
AGENCY DKT. NO. 254-8/02

J.J., on behalf of minor child, J.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review, the Commissioner concludes that respondent's November 12, 2002 letter to Administrative Law Judge Anthony T. Bruno, withdrawing its Answer and Counterclaim in this matter, evidences its agreement that petitioner's minor child, J.J., is entitled to free attendance in the District's schools and, therefore, this matter is no longer a controversy before the Commissioner of Education.

Accordingly, the recommended decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/03

Date of Mailing: 4.17.03

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

191-03

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES DI DOMENICO,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
HAMMONTON, ATLANTIC COUNTY.	:	DECISION
_____	:	

April 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6797-02S

AGENCY DKT. NO. 305-9/02

IN THE MATTER OF
THE TENURE HEARING OF JAMES DiDOMENICO,
SCHOOL DISTRICT OF THE TOWN OF HAMMONTON,
ATLANTIC COUNTY

Michael C. Damm, Esq., Selikoff & Cohen, PA, for petitioner, James DiDomenico

William S. Donio, Esq., for respondent, Board of Education

Record Closed: March 13, 2003 Decided: March 14, 2003

BEFORE EDGAR R. HOLMES, ALJ:

This matter was transmitted to the Office of Administrative Law on October 17, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement/Consent Order indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law including *In Re Cardonick.* 1990 S.L.D. 842 (1983)..

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

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

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

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

3/14/03
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

March 20 2003
DATE

M. Kathleen Duncan Esq
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

WSS

IN THE MATTER OF THE TENURE HEARING OF JAMES DI DOMENICO,

SCHOOL DISTRICT OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 6797-02

AGENCY REF. NO. 305-9/02

JOINT REQUEST FOR APPROVAL OF SETTLEMENT AND WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Petitioner, Hammonton Board of Education (the "Petitioner" or "Board") and Counsel for its tenured employee, Respondent, James DiDomenico, (the "Respondent") join in moving before this Honorable Court for an Order declaring that the Settlement Agreement between the parties attached hereto as Exhibit A, (the "Settlement Agreement") meets the requirements of *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 6A:3-5.6(a) and recommending that the Settlement Agreement be approved by the Commissioner of Education (the "Commissioner") on the condition that the Commissioner approves without modification the Settlement Agreement attached hereto as Exhibit A and ordering that the Settlement Agreement be implemented and that the tenure charges filed by the Board be withdrawn and this matter dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of tenure charges certified by the Board to the Commissioner of Education on September 30, 2002 against Respondent, James DiDomenico, a tenured health and physical education teacher alleging the inappropriate use of physical force against M.P., a

student enrolled in the Board's schools, in preparation for a gym activity involving several classes. Mr. DiDomenico filed an Answer on October 11, 2002. The tenure charges were transmitted to the Office of Administrative Law as a contested case and the matter was assigned to the Hon. Edgar R. Holmes, A.L.J.

The parties have now reached a settlement which is conditioned on the approval of the Commissioner of Education that the tenure charges be withdrawn. The parties agree that upon the Commissioner's approval of the Settlement Agreement without modification the tenure charges against Mr. DiDomenico shall be withdrawn and dismissed with prejudice subject to implementation of the Settlement Agreement. Should the Commissioner fail to approve the Settlement Agreement marked Exhibit A without modification, the parties agree to make every effort to reform their Settlement Agreement to meet any objections thereto or otherwise abide by the directives of the Commissioner, subject to each party's right to reject any such modified Settlement Agreement and proceed with the tenure proceedings.

JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

The Board originally instituted tenure charges against Mr. DiDomenico based upon information concerning his actions set forth above. The Board, through counsel, has had an opportunity to fully investigate and assess the allegations and confer with witnesses during the discovery phase. In preparation for hearing, the Board and Respondent have conducted a detailed and full independent investigation of the allegations, and have exchanged and obtained all relevant information and documentation. In addition, the Board's employees and representatives have communicated with students as to the alleged occurrence. Furthermore, prior to the Board's certification of the Tenure Charges against Respondent, C.P., M.P.'s mother filed criminal charges against Respondent, which charges were returnable before the

Hammonton Municipal Court. These charges were resolved by negotiated plea agreement before the Hon. Frank Raso, J.M.C., of the Hammonton Municipal Court at which time Respondent pled guilty to municipal ordinance violation and not the charges as originally filed by C.P., and wherein, M.P. and C.P., having been advised of the ramifications of such resolution, stated their agreement with the resolution before the Court and their substantial agreement with the factual basis placed on the record by Respondent.

Consequently, this full investigation of all the evidence that might be presented at the tenure hearing has provided the Board with the opportunity to explore means of resolving this dispute in a manner consonant with the public interest and this full investigation has revealed the following facts: this was an isolated incident in an otherwise commendable employment record of Respondent during his tenure of some 22.5 years with the Board; Respondent has shown his service, dedication and contributions to the youth of the Hammonton School District in the form of coaching and other activities; Respondent's position as a gym teacher by its very nature involves close contact with students; that Respondent did not act with malice or ill will, and that the incident as alleged included allegations by Respondent that the student, M.P., engaged in conduct initiating the incident, and that M.P.'s actions caused or resulted in Respondent being required to seek medical attention; student M.P. certified that he did not see a doctor for medical attention; that Respondent does recognize and understand that despite the fact that at the time of the incident he did not know what the intentions of the student were, that the method of his physical intervention with the student was inappropriate; that Respondent did apologize to the student on the day of the incident; Respondent asserts that this isolated incident would never reoccur; and being satisfied in view of the above that such an incident would not reoccur; and C.P., the mother of M.P., was advised of this possible outcome and is aware and has presented

no objection to the Board concerning the Settlement Agreement or the withdrawal of the Tenure Charges.

WHEREAS, in recognition of all of this the Board having reached an informed determination that the allegations originally stated against Respondent should not result in the termination of his employment but rather, a one-year suspension without pay and that after that Respondent should continue in his long-standing position as a teaching staff member for the Hammonton School District and placed on the salary scale provided in the Board's negotiated agreement with Respondent's bargaining unit as if he were not employed for the school year 2002-2003.

WHEREAS, the agreement between the Board and DiDomenico is based upon the understanding of all these facts as well as prior case law regarding tenure cases and increment withholding cases against veteran teaching staff members, In the Matter of the Tenure Hearing of Douglas Nogaki, 1983 S.L.D. 1986, and In the Matter of Claire Miller, Comm. Decision. OAL Dkt No. EDU 5812-01, Agency Dkt No. 240-7/01, both the Board and DiDomenico are satisfied with the resolution of this matter, consider it closed, and believe that this fulfills the public interest.

CONCLUSION

The parties have been fully informed of their respective rights in connection with these proceedings, including those standards for approval of the Settlement Agreement by the Commissioner. The parties are satisfied with the Settlement Agreement (Exhibit "A") and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of N.J.A.C. 1:1-19.1 and N.J.A.C. 6A:3-5.6(a), recommend that the

Settlement Agreement be adopted without modification by the Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and thereafter upon such approval dismiss with prejudice the tenure charges.

Respectfully submitted,

DONIO, BERTMAN & DONIO
Attorneys for Hammonton Board of Education

BY: _____
WILLIAM S. DONIO

DATED

SELIKOFF & COHEN, P.A.
Attorneys for James DiDomenico

BY: _____
MICHAEL C. DAMM

DATED 2/24/03

2/24/03 _____ - DiDomenico
JAMES DIDOMENICO
DATED

EXHIBIT "A"

SETTLEMENT AGREEMENT REGARDING ACTION PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Hammonton Board of Education ("Board") and its tenured employee James DiDomenico ("DiDomenico").

WHEREAS, Mr. DiDomenico has been continuously employed by the Board as a physical education and health teacher since in or about November 1980; and,

WHEREAS, on September 26, 2002 the Board certified tenure charges against Mr. DiDomenico to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE
HEARING OF JAMES DIDOMENICO,
HAMMONTON SCHOOL DISTRICT
OAL DKT. NO. EDU 6797-02 AGENCY REF. NO. 305-9/02

WHEREAS Mr. DiDomenico filed an Answer contesting the tenure charges; and,

WHEREAS, the aforesaid tenure charges were assigned for hearing before the Honorable Edgar R. Holmes, A.L.J.; and,

WHEREAS, in consideration for the mutual promises contained herein, the parties intend to resolve all matters in dispute involving Mr. DiDomenico and the incident of March 27, 2002, or which otherwise may be raised by them, in the context of this tenure proceeding;

NOW THEREFORE, the matter in dispute having been amicably adjusted by and between the parties and based on the foregoing having fulfilled the public interest, it is hereby stipulated and agreed as follows:

1. It is agreed by the parties that DiDomenico shall be suspended without pay from September 26, 2002 through September 26, 2003, health insurance to be continued, at which point he will be reinstated with the Board at the appropriate place on the salary guide as if he were not employed during the 2002-2003 school year and otherwise continuously employed without further penalty to his employment.

2. The Parties will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against Mr. DiDomenico to be withdrawn and dismissed with prejudice subject to implementation. The terms of a Joint Request for Approval

of Settlement and Withdrawal of Tenure Charges submitted to the Commissioner are incorporated herein by reference.

3. Should the Commissioner fail to approve the Settlement Agreement without modification, the parties agree to make every reasonable effort to reform their Settlement Agreement to meet his objections.

4. Should the Commissioner fail to approve the Settlement Agreement and it cannot be reformed to meet his objections and/or the matter referred to hearing, the parties agree that they will not assert in any judicial or administrative proceeding that any statements made by them or their attorneys herein are admissions, admissions against interest or competent evidence of any fact.

5. Mr. DiDomenico and the Board understand and agree that as a contested case which has been brought to the Office of Administrative Law, the settlement documents herein become part of the public record in this matter.

6. Mr. DiDomenico agrees that he has been fairly and adequately represented and advised at all stages of these proceedings, that he is fully satisfied with the services of counsel and that he is voluntarily and without coercion with a full understanding of his rights and the ramifications of this Settlement Agreement entering into it on his own accord. Mr. DiDomenico fully understands that this Settlement Agreement is subject to the approval of the Commissioner of Education.

DONIO, BERTMAN & DONIO
Attorneys for Hammonton Board of Education

BY:_____
WILLIAM S. DONIO

DATED

SELIKOFF & COHEN, P.A.
Attorneys for James DiDomenico

BY:_____
MICHAEL C. DAMM

DATED 2/24/03

2/24/03 _____
JAMES DIDOMENICO
DATED

OAL DKT. NO. EDU 6797-02S
AGENCY DKT. NO. 305-9/02

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES DI DOMENICO,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
HAMMONTON, ATLANTIC COUNTY.	:	DECISION
	:	

The record, Joint Request for Approval of Settlement and Withdrawal of Tenure Charges and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: April 15, 2003

Date of Mailing: April 17, 2003

192-03

S.L., on behalf of minor child, A.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

April15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1729-03
AGENCY DKT. NO. 63-2/03

S.L. ON BEHALF OF A.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,
Respondent.

Anthony N. Picillo, Esq., appearing for petitioner

Stephen Christiano, Esq., appearing for respondent

Record Closed: February 27, 2003 Decided: March 11, 2003

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner brought an application for emergent relief to compel respondent West Orange Board of Education (Board) to allow petitioner's minor child, A.L., to participate on the wrestling team in order to be part of the N.J.S.I.A.A. District Wrestling

Tournament starting on Friday, February 28, 2003. The varsity wrestling coach informed A.L. on Monday, February 24, 2003, that he was no longer on the team. On February 26, 2003, the matter was transmitted to the Office of Administrative Law (OAL) for emergent hearing or a preliminary injunction until a plenary hearing could be held. A hearing on the emergent relief was held on February 27, 2003. A. L. and his father, A.J.L. testified upon behalf of the petitioner. Carol M. Kulik, the Athletic Director, and Keith Appello, the varsity wrestling coach, testified for the District. The decision denying the request for emergent relief was rendered by the undersigned at the end of the hearing. Instructions were given concerning an emergency appeal to the commissioner. Shortly after the ruling the attorney for the parents informed the undersigned that the petitioners would not be filing an appeal. This opinion memorializes the oral decision of February 27, 2003.

TESTIMONY

Petitioner's evidence

A.J.L., father of A.L., testified that at the beginning of the 2002-2003 wrestling season he told the coach to call him if his son had any problems. The coach never did so the father assumed there had been no problems between the coach and his son. . In January 2003 his son had quit the wrestling team because he felt the coach had treated him unfairly but the father and son met with the coach and patched things up.

In the beginning of February 2003 A. L. won first place in his weight class and most outstanding athlete in the Essex County Tournament. He stood a good chance of winning the District tournament on February 28, 2003, and advancing in the state tournament. Wrestling in the state tournament was the ultimate dream for a high school wrestler and since A.L. was a senior the District tournament represented his only opportunity

A.L., a 17-year-old senior in the District, testified that the coach seemed to dislike him for no apparent reason. Twice this season the coach threatened to not allow A.L. wrestle in the state tournament. Throughout the year the coach scolded him for behavior the other wrestlers were allowed to do. For instance the coach yelled at him for not showering after practice but not at the other kids who did not shower. When he quit the team in January the coach brought up that A.L. was frequently late for practice. A.L. generally got permission to be late from an assistant coach because he kept forgetting his practice equipment and had to go home to get it.

On February 24, 2003, after practice, A.L. had just rolled up a mat and sat down to take his shoes off when the coach started yelling at him for not rolling up the mats. Other wrestlers were also not rolling up the mats. In responding to the coach, A.L. had to raise his voice to be heard over the coach's voice. A.L. denied arguing with the coach or calling him insulting names. At the end of the loud discussion the coach told A.L. he was off the team. Subsequently A. L. tried to speak to the coach and finally wrote the coach apologizing for the dispute and asking to be put back on the team.

Board's testimony

Keith Appello, a tenured teacher and varsity wrestling coach, said that A.L. was one of the best wrestlers on the team. Throughout the year A.L. had a serious problem following the rules. A.L. rarely came to practice on time or dressed as required, he refused to shower after practice as required by State rules, he was late for the bus a few times, and he had at least 4 unexcused absences from practice. He also did not make his weight twice, the only team member who did not this season. In January 2003 A.L. had quit the team but was allowed back after promising to follow the rules.

On February 24, 2003, at the end of practice Mr. Appello saw A.L. sitting down taking off his shoes while the other wrestlers were standing around the mats. The coach yelled across the room to A.L. to help roll the mats. A.L. started screaming in a loud and vulgar tone at the coach and a "shouting match" ensured. The coach told A.L.

that if he did not stop yelling he would not play in the District meet but A.L. continued. As A.L. was approaching the coach, he called the coach a "faggot". All the other members of the team were standing around listening to this argument. Because A.L. did not stop arguing, the coach told A.L. that he was off the team. No one on the team has shown the disrespect that A.L. had.

Carol M. Kulik, Athletic Director in the District, testified that the coach contacted her after the dispute to say he had removed A.L. from the team for disrespectful behavior. Ms. Kulik could have overturn the decision but based upon what the coach had said, she concurred. Ms. Kulik also contacted her superior, the Superintendent of Schools, who also concurred.

LEGAL DISCUSSION AND CONCLUSION

Resolution of the emergent relief request is govern by the provisions of *N.J.A.C.* 1:6A-12.1. Emergent relief shall be granted if it is determined from the proofs that:

> (i) Petitioner will suffer irreparable harm if the requested relief is not granted;
>
> (ii) The legal rights underlying the petitioner's claim is settled;
>
> (iii) The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> (iv) When the equities are an interest of the parties or balance the petitioner will suffer greater harm than the respondent will suffer if their requested relief is not granted. [*N.J.A.C.* 6A:14-12.7(m)1].

It is well settled that petitioner must meet these four criteria to prevail on this application. See *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Regarding the first prong of irreparable harm I **CONCLUDE** that petitioner has not shown irreparable harm. In this case the parties agreed that is no adequate remedy at law as the petitioner seeks no relief but reinstatement to the wrestling team by the next day. Nonetheless, the

Commissioner has repeatedly held that students do not suffer irreparable harm if they are prohibited from participating in extracurricular activity, including sport activities. *BOE of the City of Trenton v. N.J.S.I.A.A.,* 91 *N.J.A.R.* 2d (EDU) 158; *Elmwood Park BOE v. N.J.S.I.A.A.*, 94 *N.J.A.R.* 2d (EDU) 106. Indeed it has been held that participation in an extracurricular activity is not a fundamental right under the federal or state constitution. *Camden Co. Board of Education v. N.J.S.I.A.A.* (App. Div. Dkt. No. AO2802-91T2, February 18, 1992) (unpublished decision). While the importance of sports cannot be lost on the education process, there is no evidence that irreparable harm will be suffered.

Even assuming that irreparable harm could be found here due to the unique set of circumstances, the petitioner must show that the legal right underlying the petitioner's claim is settled. While petitioner made a compelling argument, there has been nothing provided to show that the matter is necessarily clear-cut. Additionally, petitioner has been unable to cite a single case requiring procedural safeguards in the context of a suspension from an extracurricular sports activity. I **CONCLUDE** from the dearth of case law cited that such a claim is any thing but settled.

Additionally, I **CONCLUDE** that the petitioner has not demonstrated the likelihood of success on the merits on this record. It is well established that the actions of a Board of Education which lie within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. *J.M. v. Hunterdon Central Reg. High Sch.,* 96 *N.J.A.R.* 2d (EDU) 415, 419 (citing *Kopera v. West Orange Bd. of Educ.,* 60 *N.J. Super.* 288 (App. Div. 1960). Plainly, a coach has the right to discipline a disrespectful team member. While the penalty of termination from the team is severe, petitioner has not presented evidence the Board acted patently arbitrarily.

High school sports are not merely about winning but about building character. Requiring a student to be respectful to a coach is an important goal of high school sports. The interest of the district in promoting such a salutary goal is arguably equal

to, if not greater than, the interest of petitioner in participating in a wrestling tournament. I therefore **CONCLUDE** that the petitioner has not shown he will suffer greater harm than the district.

In sum I **CONCLUDE** for the above reasons that petitioner has not prevailed on his application for emergent relief and this application must be **DENIED**. As the only relief petitioner sought was reinstatement to the team by February 28, 2003, the matter has become moot with the passage of time and must be dismissed.

ORDER

Based upon the foregoing, since the petitioner has not met the criteria for granting emergent relief, this application for emergent relief is hereby **DENIED**. The petition for emergent relief is hereby **DISMISSED**.

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

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

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

March 11, 2003
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

3-14-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 18 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 1729-03
AGENCY DKT. NO. 63-2/03

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

The record of this emergent matter, including the audiotapes of the hearing conducted by the Administrative Law Judge (ALJ)[1] of the Office of Administrative Law on February 27, 2003, and the Initial Decision of the ALJ denying emergent relief and dismissing the petition in this matter have been reviewed.

Upon such review, the Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim

[1]The Commissioner is compelled to comment on the ALJ's statements at hearing characterizing the Commissioner's consideration of this matter as an "appeal" to the Commissioner. As the ALJ correctly states in the Initial Decision, it is the Commissioner of Education who, by law, is authorized to make a final decision in this matter. In accordance with *N.J.S.A.* 52:14B-10, the recommended decision of the ALJ is considered the final decision *only if* the Commissioner does not adopt, modify or reject the recommended decision of the ALJ within forty-five (45) days, unless such time limit is otherwise extended. *See* Initial Decision at 6. The Initial Decision in the instant matter was received on March 14, 2003, thus precluding the Commissioner's review of the ALJ's recommendation on the application for emergent relief prior to the New Jersey State Interscholastic Athletic Association (NJSIAA) District Wrestling Tournament. However, in this instance, even if the ALJ's recommended decision had forthwith been transmitted to the Commissioner for his review pursuant to *N.J.A.C.* 1:1-12.6(i), it would not have altered the Commissioner's ultimate conclusion to adopt the ALJ's well-reasoned determination denying petitioner's application for emergent relief.

is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe* at 132-34. As set forth in the Initial Decision, petitioner's application does not, on its face and granting petitioners every inference for purposes of this motion, meet the standards required by *Crowe* for the granting of extraordinary relief and must, therefore, be denied.

Moreover, as the sole relief sought by petitioner was her son's reinstatement to the West Orange High School's wrestling team by February 28, 2003 so that he could participate in the NJSIAA District Wrestling Tournament and all further NJSIAA sanctioned tournaments he might qualify for thereafter,[2] the matter has become moot given the denial of petitioner's request for emergent relief and the passage of time.

Accordingly, the Commissioner adopts the Initial Decision denying petitioner's application for emergent relief and dismissing the petition in the instant matter for the reasons expressed therein.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/03

Date of Mailing: 4/16/03

[2] The Commissioner notes that the NJSIAA Individual Wrestling Tournament began February 28, 2003 with the District Tournament. (Petition of Appeal at 1) According to petitioner, the top three place winners in each class of the District Tournament are eligible to compete in the Regional Tournament and the top three winners in the Regional Tournament are eligible to compete in the State Tournament. (*Id.* at 2) Thus, failure to compete in the District Tournament effectively ends a wrestler's season as he would not have any chance to compete in the State Tournament. (*Ibid.*)

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

195-03

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (EARLY CHILDHOOD EDUCATION),	:	DECISION
RESPONDENT.	:	

April 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

PARTIAL INITIAL DECISION
APPROVING WITHDRAWAL OF
ABBOTT EARLY CHILDHOOD ISSUES
OAL DKT. NO. EDU 0379-03
AGENCY DKT. NO. 44-2/03

CITY OF MILLVILLE, BOE, CUMBERLAND CO.,
Petitioner,
v.
NJ STATE DEPT OF EDUCATION (EARLY CHILDHOOD EDUCATION)

Arnold Robinson, Esq., Robinson & Andujar, Attorneys at Law
for petitioner BOE

Kimberly Franklin, DAG,
Peter C. Harvey acting Attorney General N.J.
for respondent NJ State Department Of Education

Record Closed: February 28, 2003 Decided: February 28, 2003

BEFORE **EDGAR R. HOLMES**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedure Act, *N.J.S.A.*52:14B-1 to –15, the act creating the OAL, *N.J.S.A.* 52:14F-1 to 13 and Court Directive concerning "Abbott Appeals" filed January 23, 2003.

STATEMENT OF THE RELEVANT UNCONTESTED FACTS

The parties convened on Friday, February 28, 2003, at the OAL in the Atlantic County Civil Courthouse, Atlantic City and agreed on the record that so much of the petition which concerns the Millville Early Childhood Program can be **WITHDRAWN** based upon the stipulations referred to in the letter attached hereto as J1 dated 2/28/03 and the documents listed in evidence P1 through P4.

The remaining issues shall be continued pending final funding decisions regarding K-12 programs.

The undersigned Administrative Law Judge shall retain jurisdiction.

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

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

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

2/28/03
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

March 6, 2003
DATE

M. Kathleen Duncan (Co)
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

WSS

WITNESSES

None

EXHIBITS

For Petitioner:

P1	Letter	Frede and MaGinnes to Miller	01/06/03
P2	Letter	Frede to Miller	02/18/03
P3	Letter	Rosenberg to Chief School Administrator with attachment	02/06/03
P4	Memo	Rosenberg to Millville	02/26/03

For Respondent:

None

Joint Exhibit:

J1	Letter	Robinson to Holmes	02/28/03

ROBINSON & ANDUJAR

Attorneys At Law

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Arnold Robinson
Certified Criminal Trial Attorney

Carlos Andujar, Jr.
Member of NJ Bar and Admitted to US Supreme Court

Jennifer Webb-McCrae
Member of NJ & PA Bar and US District Court (District of NJ)

February 28, 2003

Honorable Edgar R. Holmes
1201 Bacharach Boulevard
Atlantic City, NJ 08401

RE: Board of Education of the City of Millville vs.
NJ Department of Education
OAL Docket No.: EDU 00379-03S
Agency Ref. No.: 44-2/03

Dear Judge Holmes:

The above noted appeal concerns (1) Department of Education cuts of specific programs in the Early Childhood Program; and (2) Department of Education's failure to totally fund the Early Childhood Program. I am pleased to advise that the Petitioner hereby withdraws its appeal as to the specific program issues since the District has negotiated a resolution with Dr. Frede who issued an amended approval letter dated February 18, 2003.

As to the Petitioner's appeal of its overall Early Childhood Program aid funding, the Respondent has represented to the Petitioner that the total approved ECP budget of $6,687,451 (as revised by the correspondence from Respondent dated 2/18/03) will be fully funded. However, to date, final funding information has not been conveyed to the Petitioner. Accordingly, I withdraw the Petitioner's appeal of the Abbott District pre school programs and budget proposed for the 2003-2004 school year, pending the receipt of final funding information. This withdrawal is made with reliance upon the Respondent's stipulation that the matter will continue on the regular OAL Education case track pending receipt of final funding information. The parties consent to Administrative Law Judge Holmes' entry of an Order withdrawing the Abbott appeal component only. The Administrative Law Judge shall retain jurisdiction.

The issue reserved is whether final funding would require a reallocation from the District's K-12 budget funds to the ECP which would undermine or weaken the K-12 program.

I have conferred with DAG Kim Franklin and she consents to this request.

Jule
2/28/03

Thank you for your consideration in this matter.

Very truly yours,

ROBINSON & ANDUJAR, LLC

Arnold Robinson

AR:wss
cc: DAG Kimberly Lake Franklin (Via fax 609 777 4036 and regular mail)
Dr. G. Larry Millville, Superintendent
Bryce Kell, Business Administrator

OAL DKT. NO. EDU 0379-03
AGENCY DKT. NO. 44-2/03

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (EARLY CHILDHOOD EDUCATION),	:	DECISION
RESPONDENT.	:	

The pertinent portion of the record in this matter, and the Partial Initial Decision Approving Withdrawal transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2, have been reviewed.

Upon review, the Commissioner affirms the Partial Initial Decision and approves the partial withdrawal, with the remaining issues to be retained by the OAL as set forth in the Decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: April 17, 2003

Date of Mailing: April 21, 2003

204-03

S.A., on behalf of minor, R.A.; R.B., on behalf of minor, E.B.; S.K., on behalf of minor, J.K.; D.P., on behalf of minor, J.P.; and R.Z., on behalf of minor, D.Z.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON MOTION
RESPONDENTS.	:	

April 22, 2003

S.A. G.A.L. for R.A., R.B., G.A.L. for E.B., S.K., G.A.L. for J.K., D.P., G.A.L. for J.P., R.Z., G.A.L. for D.Z.,	:	OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	OAL Dkt. No. 87-3/03 Agency Dkt. No.
v.	:	
GARFIELD BOARD OF EDUCATION, its AGENTS, SERVANTS and EMPLOYEES, and DEPARTMENT OF EDUCATION, OFFICE OF EARLY CHILDHOOD EDUCATION,	:	ORDER
Respondents.	:	

THIS MATTER having been brought to the Office of Administrative Law by an Order to Show Cause and Petition for Emergent Relief by Maycher, Lynch, Bartzos, LLP (Dennis A. Maycher, Esq., appearing) attorneys for petitioners, S.A., G.A.L. for R.A., R.B., G.A.L. for E.B., S.K., G.A.L. for J.K., D.P., G.A.L. for J.P. and R.Z., G.A.L. for D.Z., and opposition having been submitted by Toni Belford Damiano Esq., (Steven M. Segalas, Esq., appearing) attorneys for respondent, Garfield Board of Education, and opposition having been submitted by Peter C. Harvey, Acting Attorney General of the State of New Jersey (Allison Colsey Eck, Deputy Attorney General, appearing) attorney for the Department of Education, Office of Early Childhood Education; and the Office of Administrative Law having considered the written and oral arguments

of the parties; and for the reasons set forth on the record on March 21, 2003; and for good cause shown;

IT IS on this 28th day of March, 2003

ORDERED that effective on February 21, 2003, Respondents Garfield Board of Education and the Department of Education, Office of Early Childhood Education, shall allow Petitioners' children to attend and complete the preschool program offered by the Garfield Board of Education for the balance of 2002-2003 school year only, which preschool program shall be completed no later than June 30, 2003, or upon the conclusion of the contested matter, whichever shall first occur; and

IT IS FURTHER ORDERED that Petitioners shall not be responsible for the payment of tuition and/or reimbursement to the District for the attendance of their children in the preschool program for the balance of the 2002-2003 school year during the pendency of this matter without prejudice; and

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within 5 days of the entry hereof.

This ORDER may be reviewed by the Commissioner of Education either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6

Barry N. Frank

Honorable Barry N. Frank, A.L.J.

CONSENT AS TO FORM

Maycher, Lynch, Bartzos, LLP
Attorneys for petitioners,
S.A., G.A.L. for R.A.
R.B., G.A.L. for E.B.
S.K., G.A.L. for J.K.
D.P., G.A.L. for J.P.
R.Z., G.A.L. for D.Z.

By: _____
Dennis A. Maycher, Esq.

Toni Belford Damiano, Esq.,
Attorney for Respondent,
Garfield Board of Education

By: _____
Steven M. Segales, Esq.

Peter C. Harvey, Acting Attorney General
of the State of New Jersey
Attorney for Respondent, Department of
Education, Office of Early
Childhood Education

By: _____
Allison Colsey Eck
Deputy Attorney General

OAL DKT. NO. EDU 3109-03
AGENCY DKT. NO. 87-3/03

S.A., on behalf of minor, R.A.; R.B., on behalf of minor, E.B.; S.K., on behalf of minor, J.K.; D.P., on behalf of minor, J.P.; and R.Z., on behalf of minor, D.Z.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON MOTION
RESPONDENTS.	:	

Petitioners' application for emergent relief was opened before the Commissioner of Education on March 17, 2003. On the same date, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing, which was conducted on March 21, 2003. At that time, the Administrative Law Judge (ALJ) issued an oral Order recommending that the requested relief be granted to petitioners, which was later memorialized by written order dated March 28, 2003. The recommended Order was transmitted to the Commissioner by cover memorandum dated April 15, 2003, and received on April 16, 2003.

In this connection, the Commissioner notes that OAL regulations provide that:

> Upon determining an application for emergency relief, the judge *forthwith* shall issue to the parties, *the agency head* and the Clerk a written order on the application. The Clerk shall file with the agency head any papers in support of or opposition to the application which were not previously filed with the agency and a sound recording of the oral argument on the application, if any oral argument has occurred. (emphasis added) (*N.J.A.C.* 1:1-12.6(i))

The Commissioner is further mindful that, notwithstanding the significant delay between issuance of the recommended Order in this matter and its transmittal to the agency, together with the necessary sound recording of oral argument, he is nevertheless bound by regulation to issue a final decision on petitioners' motion "no later than 45 days from entry of the judge's order ***." (N.J.A.C. 1:1-12.6(j))[1] The Commissioner further notes that to the extent the parties have acted in furtherance of the ALJ's recommended Order during this delay, they have done so at their own peril, particularly since the Order is herein set aside.

Petitioners are teaching staff members and employees of the Board of Education of the City of Garfield, an *Abbott* district, see *N.J.A.C.* 6A:24-1.2, whose children have been attending the Board's preschool program since the start of the 2002-2003 school year as non-resident students, free of charge. On or about February 28, 2003, the New Jersey State Department of Education's Office of Early Childhood Education informed the Board that "all children enrolled in Abbott-funded preschool classrooms must reside in the district to be eligible for this program." (Board's Answer at Exhibit A) Thereafter, by letter dated March 12, 2003, the Department presented the District with the following options:

> Parents can choose to keep their children in the program until the end of the school year and pay monthly tuition costs from March 3, 2003, or parents can remove their children from the program as originally planned and incur no fees. (*Id.* at Exhibit D)

Consequently, by letter dated March 12, 2003, the administration notified parents of these options, also instructing that the daily cost to remain in the preschool program is $47.93. The notice provided the following tuition assessment:

March 3-31	(21 days) x	$47.93	=	$1,006.53

[1] The Commissioner further notes that the ALJ's recommended Order erroneously indicates that it is reviewable pursuant to *N.J.A.C.* 1:1-14.10, those procedures established for review of an ALJ's interlocutory order, or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6. Notably, however, *N.J.A.C.* 1:1-14.10(a) specifically excepts those orders issued pursuant to the special review procedures for emergent relief, *supra.*

April 1-30	(16 days) x	$47.93	=	$ 766.88
May 1-30	(20 days) x	$47.93	=	$ 958.60
June 1-19	(14 days) x	$47.93	=	$ 671.02

(*Id.* at Exhibit G)

In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm; where the legal right underlying petitioner's claim is settled; where there is a likelihood of success on the merits; and where the relative hardship to the moving party favors granting such relief. *Crowe v. DeGioia*, 90 *N.J.* 126, 132-134 (1982). Here, petitioners assert that since "Time and Memorial" [sic], they have been permitted to have their nonresident children attend the Board's K-12 program on a non-tuition basis and, later, the preschool program, when it became available. (Petitioners' Letter Memorandum in Support of Motion for Emergent Relief at 2) They contend that they do not have the financial resources to pay the tuition for the program and the sudden removal, therefore, of their children from the program will negatively affect their emotional development and educational progress. (Petition of Appeal at 1, 2) In oral argument, petitioners assert that this interruption of services will irreparably harm their children. Petitioners further claim that their underlying legal right to a free preschool program is settled, in that *N.J.S.A.* 18A:38-3 grants a local board the authority to accept nonresident students and this perquisite has, over the years, become part of their bargaining unit's benefits. Contending that no material facts are in dispute, petitioners reason that the grant of their request to permit their children to remain in the program, without charge, until the end of the year will cause minimal hardship to the Board.

The Board counters that petitioners have not met the standard necessary for the grant of emergent relief, indicating that "[p]etitioners conveniently fail to disclose their salaries, which average in excess of $42,000 annually, and range from $19,000 to over $60,000."

(Board's Answer at 2)[2] In oral argument, the Board underscores that its decision to charge tuition for these students will cause only financial inconvenience to petitioners, a result which cannot constitute irreparable harm. Contrary to petitioners' contention with respect to their underlying legal rights, the Board emphasizes that there is no statutory entitlement to preschool education, and its obligation to provide preschool education extends only to students residing in *Abbott* districts. Finally, the Board notes that it has already been fined over $20,000 by the Department of Education for permitting nonresident, non-Abbott students into its preschool program and argues that:

> [p]etitioners are asking this Court to further disadvantage four hundred seventy three (473) students, who the State has already deemed to be disadvantaged, (and therefore entitled to preschool education), to the benefit of five (5) students, whose parents, presumptively, are responsible for providing their children with a pre-school education out of their own funds. (Board's Answer at 3)

Upon review of the parties' papers filed pursuant to the motion for emergent relief and the audiocassette tape of the oral arguments before the OAL, the Commissioner determines that petitioners have failed to satisfy the four-pronged standard necessary for the grant of emergent relief. In this regard, the Commissioner finds that even assuming, *arguendo*, there is credible evidence on the record to support the ALJ's finding that petitioners' children are likely to be emotionally and/or educationally harmed by their removal from the preschool program at this time,[3] any such finding would have to be predicated on the notion that petitioners *are* financially incapable of paying the tuition to keep their children in the program. Not only have

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[2] The Board's Answer contains a certification from Superintendent Perrapato that S.A. is paid $39,900, plus a $7,500 stipend annually; R.B. is paid $51,455 annually; S.K. is paid $61,185 annually; D.P. is paid $61,185 annually and R.Z. is paid $19,089 annually. (Answer, Certification of Nicholas Perrapato at 4)

[3] The Commissioner notes, however, that this record is devoid of such evidence.

petitioners failed to make a preliminary showing of financial hardship, however, but the Commissioner determines that, under these circumstances, even a preliminary demonstration of financial hardship would be insufficient, where "[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." *Crowe v. DeGioia*, supra, at 132-133.[4]

Further, the Commissioner finds that petitioners have not demonstrated that they have a settled, legal right to have their children attend a preschool program at the Board's expense. Indeed, the statutory authority on which petitioners rely provides only that a board *may* admit nonresident students to the schools in its district, "with or without payment of tuition, as the board may prescribe." *N.J.S.A.* 18A:38-3. Furthermore, even assuming, *arguendo*, that enrollment in the Board's preschool program has become a fixed perquisite of the bargaining unit's contract, the Supreme Court's mandate to provide preschool services to students residing in the identified Abbott districts, *Abbott v. Burke*, 153 *N.J.* 480, 503-508 (1998), together with the State Board of Education's proposed regulations relative thereto, *N.J.A.C.* 6A:10-3.1 *et seq.*, cast doubt as to the legitimacy of such a contractual benefit. Also, for this reason, the Commissioner cannot find that petitioners have demonstrated a likelihood of success on the merits of their claim. Finally, upon balancing the relative hardships to the parties, the Commissioner finds that petitioners have not demonstrated that they, or their children, will suffer a greater hardship than the Board if the relief is not granted, particularly where, absent such relief, petitioners' children are, nevertheless, permitted to remain in the program on a tuition basis.

[4] The Commissioner recognizes that *Crowe* also provides that, "[i]n certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." *Crowe, supra,* at 133. Petitioners, however, have made no such preliminary showing.

In determining that petitioners are not entitled to emergent relief, the Commissioner underscores that the Board's decision as articulated in the letter of March 12, 2003, *supra*, stands. That is, petitioners' nonresident children may remain in the pre-school program until the end of the school year on a tuition basis, retroactive to March 14, 2003. However, if petitioners so choose to keep their children in the preschool program, in accordance with guidance provided by the Office of Early Childhood Education in the Department of Education, "resident children have priority over the non-resident children, and must be given space in the Abbott preschool program." (Board's Answer at Exhibit D) Thus, seats occupied by petitioners' children must yield to any request for services by an Abbott student who is currently not being served.

Accordingly, the ALJ's recommended Order is rejected and petitioners' request for emergent relief is denied. This matter shall continue for those proceedings which may be necessary to bring it to conclusion.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: April 22, 2003

Date of Mailing: April 23, 2003

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

205-03

#205-03E

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
MARY LOU MARGADONNA,	:	
RESPONDENT.	:	

April 25, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2409-03
AGENCY DKT. NO. 123-4/03

BOARD OF EDUCATION
OF THE TOWNSHIP OF WALL,
Petitioner,
v.
MARY LOU MARGADONNA,
Respondent.

Douglas J. Kovats, Esq., for petitioner (Kenny, Gross & Kovats, attorneys)

Richard B. Stone, Esq., for respondent (Stone Mandia, attorneys)

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

Record closed: April 24, 2003 Decided: April 25, 2003

STATEMENT OF THE CASE

The basic issue here is whether respondent Mary Lou Margadonna may hold office as a member of the petitioner Board of Education of the Township of Wall (BOE).

The case is complicated, but can be summarized. N.J.S.A. 18A:12-2 states, "No member of any board of education shall be interested directly or indirectly in any contract with or claim

against the board." N.J.S.A. 19:60-5 states that each nominating petition for election to a school board shall state "That the person so endorsed is legally qualified to be elected to the office." For several school years, the BOE employed respondent as a non-tenured teacher, but, in 2002, it declined to offer her another contract to continue that employment. Thereafter, in 2002, respondent served the BOE with a New Jersey Tort Claims Act notice of claim, alleging wrongful loss of employment, damage to her good name, etc. N.J.S.A. 59:8-4. Thereafter, in 2002 also, she petitioned the Commissioner of Education, naming the BOE and its employees and agents as respondents; claiming that the BOE should afford her a public hearing relative to whether it should have offered her another contract of employment; and claiming that the BOE should offer her a contract as a teacher, which by statute would result in tenure. N.J.S.A. 18A:6-9; N.J.S.A. 18A:28-5. In 2002 the Commissioner dismissed her petition, the State Board of Education affirmed, and she has appealed to the Superior Court, Appellate Division. R. 2:2-3(a)(2). In 2003 she submitted to the BOE her nominating petition for the BOE's April 15, 2003, election, wherein, despite her claim that the BOE should employ her and despite N.J.S.A. 18A:12-2, she certified that she was "legally qualified" to be a member of the BOE. P-1(5). She appeared on the April 15, 2003, election ballot and received the second highest number of votes. Consequently, absent disqualification, she could begin as a BOE member at the BOE's April 29, 2003, reorganization meeting required by N.J.S.A. 18A:10-3(b). The BOE requested that respondent notify it as to (1) whether she agreed to withdrawal and/or dismissal with prejudice of her claims against the BOE or (2) whether she would decline a seat on the BOE. She refused withdrawal and/or dismissal of her claims, so the BOE filed the petition resulting in this case. The BOE requested that respondent be ordered to choose between the dismissal of her claims or declining office and the BOE requested that, if she declined office, the matter be referred to the county superintendent of schools for filling the membership of the BOE. N.J.S.A. 18A:12-15. On the record made April 24, 2003, respondent agreed to dismissal of her claims with prejudice, except for a claim still pending before the Appellate Division, i.e., that the BOE must afford her the public hearing relative to whether it should have offered her another contract of employment. Respondent's attorney argues that this would not constitute a disqualifying claim within the intent of N.J.S.A. 18A:12-2. However, the BOE submits that respondent is continuing a claim and that, consequently N.J.S.A. 18A:12-2 prohibits her service as a BOE member. I agree with the BOE and enter orders accordingly.

PROCEDURAL HISTORY

On April 22, 2003, the BOE filed its verified emergent petition with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on April 23, 2003. N.J.S.A. 52:14B-2(b). On April 24, 2003, in the OAL, Trenton, the respondent's opposition papers were filed and the case was argued.

FINDINGS OF FACT

During the 1999-2000, 2000-01, and 2001-02 school years, the BOE employed respondent as a non-tenured teacher. Consequently, if the BOE had employed her for the 2002-03 school year, pursuant to N.J.S.A. 18A:28-5, she would have obtained tenure.

Late in the 2001-02 school year, respondent began to receive reviews that she alleges were inconsistent with her excellent performance and, in April 2002 the BOE notified her that it would not offer her a contract for the 2002-03 school year. The respondent requested a statement of the BOE's reasons for not offering a contract and the BOE provided such a statement and notified her that in that regard she had an opportunity for an informal appearance before the BOE. P-1; see N.J.S.A. 18A:27-3.2, -4.1.

On June 11, 2002, respondent had her informal appearance before the BOE and, thereafter, the BOE notified her that it had not taken action to offer her a contract. Thereafter, members of the public appeared before the BOE to urge it to offer respondent another contract; but the BOE declined to do so.

On June 18, 2002, respondent requested a public hearing before the BOE and the BOE denied her request. P-1(3).

On July 17, 2002, respondent served the BOE with a New Jersey Tort Claims Act notice of claim, wherein she claimed that the BOE had wrongfully denied her rights of due process and wrongfully denied her a public hearing, causing "loss of employment [and] damage to [her] good

name and reputation," etc., and wherein she demanded damages for "loss of salary and benefits," etc. P-1(2); N.J.S.A. 59:8-4.

On or about July 18, 2002, respondent filed a petition with the Commissioner of Education, captioned as Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, wherein she alleged that the BOE had denied her the "right to a public hearing" on the matter of whether it should employ her as a teacher for the 2002-03 school year and wherein she demanded relief, including continued employment as a BOE teacher with tenure. P-1(1); N.J.S.A. 18A:6-9.

On October 29, 2002, in Margadonna v. Wall BOE et al., Agcy Dkt. No. 225-7/02, the Commissioner concluded that respondent's (petitioner in that case) petition failed to state a claim on which relief could be granted and he dismissed it. P-1(3). The Commissioner cited Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), as holding that a non-tenured teacher does not have a protected interest in continued employment and, if the school declines to continue his or her employment the United States Constitution's Fourteenth Amendment does not guarantee due process in that regard. The Commissioner cited Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974), holding that a board of education need not base its declining to continue employment of a teacher on unsatisfactory performance and the board's action or inaction may be based on another valid reason; although a board may not decline to continue employment because of a teacher's membership in a union or exercise of a constitutional right and the teacher has a right to a statement of reasons from the board for declining to continue the employment. The Commissioner cited Lydia Anderson v. State-operated School District of the City of Newark, State Board (February 7, 2001), as holding that, under the New Jersey Constitution, a non-tenured teacher has limited rights to due process in that regard. The Commissioner cited Angelo Velasquez v. Board of Education of the Borough of Brielle, State Board (August 6, 1997), as holding that, when a board of education declines to continue a non-tenured teacher's employment, the teacher may appear for an informal meeting with the board; but he or she does not have a right to a vote by the board on whether another contract should be offered. The Commissioner cited Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447, at 453 (App. Div. 1982), holding that a district board of education's decision not to continue employment of a non-tenured teacher may be based on a broad range of factors, including factors other than the teachers' evaluations and boards have

"virtually unlimited discretion in hiring or renewing non-tenured teachers." The Commissioner also cited Guerriero v. Board of Education of the Borough of Glen Rock, State Board (February 6, 1986), aff'd, No. A-3316-85T6 (App. Div. 1986), as holding that, where a non-tenured teacher challenges a board's declining to offer another contract on the grounds that facts do not support the board's reasons, the non-tenured teacher is entitled to litigate the matter only if the facts he or she alleges are true would constitute a violation of a constitutionally or statutorily conferred right. Given the above, the Commissioner agreed with the BOE that Rice v. Union County Regional High School District, 155 N.J. Super. 64 (App. Div. 1977), cited by respondent as requiring the public hearing relative to the BOE's declining to offer her another contract, did not require such a hearing.

The respondent appealed the Commissioner's decision in Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, to the State Board of Education, which, on February 5, 2003, affirmed the Commissioner. P-1(4); N.J.S.A. 18A:6-27, -28

On February 24, 2003, respondent submitted to the BOE her nominating petition relative to the April 15, 2003, election for membership on the BOE. Her petition certified that she was "legally qualified under the laws of the State to be elected a member of the [BOE]" and included sufficient signatures for placement of her name on the ballot. P-1(5); N.J.S.A. 19:60-5d.

On March 7, 2003, respondent filed an appeal from the State Board's decision in Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, with the Superior Court, Appellate Division, A-3338-02T2. P-1(6); R-2; R. 2:2-3(a)(2).

In the April 15, 2003, BOE election, the respondent's vote total was the second highest, i.e., sufficient for election to the BOE, absent disqualification. P-1.

By letter dated April 15, 2003, the BOE notified respondent that she had obtained sufficient votes to take a seat on the BOE; that, given her claims against the BOE, N.J.S.A. 18A:12-2 prohibited her from holding office as a member of the BOE; that, by April 21, 2003, she should notify the BOE of whether she would withdraw or dismiss the claims with prejudice; and that, if she failed to do so, the BOE would petition for relief. P-1(7).

By letter dated April 16, 2003, respondent's attorney responded that, due to the "complexity of this matter and a pre-planned vacation, a proper response [could not] be provided by . . . April 21, 2003" and he requested a two-week extension to respond. P-1(8).

By letter dated April 16, 2003, the BOE notified respondent that (as required by N.J.S.A. 18A:10-3(b)), on April 29, 2003, it would hold its reorganization meeting and it could not consent to the two-week delay in her response. P-1(9).

By way of respondent's attorney's April 23, 2003 letter brief, respondent represented that she "will withdraw her Notice of Tort Claim under [N.J.S.A. 59:1-1 et seq.]." R-1; emphasis added. On the record made April 24, 2003, respondent agreed to dismissal with prejudice of her claims against the BOE, except for her demand in Margadonna v. Wall BOE et al., No. A-3338-02T2, before the Appellate Division, that the BOE afford her a public hearing relative to whether it should have offered her another contract of employment. Her attorney argued that this does not constitute a claim within the intent of the laws cited above and that, if the BOE decides to offer her employment, she may then decide whether to accept the employment or reject it and continue as a member of the BOE.

CONCLUSIONS OF LAW

"No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." N.J.S.A. 18A:12-2. Consistent with N.J.S.A. 18A:12-2, the petition of a candidate for nomination for election to a board of education must state that he or she "is legally qualified to be elected to the office." N.J.S.A. 19:60-5.

From July 17, 2002, when respondent served the BOE with her New Jersey Tort Claims Act notice of claim, until April 24, 2003 (during the argument of this case), the respondent asserted a claim that the BOE had wrongfully denied her rights of due process and wrongfully denied her a public hearing, causing "loss of employment [and] damage to [her] good name and reputation," etc., and she demanded damages for "loss of salary and benefits," etc. P-1(2); N.J.S.A. 59:8-4.

On or about July 18, 2002, respondent filed the petition with the Commissioner of Education, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, wherein she alleged that the BOE had denied her the "right to a public hearing" on the matter of whether it should employ her as a teacher for the 2002-03 school year and wherein she claimed relief, including continued employment as a BOE teacher with tenure. P-1(1). She continued her claim until April 24, 2003 (during the argument of this case), when she agreed to dismissal with prejudice of her petition's claims (now in the Appellate Division), except that she continues her claim that the BOE must afford her a public hearing relative to whether it should have offered her another contract of employment.

Given the above, on February 24, 2003, when the respondent submitted her petition, and on April 15, 2003, at the time of the election, she was directly interested in claims against the BOE that related to a contract and employment.

Howell Township Board of Education v. Suchcicki, 93 N.J.A.R.2d (EDU) 157, where an employee of the board of education submitted a petition for nomination for election to the board, applied N.J.S.A. 18A:12-2 and N.J.S.A. 18A:14-10 (repealed). N.J.S.A. 18A:14-10, like N.J.S.A. 19:60-5 which replaces it, required that petitions for nomination for election to a board of education state that the proposed candidate "is legally qualify to be elected" and the decision states:

> Public policy demands that one who holds public office discharge his duties with undivided loyalty and from this policy the concept of "incompatibility" has evolved. Consistent with this concept, one may not hold two public offices, each of which has an interest which competes with the other, and one cannot hold two public offices where his performance in one office would be subordinate to the other, or subject to its control, or requires him to choose the obligation of one office over another. In such circumstances, it is not enough for the office holder to abstain from participation when an area of conflict arises; holding both the public offices is prohibited. See Jones v. MacDonald, 33 N.J. 132 (1960); Dunn v. Froehlich, 155 N.J. Super. 249 (App. Div. 1978); Kaufman v. Pannuccio, 121 N.J. Super. 27 (App Div. 1972);

Visotcky v. City Council of City of Garfield, 113 N.J. Super. 263 (App. Div. 1971).

Consistent with the concept of "incompatibility," N.J.S.A. 18A:12-2 provides that "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." Also, a nominating petition, such as that filed by the respondent, must state that the proposed candidate "is legally qualified to be elected" to the board . . . ." N.J.S.A. 18A:14-10 (Emphasis added.) [repealed and replaced by N.J.S.A. 19:60-5].

Surely the respondent's employment contract, if not his union responsibilities, give him the kind of "interest" which N.J.S.A. 18A:12-2 speaks of. Compare Visotcky v. City Council of Garfield, supra, wherein it was decided that holding the position of teacher is "incompatible" with membership on the Board of Education in the same school district and where membership on the board would be invalid in such circumstances.

During the hearing, respondent represented that it was and is his intention, conditioned upon his election, to resign as an employee and union representative. However, as quoted above, in N.J.S.A. 18A:14-10, the Legislature speaks in the present tense of legal qualification for election to the Board, i.e., there must be qualification at the time of execution of the petition and its accompanying certificate. (This is a reasonable and practical condition intended to assure that a candidate will not later reconsider and decide not to give up his disqualifying employment, etc.) Therefore, I **FIND** and **CONCLUDE** that, despite the respondent's petition's statement and accompanying certification wherein he is described as "qualified," he was and is not qualified.

During the hearing, the respondent also stated that he was unaware of his lack of qualification. This statement is somewhat inconsistent with the respondent's representation that he intended to resign his position as a Board employee if elected, but, in any event, it is the proposed candidate's responsibility to learn applicable laws before certifying his qualification for election. See Graham v. N.J. Real Estate Comm'n, 217 N.J. Super. 130, 138 (App. Div. 1987), and In re Krah, 130 N.J. Super. 366 (App. Div. 1974), for the proposition that everyone is conclusively presumed to know the law, statutory and otherwise, and, in the absence of statutory or constitutional requirements, an agency is not required to give actual notice of the law.

> Given the above facts and circumstances, I **FIND, CONCLUDE** and **DECLARE** as follows: (1) The respondent is not legally qualify for election to the Board; (2) The respondent's nominating petition is invalid, null and void; and (3) The respondent's name as a candidate for election to the Board must be removed from the ballot relative to the April 7, 1992 election.
>
> [Howell Township v. Suchcicki, supra, 93 N.J.A.R.2d at 157-58.]

Since respondent was continuing all of her claims against the BOE at the time she submitted her petition for nomination for election to the board, pursuant to N.J.S.A. 18A:12-2 she was not qualified to serve on the BOE; her petition and her presence on the ballot violated N.J.S.A. 19:60-5; and her election may be voided.

Respondent's attorney argues that her petition in Margadonna v. Wall BOE et al., No. A-3338-02T2, does not constitute a "claim" within the intent of N.J.S.A. 18A:12-2. However, in that case, as the "petitioner" she is "requesting relief or action." N.J.A.C. 1:1-2.1 "Petitioner"; see also N.J.A.C. 6A:3-1.3. See also N.J.A.C. 1:1-1.3(a) and R. 4:5-2, stating that a claim contains a "statement of the facts . . . [purportedly] showing that [she] is entitled to relief." The respondent's petition alleges facts and sets forth a demand for relief: an order commanding the BOE to afford her the public hearing. (It is similar to a mandamus action. Compare R. 4:69.) Consequently, respondent's petition contains a "claim" and N.J.S.A. 18A:12-2 prohibits her holding office as a member of the BOE.

Further, in respondent's case in the Appellate Division, she continues her claim that an order should be entered requiring the BOE to hold a public hearing relative to whether it should have offered her another contract of employment.

The respondent's attorney also contends that N.J.S.A. 19:60-5 and N.J.S.A. 18A:12-2 violate her constitutional rights. In these statutes, the Legislature has articulated important policies to avoid conflicts of interest for public officials and statutes are presumed to be lawful. In any event, this administrative case has not been transmitted here for a decision on such an issue and, as the BOE's attorney has pointed out, respondent has not notified the Attorney General of this challenge to State statutes. N.J.S.A. 52:14B-2(b).

To summarize, the respondent (represented by counsel) brought and maintained claims against the BOE and, contrary to N.J.S.A. 18A:12-2 and despite the requirements of N.J.S.A. 19:60-5, she certified in her nominating petition that she was qualified to serve as a BOE member. Despite the opportunity to do so, she has again refused to dismiss her claim against the BOE. Her real claim and interest is in a contract of employment with the BOE and N.J.S.A. 18A:12-2 prohibits a BOE member from maintaining such a claim. Consequently, although frustrating the will of her voters, her actions require the results ordered below.

ORDER

Consistent with the above, (1) I **ORDER** the respondent disqualified from holding office as a member of the BOE and (2) I refer to the county superintendent of schools the decision relative to the filling the membership of the BOE. N.J.S.A. 18A:12-15.

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

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

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

April 25, 2003
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

April 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioner:

P-1 Verified Emergent Petition & Verification, April 22, 2003

P-1(1) Petition, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, July 8, 2002

P-1(2) Letter from Stone Mandia, July 12, 2002, with notice of claim under the New Jersey Tort Claims Act, July 12, 2002

P-1(3) Letter/decision from Commissioner of Education, dismissing petition, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, October 29, 2002

P-1(4) Decision of State Board of Education, affirming Commissioner's Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, decision, February 5, 2003

P-1(5) Nominating Petition for April 15, 2003, Annual School Election for Margadonna, February 24, 2003

P-1(6) Notice of Appeal to the Superior Court, Appellate Division, from the Decision of State Board of Education, affirming Commissioner's Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, decision, February 5, 2003, March 5, 2003

P-1(7) Letter from BOE's attorney, April 15, 2003

P-1(8) Letter from respondent's attorney, April 16, 2003

P-1(9) Letter from BOE's attorney, April 16, 2003

For Respondent:

R-1 Letter brief, April 23, 2003

R-2 Statement of Issues, Margadonna v. Wall BOE et al., App. Div. No. A-3338-02T2, with exhibits

OAL DKT. NO. EDU 2409-03
AGENCY DKT. NO. 123-4/03

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,

PETITIONER,

V.

MARY LOU MARGADONNA,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

Upon careful review of the papers submitted pursuant to the Petition for Emergent Relief submitted by the Board of Education of the Township of Wall, and in consideration of the legal standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), the Deputy Commissioner, to whom this matter has been delegated for review, pursuant to *N.J.S.A.* 18A:4-34, hereby orders that Respondent Mary Lou Margadonna must elect, by noon on Tuesday, April 29, 2003, whether she will withdraw her claim against the Board of Education and assume her seat on the Board at its meeting on April 29, 2003 **or** whether she will maintain such claim and be precluded from taking her seat on that date, pending the Commissioner's final review of this matter on its merits.

IT IS SO ORDERED. *

ACTING COMMISSIONER

Date of Decision: 4/25/03

Date of Mailing: 4/25/03 (by Fax)

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

206-03

IN THE MATTER OF THE TENURE	:	
HEARING OF DENNIS GILLIAMS,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

May 1, 2003

AGENCY DKT. NO. 404-12/02

IN THE MATTER OF THE TENURE	:	
HEARING OF DENNIS GILLIAMS,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
CAMDEN, CAMDEN COUNTY.	:	DECISION
	:	

This matter was opened before the Commissioner of Education on December 23, 2002 through the certification of tenure charges alleging chronic and excessive absenteeism, incapacity, incompetence, unbecoming conduct, abuse of sick leave and neglect of duty against a tenured teacher employed by the Board of Education of the City of Camden.

The Commissioner directed respondent, via both certified and regular mail on December 24, 2002, to file an Answer to the tenure charges against him.[1] By letter dated January 24, 2003, the Board notified the Commissioner that, upon further investigation, respondent was believed to have moved to a new address as of July 2002. The Board, therefore, served an additional copy of the charges and exhibits upon respondent on January 24, 2003. Again, the Commissioner directed respondent, via both certified and regular mail on January 27, 2003, to file an Answer to the tenure charges against him.[2]

Both communications from the Bureau of Controversies and Disputes clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual

[1] The notice sent via certified mail to respondent's address in Camden, New Jersey was returned unclaimed. The notice sent by regular mail to the same address was not returned.

[2] Again, the notice sent by certified mail to respondent's address in Maple Shade was returned unclaimed, but the notice sent via regular mail was not returned.

against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been no submission by the charged employee of a responsive filing indicating that he does not contest the charges, **will** result in the charges being deemed admitted by the charged employee. Because no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicate that respondent has been chronically and excessively absent over a period of four school years. In the 2001-2002 and 2000-2001 school years, respondent was absent for 173 days and 91.5 days, respectively, for a total of 264.5 days, representing 72% of the time. In the 1999-2000 and 1998-1999 school years, respondent was absent for 29 days and 22.5 days, respectively. (Tenure Charges at 1-4)

Further, respondent has demonstrated an "abusive pattern of absences" by "straddling" his absences over weekends, holidays and other dates on which the Camden schools were closed. (*Id.* at 5) Additionally, respondent failed to comply with district procedures and requirements for taking sick leave, in that he did not obtain approval for any of his leaves of absence *prior* to the first day of the leave. (*Id.* at 6)

The Board recognizes that although many of respondent's absences were approved leaves, he has been absent since the start of the September 2001 school year *without leave*, and without submitting necessary medical documentation to the Board. In this regard, respondent was notified by letter dated September 20, 2001 that he was absent without leave and was directed to contact the Office of Human Resources as soon as possible. Respondent did not,

however, respond to the letter. (*Id.* at 3) Because respondent has failed to return to work following the expiration of his last approved leave on June 30, 2001 and has failed to request an additional extension, as required by his collective bargaining agreement, respondent has shown no intent to resume his duties and has abandoned his position. (*Id.* at 12, 13) Finally, as evidenced by numerous notes from his physicians, including the last indication of respondent's medical condition which the Board received from Dr. Stanley Schwartz on June 11, 2001 deeming him "totally incapacitated," respondent is incapable of returning to work. (*Id.* at 10, 11)

The Board asserts:

> While the great majority of Gilliams' absences during the 2000-2001 school year were on extended leave and approved by the Board, these days are nonetheless charged as absences and represent a significant disruption of the continuity of instruction for his students, and a significant loss of instruction time for the district. It should be emphasized that Mr. Gilliams teaches special education students who already face a multitude of learning difficulties, and require consistency. By vacating himself from his duties for 264.5 days in the last two (2) school years, or 72% of that time, Mr. Gilliams has not only deprived his special needs students of their regular and customary teacher, he has thereby hindered their academic achievement. (*Id.* at 3)

Initially, the Commissioner recognizes that the enabling statute provides that tenured staff shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause***." *N.J.S.A.* 18A:6-10. Additionally, the Commissioner recognizes that "[w]hether the charges fall under any of the categories is a determination for [him] to make." *In the Matter of the Tenure Hearing of Walter Driscoll, School District of Woodstown-Pilesgrove Regional High School, Salem County,* decided by the New Jersey Superior Court, Appellate Division, October 25, 1983, Docket No. A-748-82T2, Slip Opinion at 3. Deeming the above charges to be admitted, and noting that respondent has chosen not to deny the specific allegations contained therein, the Commissioner finds that the Board has

demonstrated that respondent is incapable of fulfilling his duties as a teacher, and has further demonstrated just cause for respondent's dismissal by virtue of his chronic absenteeism, abuse of sick leave and abandonment of his position.[3]

IT IS ORDERED this 1st day of May 2003 that summary decision shall be granted to the Board, and respondent shall be dismissed from his tenured position as a teacher in the Board's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[4]

COMMISSIONER OF EDUCATION

Date Issued: 5|01|03

Date Mailed: 5|01|03

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[3] It is herein noted that the Board also charges respondent with "neglect of duty" for, *inter alia*, failing to improve his lesson plans and the submission of same, demonstrating a record of lateness and having problems maintaining control over his classroom. (Tenure Charges at 7, 8) The Commissioner finds, however, these charges sound predominately in inefficiency and, therefore, trigger the procedural safeguards identified in *N.J.S.A.* 18A:6-11; that is, the charged employee must be provided at least 90 days in which to overcome the inefficiency before the charge may properly be certified to the Commissioner. *N.J.A.C.* 6A:3-5.1(c); *See, also, Bd. of Ed. of the Township of Teaneck, Bergen County v. Wilburn*, 91 *N.J.A.R.* 2d (EDU) 48, 58, *aff'd* 92 *N.J.A.R.* 2d (EDU) 328, *aff'd* New Jersey Superior Court, Appellate Division, Dkt. No. A-4663-91T2, April 12, 1993. In that the record does not evidence the Board's compliance with the procedural mandate, the Commissioner determines to dismiss Charge Three.

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

CAROL UNANGST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREDON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former tenured part-time art teacher, sought to rescind her resignation, claiming she resigned under duress. Petitioner contended she was the victim of battered woman's syndrome and that, as a result, incapable of rational decision-making. The Board alleged the petition was untimely filed.

The ALJ noted that it was undisputed that the petition was not filed within 90 days of the acceptance of petitioner's resignation and that petitioner was a victim of domestic abuse. The ALJ determined, however, that there was sufficient evidence to demonstrate that petitioner possessed the mental capacity to make meaningful decisions, seek professional help and receive legal advice. Yet, she waited until it was too late to challenge the resignation. A showing of emotional stress alone, without the showing of circumstances amounting to genuine incapacity, was not enough to toll the time limit for appeal. The petition was dismissed.

The Commissioner concurred with the ALJ that the petition was untimely filed. Citing *LeMee* and *Pacio*, the Commissioner did not find that the factual circumstances herein constituted grounds for relaxation of the 90-day rule.

May 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9828-98
AGENCY DKT. NO. 434-9/98

CAROL UNANGST,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF FREDON,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen, LLC, attorneys)

Craig U. Dana, Esq., for respondent
(Morris, Downing & Sherren, attorneys)

Record Closed: March 10, 2003 Decided: March 13, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a tenured seeking staff member seeking to rescind her resignation on the ground of duress. Specifically, petitioner contends that, at the time of her resignation, she was the victim of battered woman's syndrome and that, as a result, incapable of rational decision-making. Prior to hearing, district moved to dismiss the petition for failure to comply with the ninety-day rule set forth in *N.J.A.C.* 6:24-2.1(c)

[recodified as *N.J.A.C.* 6A-3.1.3(d).] Recognizing that her petition was not filed within ninety days of the school district's acceptance of her resignation, petitioner urges that strict application of the ninety-day rule should be relaxed under *N.J.A.C.* 6:24-1.17 [recodified as *N.J.A.C.* 6A:3-1.16] to prevent injustice. In response, respondent argues that petitioner was not mentally incapacitated or incompetent so as to prevent her from filing a timely appeal. For the reasons that follow, the circumstances do not justify relaxation of the limitation period for filing a school-law complaint.

Procedural History

Petitioner Carol Unangst ("Unangst") filed her verified petition with the Commissioner of Education ("Commissioner") seeking reinstatement and back pay on September 21, 1998. Respondent Fredon Board of Education ("Board") filed its answer on October 16, 1998, raising the affirmative defense of untimeliness. Subsequently, on October 29, 1998, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

On May 17, 2000, the Board filed a notice of motion, together with a supporting certification and legal brief. Unangst filed her opposing papers on August 16, 2000. The Board filed a reply on August 18, 2000. Thereafter, on August 23, 2000, the OAL took testimony and heard oral argument on the Board's motion.[1] Witnesses and exhibits are listed in the appendix.

Findings of Fact

Carol Unangst had been employed part-time as an art teacher in the Fredon, New Jersey school district since September 1994 and had attained tenure in that position. She worked three days per week in Fredon and for the remaining two days

[1] While the Board's papers were designated a motion for summary decision, the OAL held an administrative hearing and allowed testimony on the issue of timeliness. Therefore, the motion will be treated as a motion to dismiss based on the proofs.

per week in the neighboring school district of Frelinghuysen, New Jersey. At the outset, it is undisputed that Unangst did not file her petition within ninety days of the Board action of which she complains. Unangst submitted her letter of resignation to the Board on March 12, 1998. One week later, on March 19, 1998, the Board accepted her resignation at a public meeting.[2] Nevertheless, she did not file her petition until six months later on September 21, 1998.[3] Moreover, it is undisputed that Unangst had been horrendously abused by her boyfriend and was under great stress at the time of her resignation. Rather, the disagreement involves whether her thought processes were so substantially impaired that she could not appreciate the nature and consequences of her action.

Unangst's relationship with the man who harassed her, Arthur Smith, started in 1994 in Fort Worth, Texas. Although she knew he had a criminal record and was on parole, she did not learn until later that he had been convicted for murder. Their relationship started as a friendship and blossomed into romance. In or around August 1994, Unangst moved from Texas to Pennsylvania in order to live near her grandchildren. Smith joined her in April 1995, and moved into the farmhouse in which she was living. During the following year, the relationship began to deteriorate.

According to Unangst, Smith became overly possessive and "abusive verbally." When she babysat for her grandchildren, Smith would call her "on an hourly basis" and demand to know when she would be coming home. On one night in January 1998, Smith warned her that, if he should ever become angry, "you'd be dead." Then he threatened to bury part of her body in the swamp behind the farmhouse and another part of her body in the unused well on the front lawn. On another occasion, he threatened that, if she didn't do what he wanted, she "would never see [her] grandchildren again." Although he would sometimes push her, she never went to the hospital or sought medical treatment. Afterwards, he would be "sorry and remorseful,"

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[2] Unangst had prior notice of this meeting but opted not to attend.
[3] In his sworn certification, superintendent of schools Frank Fehn recites that he informed Unangst of the Board's resolution by telephone on March 20, 1998.

bring her flowers, beg her forgiveness and promise never to do it again. He would be nice "for a few weeks" and then the cycle would start over again.

A turning point occurred in January 1998, when Smith told her that he had murdered someone else. Unangst called the Pennsylvania state police to get him out of her house and applied to the Northampton County Court for a protective order. About a week later, Unangst let Smith return when he threatened to kidnap her grandchildren if she refused. He promised not to bother her if she "would just let him come back in the house until he could get organized and find a place to live." Although Smith wanted to resume their relationship, Unangst still wanted him to leave. She helped him find an apartment and paid the first month's rent.

In late February 1998, Smith moved to an apartment located in another town, about ten miles away from Unangst's house. Because Smith didn't have any furniture, Unangst's daughter offered to donate a bed. On Sunday March 8, 1998, Unangst delivered the bed to Smith's apartment by truck. Smith unloaded the bed and set it up in his apartment. As Unangst was leaving the apartment, Smith "put his arms across the door," blocking her exit. He wanted her to read a bunch of cards and letters she had sent him while he was in Texas. Unangst managed to slip past him, ran outside into the truck and locked the truck door. Smith followed her outside and threw the cards and letters into the back of the pick-up truck as Unangst was driving away. Yelling words to the effect of "You're not going to forget this day," Smith got into his car and drove past her "going really, really fast."

When Unangst arrived at her house, Smith was in her garage retrieving his motor scooter, which was stored there. While Unangst entered her house and locked the door behind her, Smith continued yelling, "Mark this day on your calendar. You'll never forget it." Smith began banging on the door, but Unangst refused to let him in. Meanwhile, Unangst telephoned her daughter. As they were talking, an operator interrupted with an "emergency call" from Arthur Smith. Unangst refused to accept the call. Later than night, Unangst went to stay at her daughter's house. Her daughter told

her that Smith had called and left a message that he was "at [her] superintendent's house." At the time, Unangst thought he was only bluffing.

Next morning, Monday March 9, 1998, Unangst went to work as usual in the Frelinghuysen school district. Frelinghuysen school superintendent, Mr. Chioffi, told her he had a visitor over the weekend. Smith had come to his house on Sunday and said "some pretty awful things" about her. Chioffi mentioned that he had contacted his counterpart, Fredon school superintendent Dr. Frank Fehn, and advised Unangst to get a protection order.

On the following day, Tuesday March 10, 1998, Unangst went early to school in Fredon in order to talk with the superintendent. Dr. Fehn had already conferred with Board members and surprised her by announcing that the Board no longer wanted her teaching in Fredon. He indicated that the Board didn't want her in the school building and, because she didn't bring a car, offered to drive her to her daughter's house. Dr. Fehn also recommended that she seek a protection order. That same afternoon, Unangst applied to the Northampton County Court and, without assistance of counsel, obtained a temporary order prohibiting Smith "from abusing, threatening, harassing or approaching" her. She returned to both schools on Wednesday, March 11, 1998, to deliver copies of the protection order.

Speaking to her after school on March 11, 1998, Dr. Fehn reiterated that the Board no longer wanted her in the district and, if she did not leave voluntarily, "they were going to get a lawyer and try to break [her] contract." Further, he recommended that it would be "in [her] best interest" to resign because "there wouldn't be any blemish on [her] record" and he would "help [her] find a job." When Unangst inquired when she should resign, Dr. Fehn replied, "the sooner, the better." Unangst also recalled Dr. Fehn cautioning her not to talk with anyone, even her union representative.

At home that evening, Unangst wrote a short letter resigning from her teaching position in Fredon, effective June 30, 1998, and promising to cooperate "to make this transition as smooth as possible for those concerned." Dr. Fehn had suggested that

they meet at a diner in Blairstown, conveniently located halfway between her home and the school. On Thursday, March 12, 1998, Unangst drove to the diner and handed her resignation letter to Dr. Fehn. She received full salary and medical benefits for the remainder of the school year. Her duties were limited to preparing lessons plans, which she dropped off at school on a weekly basis.

Thus far, the parties largely agree on the underlying facts.[4] Most of their factual dispute revolves around Unangst's state of mind at the time of her resignation and during the three-month period immediately after the Board accepted her resignation. Unangst described her condition as "frightened and confused" and "lacking enough confidence to do anything yet." Before submitting her resignation, she had discussed her situation with her son-in-law, who is a practicing attorney in Pennsylvania. He seemed more concerned about the safety of his children than about her and was reluctant to give any advice because "he didn't like to get involved with family things." Nonetheless, Unangst managed to return to court by herself on March 16, 1998 and persuade the judge to issue a final protection order. She also functioned well enough to prepare her weekly lesson plans. Despite the outstanding protection order, Smith continued to show up unannounced and to follow her around. Therefore, Unangst retained an attorney, who went to court on April 1, 1998 and obtained a contempt order. As a result, Smith was found guilty of criminal contempt and incarcerated in a Pennsylvania prison for approximately one month.

Just two weeks after her resignation, Unangst made an appointment to see a counselor at a women's shelter in Bethlehem, Pennsylvania. She contacted the domestic violence hotline of an advocacy organization known as Turning Point on March 26, 1998 and attended four counseling sessions, the final one on May 19, 1998. These sessions explored many personal issues, including Unangst's sudden

[4] Dr. Fehn averred that he counseled Unangst to consult with both an attorney and her union representative before resigning. Unangst was uncertain whether or not Dr. Fehn had encouraged her to seek legal advice. However, she testified that Dr. Fehn urged her not to talk to anyone. Furthermore, Dr. Fehn remembered telling her he would only recommend her resignation to the Board "if she received a paid leave for the balance of the school year." Although Unangst did receive such benefit, she does not recall Dr. Fehn talking to her about it.

resignation and the counselor's apparent belief that she should pursue getting her job back. Unangst stopped going to counseling in late May 1998 because she felt "calmer" and "a little better and a little safer." During April, May and June, Unangst did "a lot of babysitting" for her grandchildren and sent out job applications to "at least a dozen" school districts. In July or August, Unangst had a conversation with her daughter's father-in-law, who happens also to be a retired attorney. He thought that she should talk to her union, which ultimately led to the bringing of this lawsuit in September 1998.

Unangst's chief witness was Martha Doerr, a counselor at Turning Point of Lehigh Valley, an agency devoted to helping victims of domestic violence. Describing herself a "victim's advocate," Doerr characterized her services as "counseling" as opposed to "therapy." She holds a bachelor's degree in psychology and, at the time in question, was working toward a master's degree in "psychological counseling," which she subsequently acquired in July 1998. Doerr does not hold any professional licenses or certifications and has never taken any formal courses dealing with battered women.[5] She has, however, extensive experience counseling women in abusive relationships and completed a one-year internship working with sexual offenders. Presently, Doerr is engaged in private practice under the supervision of a licensed psychologist.

Doerr's initial contact with Unangst was on March 26,1998, when Unangst telephoned the Turning Point hotline and spoke with Doerr for more than one and-a-half hours. During this lengthy conversation, Unangst detailed her relationship with Smith and confided that she was "very frightened of this man," who had "attempted to choke her while she was holding one of [her grandchildren.]" Mostly Unangst "talked and talked and talked," while Doerr "just listened." Doerr described Unangst as "obviously distressed" and "cr[ying] through a lot of the call." Unangst's priority at the time was her safety rather than her job situation. Doerr offered to provide her shelter, but Unangst thought "she was relatively safe where she was."

[5] In order to sit for the psychologists' licensing exam in either Pennsylvania or New Jersey, the candidate must possess a doctoral-level degree.

Unangst attended individual counseling sessions at Turning Point offices for April 2, April 13, May 5 and May 19, 1998. Each session lasted more than the standard one-hour because Unangst "seemed to have a lot to say. " Unangst appeared genuinely fearful for the safety of her family. She believed that Smith "would stop at nothing to ruin her life, cause her public humiliation and undermine her reputation," even if he had to do it by harming her grandchildren. Her demeanor was "usually tearful" and "there was a great deal of anxiety and quivering in her voice." In Doerr's estimation, Unangst was "vulnerable," her self-confidence had been "shaken."

By the time of her first telephone call, Unangst had already resigned from her teaching position at Fredon. Originally, she told Doerr that Smith "had caused her to lose her job," but later she clarified that the superintendent had asked her to resign. Although Doerr expressly told Unangst that the school's treatment of her had been "unfair if not illegal," Unangst remained convinced that the superintendent "had been kind about it" and that resignation was in her best interest. Despite personal reservations that Unangst's decision had been "impulsive, "hasty" and "not well thought-out," Doerr made no attempt to dissuade Unangst from the course of action that she had chosen. Turning Point's philosophy is to empower a victim of domestic violence and "to strengthen her in order to have her make her decisions, rather than giving any kind of advice."

Significantly, Doerr acknowledged that Unangst possessed the capacity to understand what she had done. Doerr never felt it necessary to refer Unangst to a psychologist or other mental health professional. After May 19, 1998, Unangst ceased going to counseling sessions because she was no longer in crisis. Doerr explained that Unangst was "spending a lot of time in New Jersey at one of her children's home" and had "supportive family around her."

I FIND that Unangst possessed sufficient mental capacity to appreciate the meaning of her resignation and to understand her right of appeal.

Undeniably, Unangst was under extreme emotional distress at the time of her resignation due to constant threats and continued harassment by her boyfriend. Whether or not her condition amounted to "battered woman's syndrome" cannot be derived from the proofs because petitioner's only expert lacked adequate qualifications to make a definitive diagnosis. Nevertheless, the factual pattern clearly presents many of the attributes commonly associated with battered woman's syndrome, including physical or psychological coercion, episodes of severe abuse, and periods when her abuser expresses remorse and seeks forgiveness. It cannot be doubted that these conditions put Unangst in genuine fear for her own safety and that of her family.

Without trivializing the demoralizing impact of such events on Unangst's mindset, there is also considerable evidence that Unangst was able to function remarkably well under the circumstances. She had the presence of mind to obtain a preliminary and final protection order, to evict Smith from her house and to help him move to his own apartment. Throughout her difficulties, she received outside support from her counselor at a women's advocacy group, an attorney retained to enforce her legal rights and her own family. By her own admission, she felt much better by mid-May 1998, when she discontinued going to counseling. During this same time, she managed to prepare lessons plans for her replacement at school, search diligently for a new job and take care of her grandchildren.

Certainly it was less than courageous for the district to abandon Unangst in her hour of need, although it is understandable why Board members might consider their primary responsibility to be the safety of the school children. Any alleged impairment of her thought-processes was not caused by anything that the Board did, but rather by intimidation from her boyfriend. Doerr made Unangst aware of options other than resignation before expiration of the ninety-day limitation period. Regardless of whether it was truly in her best interest to resign, Unangst knew she had other options and made a conscious decision not to exercise them.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board's motion to dismiss should be granted.

N.J.A.C. 6:24-1.2 prescribes that an appeal to the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested hearing." The 90-day rule "provides a measure of repose, an essential element in the proper and efficient administration of the school laws." *Kaprow v. Board. of Educ. of Berkeley Twp.*, 131 *N.J.* 572, 582 (1993). Prompt filing of actions before the Commissioner serves to preserve the immediacy of the record and to stabilize existing relationships, thereby avoiding disruption of the educational process. *Le Mee* v. *Bd. of Educ. of Village of Ridgewood*, OAL Dkt. No. 6889-89 (Comm'r May 3, 1990). Petitioner's counsel concedes, as she must, that Unangst filed her petition with the Commissioner "well beyond 90 days after the resignation had been accepted" and she learned of the Board's action.

Nonetheless, Unangst requests that the Commissioner exercise his authority under *N.J.A.C.* 6:24-1.17 to relax application of the 90-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Exceptions to the 90-day rule should be granted sparingly, and only where there exist compelling circumstances to justify enlargement or relaxation of the time limit. *See Riely v. Board. of Educ. of Hunterdon Cent. High Sch. Dist*, 173 *N.J. Super.* 109 (App. Div. 1980). *See also, Weir v. Bd. of Educ. of Northern Valley Reg. High School Dist.,* 1984 *S.L.D.* _ (Comm'r July 20, 1984), *aff'd* No. A-3520 84T6 (N.J. App. Div. April 9, 1986); Bogart v. Bd. of Educ. of East Orange, 1983 S.L.D. _ (Comm'r May 11, 1983). If the rule were relaxed every time that a harsh result occurred, then the rule and its salutary public policy of encouraging prompt resolution of disputes would be nullified. *Pacio v. Bd. of Educ. of Lakeland Reg. High Sch. Dist.*, 1989 *S.L.D.* 2060 (Comm'r July 29, 1989). Equitable considerations which might allow relaxation of the rule include

good faith discussions between parties to resolve the dispute, *Polaha v. Buena Reg. Sch. Dist.*, 212 *N.J. Super.* 628 (App. Div. 1986), delay attributable solely to the board of education, *Perrotti v. Bd. of Educ. of Newark*, 1981 *S.L.D.* _ (Comm'r May 11, 1981), *aff'd* (St. Bd. Sept. 2, 1981), or cases presenting a substantial constitutional issue or matter of significant public interest, *Miller v. Morris Sch. Dist.*, 1980 *S.L.D.* _ (Comm'r Feb. 27, 1980). Although Unangst does not seek to overcome the rule on any of these traditional grounds, she seeks waiver on the basis of battered woman's syndrome.

New Jersey courts recognize battered woman's syndrome as a legitimate diagnosis resulting from a sustained cyclical pattern of physical and psychological abuse. Most notably, in *State v. Kelly*, 97 *N.J.* 178 (1984), the New Jersey Supreme Court held that expert testimony about battered woman's syndrome was admissible to establish a claim of self-defense in a homicide case where a wife was accused of murdering her husband. Typically, victims of battered woman's syndrome become "unwilling to reach out and confide in their friends, family, or the police[.]" *Kelly*, at 195. Some women become so demoralized and degraded by exposure to unpredictable violence "that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation." *Kelly,* at 194. Subsequent reported decisions have reinforced and refined the approach adopted in *Kelly*. *See State v. Myers*, 239 *N.J. Super.* 158, 169 (App. Div. 1990), clarifying that the defense of battered woman's syndrome to a prosecution for aggravated manslaughter "does not involve insanity, mental disability or diminished capacity," but rather bears on the reasonableness of defendant's belief "that she was in imminent danger of serious injury." *See also, State v. Ellis*, 280 *N.J. Super.* 533 (App. Div. 1995), wherein the Appellate Division ruled that expert testimony concerning battered woman's syndrome could properly be used to explain a kidnapping victim's failure to attempt an escape from defendant during the period of abduction, but not as evidence that the crime had occurred.

Cases dealing with battered woman's syndrome often arise in the context of a criminal trial, where expert testimony is allowed to support a plea of self-defense or justify a victim's failure to resist. Ordinarily, therefore, the doctrine is used as a shield to

protect a victim from punishment or to prevent continued abuse. In contrast, Unangst is attempting to employ that doctrine as a sword to obtain affirmative relief against her former employer after expiration of the limitations period. Courts serve as gatekeepers to prevent litigants from attempting to use the process in domestic violence settings as a sword rather than a shield. *Cf. State v. Hoffman*, 149 *N.J.* 564, 586 (1997). In at least two cases, however, New Jersey courts have authorized victims to pursue claims of a new tort action of battered women's syndrome against their abusers, provided that the plaintiff introduces sufficient expert proof in connection with her claim for damages. *Giovine v. Giovine*, 284 *N.J. Super.* 3 (App. Div. 1995), *overruled on other grounds*, *Kinsella v. Kinsella,* 150 *N.J.* 276 (1997); *Cusseau v. Pickett*, 279 *N.J. Super.* 335 (App. Div. 1994). Both these cases involve suits against the attacker and thus rely, in part, on the premise that the person responsible for severe emotional distress contributing to delay cannot be heard to complain. No case has been found where a victim of battered woman's syndrome has been able to expand that concept to implicate an innocent third party. It is unlikely that our courts would be inclined to extend battered woman's syndrome to someone who had nothing to do with the underlying abuse.

Of course, a potential litigant can always argue that the running of the limitations period should be tolled because she was incapable of understanding her legal rights or because she acted under duress. *Jones v. Jones*, 242 *N.J. Super.* 195 (App. Div., 1990), *certif. den.* 122 *N.J.* 418 (1990). Even if battered woman's syndrome were deemed relevant to such an inquiry, the evidence presented is insufficient to sustain Unangst's burden. Proofs demonstrate that Unangst possessed the mental capacity to make meaningful decisions. Far from remaining helplessly incapable of ending the relationship, Unangst had sufficient mental composure to leave her boyfriend and to obtain a protective order. Unlike the typical victim reluctant to confide in others, Unangst sought out professional help, received legal advice from more than one source, and enjoyed a strong family support system. She continued in counseling until she felt calm and safe, at which point it was still not too late to challenge her resignation. Instead, she decided to trust her school superintendent and follow his career advice. Whether or not she made the best choice, the record reveals that she was capable of making an informed decision and did so. Often employees must decide

whether to resign under trying conditions, such as serious illness, threat of removal or public embarrassment. Emotional distress alone, without a showing of circumstances amounting to genuine incapacity, is not enough to toll the time limit for bringing an appeal to the Commissioner.

Order

It is **ORDERED** that the Board's motion to dismiss the appeal is granted.

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

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

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

March 13, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

March 19 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 20 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

1. Carol Unangst

2. Martha S. Doerr, victim's advocate

List of Exhibits

No.	Description
P-1	Copy of petition for protection from abuse order in the matter entitled Unangst v. Smith, Court of Common Pleas of North Hampton County, Pennsylvania, Dkt. No. 1998-C-20251, dated March 10, 1998
P-2	Copy of Notice to Defendant and Attached Temporary Protection from Abuse Order in the matter entitled Unangst v. Smith, Court of Common Pleas of North Hampton County, Pennsylvania, Dkt. No. 1998-C-10151, entered March 10, 1998
P-3	Copy of Final Order for Protection from Abuse in the matter entitled Unangst v. Smith, Court of Common Pleas of North Hampton County, Pennsylvania, Dkt. No. 1998-C-10151, entered on March 16, 1998
P-4	Copy of Contempt Order in the matter entitled Unangst v. Smith, Court of Common Pleas of North Hampton County, Pennsylvania, Dkt. No. 1998-C-10151, entered on April 1, 1998
P-5	Curriculum vitae of Martha S. Doerr, undated

P-6 Copy of client profile, dated March 26, 1998

P-7 Copy of handwritten case notes of Martha Doerr covering the period of April 2, 1998 through May 5, 1998

P-8 Id. Handwritten notes re: hotline telephone conversation by Martha Doerr, undated

OAL DKT. NO. EDU 9828-98
AGENCY DKT. NO. 434-9/98

CAROL UNANGST,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FREDON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision[1] of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.[2]

Upon careful and independent review of the record in this matter, the Commissioner fully concurs with the Administrative Law Judge (ALJ) that the within petition is time-barred and that relaxation of the 90-day timeline set forth in *N.J.A.C.* 6A:3-1.3(d) is not warranted under the circumstances of this case. In so concluding, the Commissioner emphasizes his concurrence that petitioner possessed sufficient mental capacity to appreciate the meaning of her resignation and to understand her right of appeal as demonstrated by her capacity to make meaningful decisions during the period of her emotional distress, such as: 1) leaving her boyfriend and obtaining a protective order, 2) seeking professional help, and 3) obtaining legal advice from more than one source. Although it is

[1]Only two witness names appear on the List of Witnesses in the Initial Decision, petitioner's and a victim's advocate, Martha S. Doerr, on petitioner's behalf.

[2] Respondent filed a letter stating that it would not be filing any formal exceptions, but requesting that the motion package filed by the Board on May 17, 2000, including the Certification by Frank J. Fehn, the then Superintendent, be included as part of the record. (Board's Letter of April 4, 2003) The Commissioner notes that the Board's motion papers of May 17, 2000, including Mr. Fehn's certification, were included in the record certified to the Commissioner by the OAL. Moreover, although failing to identify the particular facts it disputes, the Board also stated that "the Board does not fully agree with the findings of fact, however, we do understand that this Decision was based upon hearing the Petitioner's evidence only and at the conclusion of the same, our Motion to Dismiss has been granted." (*Ibid.*)

evident that petitioner was under emotional distress at the time of her resignation, a showing of emotional stress alone, without the showing of circumstances amounting to genuine incapacity, is not enough to toll the time limit for appeal.

Moreover, the 90-day filing requirement has been strictly construed by the Commissioner, the State Board of Education and the courts and, while the rule gives the Commissioner broad discretion, relaxation is reserved for limited situations wherein a compelling reason can be demonstrated for expanding the limitation period, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties. *LeMee, supra; Pacio, supra.* In that the Commissioner does not find that the factual circumstances presented herein constitute such grounds for relaxation of the 90-day rule, and in that no constitutional issues are involved in this matter, nor does it present issues of significant public interest beyond the parties, I determine, as did the Commissioner in *LeMee, supra*, that the greater public interest herein lies with the enforcement of the 90-day rule.

Accordingly, the Initial Decision of the ALJ granting the Board's motion to dismiss is adopted for the reasons expressed therein and the petition is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/1/03

Date of Mailing: 5/1/03

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

208-03

TAMIKA COVINGTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE GRANVILLE CHARTER SCHOOL, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2172-01
AGENCY DKT. NO. 151/01

TAMIKA COVINGTON,
Petitioner,
v.
BOARD OF TRUSTEES OF THE GRANDVILLE CHARTER SCHOOL, MERCER COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella and Nowak, attorneys)

Thomas W. Sumner, Jr., Esq., for respondent (Sumner George, attorneys)

Record Closed: March 7, 2003 Decided: March 11, 2003

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

This matter was transmitted to the Office of Administrative Law on April 6, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. This case was originally assigned to Judge Beatrice S. Tylutki and after her retirement the case reassigned to the undersigned.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

March 11, 2003
DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

March 20, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

TAMIKA COVINGTON, Petitioner, v. BOARD OF TRUSTEES OF THE GRANVILLE CHARTER SCHOOL AND THE GRANVILLE CHARTER GRANVILLE CHARTER SCHOOL, MERCER COUNTY, Respondents.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDU 2172-01 **SETTLEMENT AGREEMENT**

The parties to this matter, hereby agree to settle and resolve the within dispute pending before the Commissioner of Education in relation to petitioner's claim for payment of the difference between temporary disability benefits paid to her and sick leave pursuant to N.J.S.A. 18A:30-2.1, based upon the following terms:

1. Respondent shall pay to petitioner, the sum of $5,142.22, which constitutes the agreed upon amount due petitioner for the difference between

temporary disability benefits paid to her and her full salary for the time period covered by N.J.S.A. 18A:30-2.1.

2. Respondent shall remit any required pension contributions to the Teachers' Pension and Annuity Fund and Division of Pensions, and shall take whatever actions are necessary to assure that petitioner receives pension credit for all time periods that petitioner was employed by respondent but did not receive pension credit, and for all time periods that petitioner has received or does receive workers' compensation temporary disability benefits, paid sick leave, or workers' compensation permanent partial disability benefits.

3. The payment to petitioner referred to in paragraph 1 shall be made within 14 days of the Commissioner of Education's approval of this settlement agreement.

4. A. For all time periods that petitioner is entitled to pension credit under paragraph two of this agreement, respondent shall make any required pension contributions to the Teachers' Pension and Annuity Fund and Division of Pensions on the following schedule:

B (1). For all time periods that petitioner was employed by respondent but did not receive pension credit, and for all time periods that petitioner has already received workers' compensation temporary disability benefits, paid sick leave, or workers' compensation permanent partial disability benefits, respondent shall make the pension contributions required by this agreement within 14 days of the Commissioner's approval of the settlement agreement.

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ATTORNEYS AT LAW

B (2). For all other time periods, respondent shall make such pension contributions simultaneously with the payment to petitioner of workers' compensation temporary disability benefits, paid sick leave, or workers' compensation permanent partial disability benefits.

5. The above payment shall be made without prejudice to any party's position, claims, or defenses in the workers' compensation case presently pending before the Division of Workers' Compensation entitled Tamika Covington v. Granville Charter High School, CP No.: 2000-40057, and petitioner does not waive, abandon or relinquish any claim to any other or additional benefits in the workers' compensation case, including but not limited to temporary disability benefits, permanent disability benefits, or payment for medical bills.

6. This settlement shall not limit any defenses that respondent may have to any claims that petitioner may assert in the above workers' compensation case.

7. This settlement agreement shall not limit any other claims that petitioner may have against respondents or against any other person or entities, whether based on law, equity, or otherwise.

8. This settlement agreement limit any defenses that respondent or any other persons or entities may have against any other claims asserted by petitioner.

9. The parties agree that respondent shall not deduct any taxes from the payments to be made to petitioner under this settlement agreement, and that it shall be petitioner's obligation to pay any state, federal, or other taxes due from her as a

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result of the amount to be paid under this settlement agreement.

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN
Attorneys for Petitioner

By:_____ Dated: 2/3/03
Richard A. Friedman, Esq.

By:_____ Dated: 3 Feb 03
Tamika Covington

SUMNERS, GEORGE & DORTCH
Attorneys for Respondent

By:_____ Dated: 2/7/03
Thomas W. Sumners, Jr., Esq.

OAL DKT. NO. EDU 2172-01
AGENCY DKT. NO. 15-1/01

TAMIKA COVINGTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE GRANVILLE CHARTER SCHOOL, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/1/03

Date of Mailing: 5/1/03

LEEANN WOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning physical education teacher, whose full-time position was abolished and replaced with a 4/5th's position, claimed tenure and seniority rights to other full-time positions within the scope of her certification.

The ALJ found that petitioner's tenure and seniority claims were cured when the Board offered and petitioner accepted a full-time position without any loss of pay or benefits, notwithstanding issues raised by petitioner regarding her working, without written agreement under the Interlocal Services Act, *N.J.S.A.* 40:8A-1 *et seq.*, two days a week in respondent's schools and three days a week in the Pemberton Township schools. (In preceding years, her schedule had been three days in respondent's schools and two days in Pemberton Township.) The ALJ ordered the petition dismissed.

The Commissioner adopted the Initial Decision as his own, clarifying that petitioner had not raised claims arising from the shared services arrangement in her pleadings, and that Pemberton Township, an indispensable party to any such claims, was neither named as a respondent nor otherwise involved in proceedings.

May 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4388-02

AGENCY DKT. NO. 177-6/02

LEEANN WOOD,

Petitioner,

v.

BOARD OF EDUCATION
OF PEMBERTON BOROUGH,
BURLINGTON COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for the petitioner (Zazzali, Fagella Nowak, Kleinbaum and Friedman attorneys)

Barry J. Wendt, Esq., for the respondent

Record Closed: February 24, 2003 Decided: March 14, 2003

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a complaint filed by petitioner with the Commissioner of Education alleging that her tenure rights have been violated in contravention of N.J.S.A. 18A-1 to –14. The matter was referred to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15. Respondent has now filed a motion for summary decision, N.J.A.C 1:1-12.6; *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995).

The facts are substantially undisputed. Petitioner holds an instructional certificate with an endorsement in health and physical education (K-12) issued in December 1984, and an endorsement in elementary education (K-8) issued in 1996. In September 1985, petitioner commenced employed with respondent as a full-time physical education teacher and she served in that position continuously through the 2001-2002 school year. Through these years petitioner taught in the respondent district and was also assigned to teach in the Pemberton Township district. During the last few years she has been teaching two days a week in the Pemberton Township district.

On or about March 21, 2002, petitioner was advised that her position would be abolished and that instead respondent would create a 4/5th's physical education teacher position. She received an employment contract on May 17, 2002 to this effect. Petitioner appealed to the Commissioner in June 2002 alleging that her tenure/seniority rights were violated by the retention of non-tenured and/or less senior teaching staff in full-time positions. On August 8, 2002 respondent offered petitioner a contract for the current school year as a full-time physical education teacher without any loss of pay or benefits. This contract required her to reverse her teaching schedule so that she worked two days a week in respondent's schools and three days a week in the Pemberton Township schools. Petitioner executed this contract on August 31, 2002 and noted in writing that she was doing so without waiving any tenure or seniority rights she might have.

From the initial certifications it appeared there might be a fact question concerning an assertion by petitioner that she was required to work a slightly longer day in Pemberton Township. I inquired of counsel and they agreed to submit supplemental certifications. The Pemberton Borough Superintendent, Charles E. Smith, certified that he met with petitioner on September 24, 2002 to discuss differences in the school day between the two districts. He offered to contact the Pemberton Township district to resolve any unfairness, but petitioner responded that she had already worked these discrepancies out. Pemberton Township has now advised Mr. Smith that it will honor the 6 hour and 40 minute school day with petitioner that respondent uses. In her own certification petitioner acknowledges that the length of her school day is the same in both districts.

The parties agree that no written agreement exists between the two districts regarding petitioner's shared schedule under the Inter-Local Services Act, *N.J.S.A.* 40:8A-1 *et seq,* and petitioner contends that this is improper. This is the substance of the record.

Petitioner maintains that when respondent moved to abolish her position and create a 4/5th's position, it triggered tenure and seniority rights as against other teachers and that these questions must now be resolved. At the very least, the motion must await completion of discovery into these areas. I disagree. Respondent's original decision to reduce petitioner's status raised tenure and seniority issues, *Bednar v. Westwood Bd. Of Ed.*, 221 *N.J. Super.* 239 (App. Div. 1988), cert. denied 110 *N.J.* 510 (1988); *Capodilupo v. West Orange Be. Of Ed.*, 218 *N.J. Super.* 512 (App. Div. 1987) cert. denied 109 *N.J.* 514 (1987), but these were cured when respondent offered and petitioner accepted a full-time position. Any differences in the length of her day were adjusted at the outset and petitioner has not been diminished in the least. Thus, any tenure/seniority issues are moot.

Regarding the Inter-Local Services Act, it is apparent from the language of the Act that local bodies of government are entitled to enter into formal arrangements regarding shared services, but petitioner points to no authority that requires it. She has been employed in accordance with the understanding between the two districts for many years; the only thing that has changed is that she now spends a third day in Pemberton Township.

Based on the foregoing, I **CONCLUDE** that respondent is entitled to decision as a matter of law and it is **ORDERED** that this petition be dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

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

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

3/14/03
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

March 20, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

OAL DKT. NO. EDU 4388-02
AGENCY DKT. NO. 177-6/02

LEEANN WOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by petitioner, as were replies by the Board of Education (Board).

Petitioner's exceptions reiterate the previously raised contention that her tenure and seniority rights were triggered, notwithstanding her subsequent assignment to a full-time position, upon her receipt of *notice* that her employment for the following year would be reduced to a 4/5 position. Thus, she claims, she is now entitled to a determination of her tenure and seniority rights in both the Pemberton Borough (the respondent herein) and the Pemberton Township school districts, as well as to a directive from the Commissioner ordering the two districts to enter into a written agreement regarding these matters pursuant to the Interlocal Services Act (the Act), *N.J.S.A.* 40:8A-1 *et seq.* In reply, the Board urges adoption of the Initial Decision and maintains its prior stance that it is not required to provide joint services through the Act.

Upon review, the Commissioner determines to adopt the Initial Decision of the OAL. In so doing, however, he notes that this matter was pled strictly as a tenure/seniority entitlement claim against the respondent Board,[1] but that, when events transpired so that petitioner's employment was never actually reduced, petitioner's arguments before the Administrative Law Judge (ALJ) turned to claims based on the shared arrangement with Pemberton Township and the provisions of the Interlocal Services Act, notwithstanding that the Petition of Appeal made no reference whatsoever to such claims, no amended petition was ever filed, and an indispensable party to any determination in these regards, the Pemberton Township Board of Education, was neither named as a respondent nor provided an opportunity to intervene pursuant to *N.J.A.C.* 1:1-16.4. Therefore, like the ALJ, the Commissioner finds petitioner's tenure/seniority claim against the respondent Board to be moot, and on the basis set forth above, rejects petitioner's contention that she is entitled to determination on the further issues raised.

Accordingly, for the reasons expressed in the Initial Decision and herein, the recommendation of the OAL dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/1/03

Date of Mailing: 5/1/03

[1] Petitioner alleged that her employment had been reduced even though the Board was retaining nontenured and/or less senior teachers in positions for which she was qualified.

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

JERRY COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY, AND PATRICIA JOHNSON, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, former nontenured high school guidance counselor, alleged the Board terminated him absent the appropriate procedural requirements set forth at *N.J.S.A.* 18A:27-3.2.

The ALJ found that pursuant to a letter dated May 9, 2002, prior to the effective date of the termination, petitioner resigned from the District and was no longer a teaching staff member as that term is defined by the New Jersey school laws. Thus, the ALJ found that petitioner relinquished any rights that would have otherwise accrued to him had he merely been the recipient of a letter from the District indicating that his annual contract would not be renewed. (Although it was not obligated to do so, the Board still sent him a statement of reasons for nonrenewal.) The ALJ ordered that the petition be dismissed.

The Commissioner adopted the Initial Decision as his own.

May 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 6787-02

AGENCY DKT. NO. 307-9/02

JERRY COHEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY, AND PATRICIA JOHNSON, SUPERINTENDENT,

Respondents.

Jerry Cohen, petitioner, *pro se*

Ellen S. Bass, Esq., for respondents (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: March 17, 2003 Decided: March 18, 2003

BEFORE **STEVEN C. REBACK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal taken by the petitioner, Mr. Jerry Cohen, which commenced with his filing of a petition before the Commissioner of Education on or about September 30, 2002. Mr. Cohen alleges *inter alia* that the respondent Board of Education ("Middlesex" or "Board") and its individual members violated his rights under Title 18A of New Jersey statutes. Specifically,

Mr. Cohen contends that his non-tenured position as a high school guidance counselor with respondent was terminated absent the appropriate procedural requirements set forth at *N.J.S.A.* 18A:27-3.2. He alleges he failed to receive reasons in writing for the respondent's failure to renew his contract for the school year commencing September 2003. Moreover, he alleges that the respondent even if *arguendo* it did provide notice did so outside of the 30-day prescribed period set forth by the same statute. In seeking a remedy in this matter, the petitioner asked that the Commissioner award him legal fees, costs, pre- and post-judgment interest and loss of income for a period of approximately three years. He indicates in closing that the total damages he requests is $27,024.

On October 4, Middlesex filed its answer with the Commissioner. In addition to denying the various substantive allegations set forth in Mr. Cohen's brief, asserting that at all times it complied with substantive and procedural requirements contained in the New Jersey school laws, the Board specifically asserts that petitioner resigned from his position of employment and that resignation rendered moot any of the procedural protections and requirements for a statement of reasons and "informal appearance" otherwise accorded to non-tenured employees upon non-renewal of a contract. It further asserts that the petitioner's resignation was accepted by the Board at a duly scheduled public meeting and passed by resolution. Further, Middlesex asserts a number of other defenses which, if necessary, I shall address in the analytic portion of this opinion.

The appeal was transmitted to the Office of Administrative Law as a contested case on October 11, 2002, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. After a number of adjournment requests, the matter was preheard by telephone on January 30, 2003, and it was at that time that the parties agreed that the case should initially be heard on cross motions for summary decision. I received all of the moving papers submitted by the Board on March 4, 2003, and on March 12 of this year, Mr. Cohen submitted his responsive papers. On or about March 13, 2003, I requested that my secretary reach out to Board counsel to determine if it would be submitting a reply brief. On March 17, 2003, counsel for Middlesex submitted a letter reply. Accordingly, the record closed on the latter date, March 17, 2003.

STANDARDS FOR GRANTING MOTION FOR SUMMARY DECISION

Under the Uniform Administrative Procedure Rules, a party may move for summary decision if:

> the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [*N.J.A.C.* 1:1-12.5(b).]

The summary decision rule is essentially the same as the summary judgment rule under the New Jersey Rules of Court, which permits a party to move for summary judgment if:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [*R.* 4:46-29(c).]

The Supreme Court in *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520, 523 (1995) provided further guidance for the summary decision analysis: "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." *Id.* at 536. Thus, a court should deny a summary judgment only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. *Id.* at 529.

A contested case can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts indicate that a particular disposition is required as a matter of law. *In the Matter of Robros Recycling Corp.*, 226 *N.J. Super.* 343, 350 (App.

Div.1988). A summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. *Ibid.*

THE FACTS

Unless otherwise noted, the following is a substantially uncontradicted narrative of the operative facts in this matter exclusively for purposes of addressing the Board's motion. It is based entirely on the certifications and exhibits submitted on the motion, as well as in its opposition. If a factual dispute presents itself which is genuine, then, of course, I am mandated to deny the motion. However, if I find that a factual issue is contested but that the evidence clearly supports a finding for one side or the other, I shall explicitly arrive at that finding of fact and give reasons to support it. Accordingly, I **FIND**:

The petitioner, Jerry Cohen, had been employed by respondent district in the capacity of a high school guidance counselor commencing February 2001 through July 2002. On April 30, 2002, Cohen was informed by the superintendent of schools that his annual employment would not be renewed for the 2002-2003 school year. As is noted in the brief submitted on behalf of the Board, Cohen had been employed by the district for less than a year and one-half. Thereafter, by letter dated May 9, 2002, Mr. Cohen unequivocally and unambiguously advised the Board in writing that effective July 1, 2002, he would resign his position with the Board. At its public meeting of May 13, 2002, the Board, by resolution, accepted Mr. Cohen's resignation which, because of the circumstances surrounding his age, resulted in his retirement. By letter dated September 6, 2002, the Division of Pensions and Benefits accepted Mr. Cohen's application for an ordinary disability retirement allowance.

Subsequent to these events, Cohen continued to pursue his request for a statement of reasons for non-renewal, pursuant to *N.J.S.A.* 18A:27-3.2. In fact, at one point he engaged counsel to write a letter on his behalf to the Board. In her certification submitted on behalf of the Board's motion, Ms. Patricia Johnson, the Superintendent of Schools for Middlesex, indicates that the initial reply by Middlesex was to advise Cohen that his request for a statement of reasons for non-renewal was no longer necessary in light of his written resignation. He was also advised

that as a consequence of his resignation, his relationship with Middlesex was terminated as well as any statutory obligation that Middlesex would have had in respect to providing him with a reason for non-renewal. Irrespective of the foregoing and in an effort to end the ongoing correspondence between the parties, the Board did, in fact, provide Cohen with the requested statement of reasons by letter dated August 2, 2002. Counsel argues on behalf of Middlesex that the submission of the statement of reasons is without prejudice in that it remains the Board's contention that once the resignation was executed, it no longer was required to provide Cohen with anything in respect to an explanation of why his contract had not been renewed and that the decision to provide him with the information in early August of 2002 was, in its view, simply "an effort to put an end to the barrage of correspondence" that was being received from the petitioner.

The petitioner, in spite of the fact that he did receive this explanation, did not request an informal appearance before the Board, which would have been perhaps his right under *N.J.A.C.* 6:3-4.2. Rather, on September 10, 2002, Mr. Cohen filed an action in the Superior Court of New Jersey, Middlesex County, alleging that the lateness of the statement of reasons damaged him and requested $400 in legal fees as well. On September 18, 2002, the Board filed a motion to dismiss Mr. Cohen's complaint, and the Superior Court by order of October 11, 2002, granted the motion to dismiss. Thereafter, the matter proceeded on its administrative track. Mr. Cohen's letter of resignation accompanies the Board's moving papers and may be found as Exhibit C. As Exhibit D is a formal memo directed to Mr. Cohen from the Board of Trustees of the TPAF advising him that effective July 1, 2002, Mr. Cohen would qualify for ordinary disability retirement allowance. I infer from this, of course, that effective as of that date, Mr. Cohen has begun receiving his pension pursuant to his retirement and his rights under the Teachers' Pension and Annuity Fund. It appears from the papers that Mr. Cohen submitted his resignation when he was approximately 62 years of age. He is currently approximately 65 years of age.

It should be noted at the outset that Mr. Cohen in opposition to the motion provides no affidavits or certifications that set forth a factual matrix from which one would conclude that there is a factual divergency of views between the parties. Rather, Mr. Cohen simply sets forth in narrative form the circumstances under which he believes the motion should be denied. Because Mr. Cohen is a *pro se* litigant, I will exercise discretion and address his moving papers affording

him all benefits and inferences. Unfortunately, and notwithstanding the lack of certifications or affidavits, Mr. Cohen cites no legal authority under which his assertion that he would be entitled to a statement of reasons for his non-renewal and an opportunity to appear informally before the Board of Education. Those clearly are rights conferred upon a non-tenured faculty member under *N.J.S.A.* 18A:27-3.2. Specifically, the statute requires that a non-renewed teaching staff member shall be given a written statement of the reasons for non-renewal of his contract by the superintendent no later than 15 calendar days after the teaching member has received notice of his or her non-renewal. That statement is to provide the teaching staff member with reasons set forth with particularity resulting in his non-renewal. Precision is demanded by the statute. Such statement shall be delivered to the employee within 30 calendar days of the receipt of his request. Moreover, pursuant to regulation, *N.J.A.C.* 6:3-4.2(a), the non-teaching staff member is entitled, if he requests it, to an informal appearance before the Board within 30 days of the employee's receipt of the Board's statement of reasons. It should be noted that irrespective of whether the Board was or was not required to provide Mr. Cohen with a written notice, as previously set forth, it did. Nevertheless, Cohen never requested the opportunity to appear before the Board upon such receipt.

Nowhere in his moving papers, in my view, does Cohen assert that his letter of resignation was coerced, resulted from misrepresentation or fraud, or was for any other reason not a voluntary, intentional reflection and manifestation of his intention that he wished to effectively terminate his employment with the Board effective at the end of the school year. There is no issue of any substance at all regarding Cohen's letter to the Board of May 9, 2002 advising, "Please accept this letter as notice of my intention to retire from the district effective July 1, 2002." Accordingly, I explicitly **FIND** that pursuant to Cohen's letter dated May 9, 2002, he resigned from the district, was no longer a teaching staff member as that term is defined by the New Jersey school laws and thus he relinquished any rights that would have otherwise accrued to him had he merely been the recipient of a letter from the district indicating that his annual contract would not be renewed. No one, including the district, would argue that had Mr. Cohen not resigned from his position, he would have been accorded those rights under the statute. In addition, as was noted, in an effort to at least "stop the bleeding," the Board provided Mr. Cohen with the statement of reasons for his non-renewal by letter of August 2, 2002. The letter notes in passing that the basis of the decision not to renew included: (1) his attitude towards his work, his

coworkers, students and parents; (2) his failure to accept and act on constructive criticism; and (3) his nonchalant reaction and response to parents of students frequently requesting that he be removed as a counselor assigned to their child. Chronologically, it will be recalled that Cohen was advised by the Middlesex board and superintendent the fact that his employment would not be renewed for the school year 2002-2003 by letter of April 30, 2002. Only some nine days later, Cohen submitted his letter of resignation. The fact that he refers to his intent to retire does in no way diminish the impact of his letter as a clear unequivocal expression on his part that he is resigning on his own behalf.

Nevertheless, attached to her reply brief of March 17, 2003, counsel for Middlesex provides an affidavit submitted by the school business administrator for the Board, Ms. Michele Previte. In regard to the assertion that Mr. Cohen received workers compensation benefits, the Board through its administrator indicates that Cohen did file for unemployment compensation and the administrator contested that claim. Nevertheless, following a telephonic hearing, it was the determination of the hearing examiner that Cohen was entitled to unemployment compensation. The examiner found that Cohen resigned because he knew he would be terminated.

In my view, that determination has no direct bearing on the issue before me. The fact that Cohen collected unemployment compensation benefits because the hearing examiner concluded that his resignation was an anticipation of termination in no way vitiates the validity of his resignation as it relates to procedural due process that he would otherwise have been accorded absent such resignation.

The only authority cited is offered on behalf of the district which articulates the proposition that an acceptance by a board of education of a resignation is an irrevocable termination of the employment relationship between the teaching staff member and the board. *See Cutro v. Board of Education of Hazlet*, 94 *N.J.A.R.*2d (EDU 402); *Andrews v. Lamb*, 136 *N.J.L.* 548 (Sup Court 1948). Thus, by resigning his position some nine or ten days after he received notice by the Board that it would not renew his contract for the following school year, Cohen relinquished any rights that may have otherwise accrued to a non-tenured teaching staff member who sought to challenge his non-renewal. That the letter of resignation may have been

prompted by the fact that he was advised his contract would not be renewed does in no way vitiate the fact that the resignation was a voluntary, uncoerced, knowing relinquishment of his job. That the motive may have been to avoid what may have followed a informal proceeding before the Board is of no consequence in these proceedings. Accordingly and based upon the foregoing, I **CONCLUDE** that the respondent has demonstrated that the requirements for granting summary decision have been met. Accordingly, it is **ORDERED** that the petition of Mr. Cohen be and is hereby **DISMISSED.**

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

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

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

3/18/03
DATE

Steven Reback, ALJ
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

March 21, 2003
DATE

M. Kathleen Duncan (ka)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 6787-02
AGENCY DKT. NO. 307-9/02

JERRY COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY, AND PATRICIA JOHNSON, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner, as were replies by the Board of Education (Board). Petitioner's response to the Board's submission is not considered herein, since no provision is made for such filings by applicable rule, *N.J.A.C.* 1:1-18.4.

Upon review, the Commissioner observes that petitioner's arguments on exception hinge in their entirety upon his central contention, purportedly overlooked in the Initial Decision, that once petitioner was notified of his impending nonrenewal, any action he may have subsequently taken to "resign" or "retire" cannot be considered to have terminated his relationship with the Board so as to free it from its statutory obligations to nontenured persons whose employment is not recommended for renewal. However, the Commissioner determines that the Initial Decision has, in fact, adequately and correctly addressed petitioner's claims, through findings and conclusions with which the Commissioner fully concurs.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/1/03

Date of Mailing: 5/1/03

[1] For technical accuracy, the Commissioner clarifies that *N.J.S.A.* 18A:27-3.2 provides that a written statement of reasons may be *requested* by the affected employee within 15 days, not that the employee shall be *given* such a statement within that time (Initial Decision at 6).

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

IN THE MATTER OF THE DIVISION OF :
ASSETS AND LIABILITIES AMONG THE :
CONSTITUENT DISTRICTS OF LOWER :
CAMDEN COUNTY REGIONAL HIGH :
SCHOOL DISTRICT NO. 1, CAMDEN COUNTY.:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, Township of Waterford, appealed the Camden County Superintendent of Schools' distribution of assets and liabilities of the Lower Camden County Regional High School District resulting from the dissolution of the Regional district.

The ALJ found that the undisputed financial data submitted by petitioner substantiated that the non-building districts were treated disproportionately and inequitably when compared to the building districts. *Citing Union County,* the ALJ determined that deviation from the distribution formula in the County Superintendent's Report was necessary to correct the inequities. Moreover, the ALJ found that no binding agreement existed pertaining to the distribution of the liquid assets. The ALJ concluded that although not perfect or fair, the redistribution of the liquid assets from the building districts to the Waterford Board of Education was reasonable and consistent with the spirit and intent of *Union County.* The ALJ found that the County Superintendent's Report should be modified and additional liquid assets should be redistributed only to Waterford and not to the other non-building districts because the other three non-building districts obtained a benefit from their send/receive relationships. The redistribution of an additional $2,809,011 should be paid to Waterford in five yearly installments commencing June 1, 2003.

The Commissioner modified the Initial Decision. The Commissioner concurred with the ALJ that the facts of the matter justify a deviation from the asset distribution ordered in the County Superintendent's Report as authorized by the Court in *Union County.* The Commissioner, however, could not accept the ALJ's position that involvement in a send/receive relationship constituted a quantifiable asset, which must be factored into a redistribution plan. The Commissioner found that the most equitable allocation would be to divide the total liquid assets among the four non-building districts in proportion to the percentages of school taxes that each of those non-building districts paid to the former regional district, without regard to the contributions of the building districts. Each building district shall make payments in five equal, annual installments commencing July 1, 2004 to each of the non-building districts according to the five-year installment payment schedule.

May 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 328-02

AGENCY DKT. NO. 418-10/01

IN THE MATTER OF THE DIVISION OF ASSETS AND LIABILITIES AMONG THE CONSTITUENT DISTRICTS OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1

John R. Armstrong, Esq., for petitioner Township of Waterford (Cooper, Perskie, April, Niedelman, Wagenheim & Levenson, attorneys)

Allison C. Eck, Deputy Attorney General, for respondent Camden County Superintendent of Schools (Peter C. Harvey, Acting Attorney General for the State of New Jersey)

Howard C. Long, Jr., Esq., for respondent Waterford Township Board of Education (Higgins, Long & Bonfiglio, attorneys)

Anthony Padovani, Esq., for respondent Pine Hill Board of Education (Sahli & Padovani, attorneys)

Robert A. Muccilli, Esq., for respondents Berlin Township Board of Education and the Borough of Clementon Board of Education (Capehart Scatchard, attorneys)

David M. Serlin, Esq., for respondent Winslow Township Board of Education

Richard K. Tavani, Esq., for respondent Winslow Township (Weber, Gallagher, Simpson, Stapleton, Fires & Newby, attorneys)

Robert J. Borbe, Esq., for respondent Lindenwold Board of Education

Harvey C. Johnson, Esq., for respondent Borough of Chesilhurst

Emmett E. Primas, Jr., Esq., for respondent Chesilhurst Board of Education

Record Closed: January 31, 2003 Decided: March 6, 2003

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 5, 2001, petitioner, Township of Waterford ("Waterford"), filed an action with the Department of Education, Bureau of Controversies and Disputes, challenging the Camden County superintendent of school's proposed distribution of assets and liabilities of the Lower Camden County Regional High School District ("Regional District") resulting from the dissolution of the Regional District. The Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law ("OAL") on January 30, 2002, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Answers to the petition were filed by various governmental agencies, including Pine Hill Borough and Board of Education, Winslow Township and Board of Education, and Chesilhurst Borough and Board of Education, and by the Camden County superintendent of schools, Daniel Mastrobuono (hereinafter "superintendent"). The director of the OAL assigned the undersigned to hear this matter, and a prehearing conference was held on June 5, 2002. As a result of the prehearing conference the parties agreed to submit the contested issues in summary fashion. The parties were permitted to request an evidential hearing and, if no requests were received prior to January 31, 2003, the matter would be decided on the papers.

On September 16, 2002, the Pine Hill Board of Education ("Pine Hill") filed a motion seeking to stay the superintendent's proposed distribution of certain non-building assets, or liquid assets, to the constituent districts, as more particularly set forth in the superintendent's June 30, 2001, Report on the Division of Assets and Liabilities Among the Constituent Districts of Lower Camden County Regional High School District No. 1. (Armstrong Certification, Exhibit E, hereinafter "Report"). Opposition to the motion for a stay was filed by the Waterford Township Board of Education. Additionally, the Waterford Township Board of Education filed a cross-motion for summary decision seeking payment of the funds due the Waterford Township Board

of Education pursuant to the superintendent's Report. The remaining parties took no position or relied upon the moving papers and arguments offered by Pine Hill and Waterford.

Oral argument was heard on November 20, 2002, at the OAL in Atlantic City, New Jersey, and the record for the motion for interim relief and cross-motion for summary decision closed on that date. On November 25, 2002, an Order was entered **DENYING** Pine Hill's motion to stay the first installment, and the Waterford Board of Education's cross-motion seeking to compel payment was **GRANTED**.

SUMMARY OF UNDISPUTED MATERIAL FACTS

In October 1997 a majority of the constituent municipalities and boards of education petitioned the Commissioner of Education for the dissolution of the Regional District. *N.J.S.A.* 18A:13-54. The Commissioner submitted the petition to the Board of Review, which on January 8, 1998, decided that the petition should be granted and, therefore, that the question of dissolution should be submitted to the voters of the constituent districts. *N.J.S.A.* 18A:13-56; Armstrong Certification, Exhibit A. The referendum read as follows:

Referendum Question

> Should the Lower Camden County Regional High School District No. 1 be dissolved on a date to be determined by the Commissioner of Education?

Interpretive Statement

> If approved, the dissolution of the Lower Camden County Regional High School District No. 1 will result in all constituent districts having the responsibility of providing for a K-12 education.
>
> By law, each constituent district, upon dissolution, takes title to and control of all schools grounds, buildings and furnishings situated therein. Therefore, Lindenwold will acquire the Overbrook Junior High School facility; Pine Hill will acquire the Overbrook Senior High School facility, and Winslow Township will acquire the Edgewood Senior and Edgewood Junior High School facilities.

> No capital indebtedness will be assumed by any of the constituent districts upon dissolution. Therefore, dissolution will have no effect on the borrowing margin of any constituent district.
>
> [Armstrong Certification, Exhibit C.]

On May 12, 1998, a majority of the voters of the constituent districts of the Regional District approved a referendum dissolving the regional high school district. *N.J.S.A.* 18A:13-54. Following the voter approval, the Commissioner of Education set June 30, 2001, as the effective date of dissolution of the Regional District. *See* Report at 1. On June 30, 2001, the superintendent issued a Report setting forth how the assets (both building and non-building) of the Regional District would be distributed. *N.J.S.A.* 18A:8-24; *N.J.S.A.* 18A:13-62. The Regional District owned six buildings as well as the land on which each is situated. The buildings were identified as Overbrook High School, Overbrook Junior High School, Edgewood High School, Edgewood Junior High School, the district's administrative offices, and the so-called MIS Building, which housed the Regional District's computer system. Report at 2. There was no outstanding bonded indebtedness incurred by the Regional District as of June 30, 2001. Report at 3; Armstrong Certification, Exhibit G at RFA 10. The Report concludes that the building assets shall remain where they are situated and the shared or rotated assets (liquid assets) shall be fairly apportioned among the constituent districts. *N.J.S.A.* 18A:13-61. The superintendent valued the shared or liquid assets at $8.4 million and the building assets at $62.3 million. The most recent appraisals valued the land and buildings as follows:

BUILDING	VALUE
Overbrook HS	$19,923,563
Overbrook JHS	$13,153,941
Edgewood JHS	$13,104,909
Edgewood HS	$15,372,305
Admin. Office Bldg.	$800,000
MIS Building	Unappraised
TOTAL	**$62,354,718**

[Pet'r Br. at 12, Table 1: Value of regional district real estate]

The building assets were allocated by statute to the three "building districts," which were Lindenwold, Pine Hill and Winslow. The Regional District had no real estate in the four "non-building districts," which were Berlin Township, Chesilhurst, Clementon, and Waterford Township. Report at 2. The liquid assets remained with the respective building districts and therefore the superintendent allocated a portion of the value of the liquid assets to the non-building districts in order to equalize the distribution. The Regional District's six buildings are equipped with a substantial amount of personal property, that is, office equipment and furniture necessary to administer each school, *e.g.*, audio-visual, athletic, vocational training, science and musical equipment; library books; vehicles, etc. (again, the "liquid assets"). Report at 6. The superintendent noted that there are no significant liabilities to be apportioned among the districts and therefore the building assets were conveyed to the building districts debt free. The superintendent valued the liquid assets, after adjustments for various offsetting capital outlays, at $8,469,326. Report at Exhibit C. Pursuant to *N.J.S.A.* 18A:13-62 and -24, the superintendent distributed the liquid assets to all seven constituent districts in proportion to the amount each contributed to the overall tax levy for the Regional District as of school year 2000-2001. This was the last year the school tax was recalculated, and the calculations were as follows:

DISTRICT	% TAX CONTRIBUTION	ENTITLEMENT
Berlin Township	9.7021026	$821,703
Chesilhurst	1.4751950	$124,939
Clementon	5.4888015	$464,864
Lindenwold	14.9252315	$1,264,067
Pine Hill	8.3458839	$706,840
Waterford Township	16.3416574	$1,384,028
Winslow Township	43.7211281	$3,702,885
TOTAL		**$8,469,326**

[Pet'r Br. at 13, Table 2: Constituent district tax contribution and liquid asset entitlement]

The superintendent also noted that "[s]hould any controversy arise after the issuance of this report, all parties notwithstanding will have the ability to file a petition of appeal pursuant to N.J.A.C. 6A-3.1." Report at 9. The only party to formally file a petition contesting the superintendent's Report and proposed allocation of assets and liabilities was Waterford Township.

LEGAL ANALYSIS

Petitioner seeks to have the superintendent's June 30, 2001, liquid asset distribution formula modified and all of the liquid assets redistributed to the non-building districts. Respondents assert that any redistribution of the liquid assets is contrary to: 1) the applicable statutes, *N.J.S.A.* 18A:8-24, 18A:13-61 and 18A:13-62; 2) the controlling case law, *In re the Distribution of Liquid Assets Upon Dissolution of the Union County Regional High School District No. 1, Union County*, 168 *N.J.* 1 (2001) (hereinafter "*Union County*"); and 3) an alleged informal but unexecuted agreement between the constituent districts.

At the prehearing conference held on June 5, 2002, the parties agreed that the following issues should be considered:

> 1. Whether the proposed plan of distribution by the County Superintendent of Schools dated June 30, 2001, meets the requirements of the statute and related case law and therefore should be upheld?
>
> a. Are there any procedural grounds or estoppel arguments precluding the filing of the petition?
>
> 2. If the proposed plan of distribution by the County Superintendent does not meet the requirements of the relevant statutes and case law, what method of distribution would be fair and equitable and should that be determined by the ALJ or referred to the Department of Education?
>
> [Prehearing Order dated June 11, 2002.]

The dissolution of a regional school district is governed by *N.J.S.A.* 18A. The county superintendent of schools is charged with dividing the assets and liabilities among the constituent districts pursuant to *N.J.S.A.* 18A:13-63, which provides in pertinent part as follows:

> Upon the effective date of a dissolution of a regional district each constituent municipality shall thenceforth be constituted a separate local school district and be governed by the laws applicable thereto, **and its assets and liabilities shall devolve upon the respective constituent districts in accordance**

> **with the division made by the county superintendent as provided in section 12 of P.L.1975, c. 360 (C.18A:13-62).**
>
> [Emphasis added.]

In the case of a dissolution of a regional school district, the districts where the building assets are located shall take title to same and the superintendent shall give due consideration to the value of the buildings allocated to those districts when dividing the remaining rotated or liquid assets. In this regard, *N.J.S.A.* 18A:13-61 provides:

> The withdrawing district and the remaining districts, or each constituent district in the event of a dissolution, shall take title to and control of all school grounds and buildings, and the furnishings and equipment therein, other than those which had been rotated or shared among the regional schools, situated in their respective districts on the effective date of withdrawal or dissolution as established by the commissioner. **The county superintendent shall allot a fair proportion of the shared or rotated furnishings and equipment to the withdrawing district or to each of the constituent districts in the event of a dissolution.**
>
> . . . In the event of a dissolution, the county superintendent and board of review, in determining the amount of indebtedness to be assumed by each constituent district, **shall give due regard to the value of school buildings and grounds being conveyed to the constituent district in which those buildings and grounds are located.**
>
> [Emphasis added.]

The county superintendent is required to file a report making a division of the assets and liabilities, if any. The scope of the superintendent's duties and the asset distribution formula are set forth in *N.J.S.A.* 18A:8-24, which states:

> The county superintendent in a written report filed by him at the end of the school year preceding that in which the new district is created shall make a division of the assets, except school buildings, grounds, furnishings and equipment, and of the liabilities, other than the bonded indebtedness of the original district, between the new district and the remaining district on the

> basis of the amount of the ratables in the respective districts on which the last school tax was levied, and in determining the amount of assets to be divided, he shall take into account the present value of the school books, supplies, fuel, motor vehicles and all personal property other than furnishings and equipment. In the case of any vehicle used for the transportation of school children, the original cost of the vehicle, less any state aid appropriated therefor, shall be deemed to be the present value.

The superintendent, respondent building districts Pine Hill, Lindenwold and Winslow and respondent non-building districts Berlin and Clementon argue that the superintendent properly fulfilled his statutory duty. They further assert that petitioner's reliance upon *Union County* is misplaced. There is no dispute regarding the superintendent's valuation of the liquid assets.

In discharging his duties, the superintendent must prepare a report that values and divides the assets and liabilities. *N.J.S.A.* 18A:13-62. Thereafter, the superintendent is required to allot a "fair proportion" of the liquid assets "to each of the constituent districts." *N.J.S.A.* 18A:13-61. Respondents assert that it is an imperfect process that will not always result in an equitable distribution. But, so long as the distribution methodology is executed in accordance with the statute(s) and the corresponding distribution is fair, the superintendent's report is entitled to great weight and should not be disturbed. The superintendent is only fulfilling the will of the Legislature and to that extent a court should not substitute its judgment. *Roman Check Cashing, Inc. v. Department of Banking and Ins.*, 169 *N.J.* 105 (2001); *New Jersey v. Freysinger*, 311 *N.J. Super.* 536, 542 (Ch. Div. 1994). There is no dispute that the superintendent fulfilled the procedural obligations pursuant to the applicable statutes. The real issue in this matter is what does *Union County* stand for and how does it affect this case?

In *Union County, supra*, 168 *N.J.* 1, the New Jersey Supreme Court was confronted with a challenge to the distribution of liquid assets following the dissolution of the Union County Regional High School District No. 1. The district possessed approximately $110 million in real property or building assets and $3.3 million in liquid assets. The real property was located in four out of the six constituent districts. The superintendent correctly allocated the building assets among the constituent districts where the building assets were situated. In *Union County*, as in the present matter, there was no significant debt to be allocated such that the distribution of

assets could be equalized by re-allocating debt. Only the liquid assets were available to equalize the distribution. The Union County superintendent recommended that the non-building districts "receive all liquid assets of the Regional District." 168 *N.J.* at 5. The State Board of Education, Board of Review, rejected the superintendent's report and allocated the liquid assets to all six municipalities. The Appellate Division affirmed. The New Jersey Supreme Court reversed and clarified the purpose of the legislation. The Court stated:

> The legislative history and the statutory scheme for dissolution of regional districts illustrate clearly that the **overriding goal of the statutory scheme is to distribute equitably** the regional district's assets and liabilities.
>
> [*Id.* at 15; emphasis added.].

In *Union County* the Court reversed the allocation made by the agency and allocated all of the $3.3 million of liquid assets to only the non-building districts. The Court corrected significant inequities in the agency's asset allocation. The Court found that there were overriding or compelling circumstances. The decision corrected misconceptions connected with the agency's interpretation of the relevant statute(s) because the agency's interpretation produced an unfair result. The Court noted:

> The "fundamental consideration" in reviewing agency actions "is that a court may not substitute its judgment for the expertise of an agency 'so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.' " *Williams v. Dep't of Human Servs.*, 116 *N.J.* 102, 107, 561 *A.*2d 244 (1989) (quoting *Dougherty v. Dep't of Human Servs.*, 91 *N.J.* 1, 12, 449, *A.*2d 1235 (1982)). . . . We are, however, "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," *Mayflower Sec. Co. v. Bureau of Sec.*, 64 *N.J.* 85, 93, 312 *A.*2d 497 (1973), and we will intercede if the agency's action exceeds the bounds of its discretion. *In re Taylor*, 158 *N.J.* 644, 657, 731 *A.*2d 35 (1999) (noting that "an appellate court's review of an agency decision is not simply a *pro forma* exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence"); *L.M. v. State Div. of Med. Assistance and Health Servs.*, 140 *N.J.* 480, 490, 659 *A.*2d 450 (1995) ("When an agency's decision is manifestly mistaken . . . the interests of

> justice authorize a reviewing court to shed its traditional deference to agency decisions.").
>
> [*Id.* at 10-11.]

Respondents argue that the *Union County* decision turned on contract-related issues and is not a clear precedent to depart from the statutory distribution formula proposed by the superintendent. In the Court's holding, it acknowledged that the *Union County* parties agreed upon a predistribution formula ("agreement") that represented a more equitable assets allocation. The Court considered the predistribution agreement as a factor in its decision, but again reiterated the overriding purpose of the statutory framework, and held:

> **Given the obvious purpose of the statutory scheme to distribute assets and liabilities equitably, and the generalized assumption in the statute that debt allocation is a sufficient mechanism for ensuring equity**, we are persuaded that in these circumstances insistence on strict application of the asset distribution scheme in *N.J.S.A.* 18A:8-24 is unwarranted, particularly where, as here, the parties entering into dissolution have agreed to an alternative liquid asset distribution formula that represents a more equitable asset allocation. **To hold otherwise would be to ignore the clear overriding purpose of the statutory framework in favor of ritualistic application of statutory language divorced from context**. "In discharging our interpretive responsibility, we are admonished that 'each part or section [of the statute] should be construed in connection with every other part or section so as to produce a harmonious whole,' and that 'it is not proper to confine interpretation to the one section to be construed.'" *In re Passaic County Utilities Auth. Petition Requesting Determination of Financial Difficulty and Application for Refinancing Approval,* 164 *N.J.* 270, 300, 753 *A.*2d 661 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.05 at 103 (5th ed. 1992)).
>
> [*Id.* at 17; emphasis added.]

The decision in *Union County* made it abundantly clear that the "statutory framework permits deviation from the asset distribution formula." *Id.* at 18.

The facts in the instant matter are compelling and, likewise, justify judicial deviation from the asset distribution formula in the Report. Petitioner's Table 3 depicts the disparity created by the formula used by the superintendent:

DISTRICT	REAL ESTATE REC'D	LIQUID ASSETS REC'D	TOTAL ASSETS REC'D	% REG. DISTRICT ASSETS REC'D	% TAX CONTRIB.	PRO RATA VALUE OF TOTAL ASSETS BY % TAX CONTRIB.	GAIN/LOSS
Berlin Twp.	$0	$821,703	$821,703	1.16	9.7021026	$6,871,421	($6,049,719)
Chesilhurst	$0	$124,939	$124,939	0.18	1.4751950	$1,044,793	($919,854)
Clementon	$0	$464,864	$464,864	0.66	5.4888015	$3,887,391	($3,422,527)
Lindenwold	$13,153,941	$1,264,067	$14,418,008	20.36	14.9252315	$10,570,653	$3,847,355
Pine Hill	$19,923,563	$706,840	$20,630,403	29.13	8.3458839	$5,910,892	$14,719,511
Waterford Twp.	$0	$1,384,028	$1,384,028	1.95	16.3416574	$11,573,823	($10,189,794)
Winslow Twp.	$29,277,214	$3,702,885	$32,980,099	46.57	43.7211281	$30,965,071	$2,015,028
TOTAL	**$62,354,718**	**$8,469,326**	**$70,824,044**	**100.00**	**100.00**	**$70,824,044**	

[Pet'r Br. at 14, Table 3: Total assets received compared with percentage of taxes paid]

Petitioner's Table 3 illustrates that the non-building districts are being treated substantially different than the building districts. For instance, Waterford contributed 16.34% towards the cost of the Regional District's total assets, based upon its percentage of tax contributions, and it is receiving 1.95% back upon dissolution. Waterford is incurring a $10.1 million loss. The same is true for the remaining non-building districts. Each non-building district is receiving significantly less than what it contributed in terms of percentages and real dollars. Conversely, the building districts are reaping significant gains in percentage terms and in real dollars. For example, Pine Hill contributed 8.34% towards the cost of the Regional District's total assets, based upon its percentage of tax contributions, and it is receiving 29.13% back upon dissolution. Pine Hill will reap a $14.7 million gain. Clearly, the undisputed financial data confirms that the distribution formula used by the superintendent created an unfair and inequitable result. This scenario is almost identical to the one in *Union County*.

In *Union County* the superintendent set out to avoid just such a result by allocating all of the liquid assets to the non-building districts in his initial report. He recognized the disparity and made the appropriate adjustments to properly correct inequities. The Commissioner of Education and the Board of Review chose not to follow the superintendent's recommendation, but the New Jersey Supreme Court's decision in *Union County* made clear that deviation from the strict

statutory formula is not only permissible but is required when inequity is present. 168 *N.J.* at 17. The Court stated:

> First, does the statutory scheme allow for deviations? And if so, did the State Board err in not ordering a deviation from the statutory scheme in this case? We answer both of those questions in the affirmative.
>
> [*Id.* at 15.]

Here, I **FIND** that the undisputed financial data submitted by petitioner substantiates that the non-building districts were treated disproportionately and inequitably when compared to the building districts. I further **FIND** that the financial data submitted by petitioner is sufficiently similar to the data in *Union County*, and therefore deviation from the distribution formula in the superintendent's Report is necessary to correct the inequities.

Respondents Berlin and Clementon argue that any further redistribution is prohibited by an informal, unexecuted agreement. Respondents note that all of the districts had various meetings leading up to the completion of the superintendent's Report, and they reached an informal agreement to receive their entitlement of the liquid assets rather than the hard assets themselves. Many financial considerations were discussed at these meetings and there was an informal, unsigned agreement not to contest the proportionate distribution of the liquid assets to all of the districts. Resp'ts Berlin/Clementon Br. at 6. Respondents support this argument by reference to the superintendent's Report, Exhibit I, which is a document entitled "DIVISION OF ASSETS AGREEMENT."

There are however, glaring facts that refute the assertion that an agreement existed among the districts concerning the distribution of the liquid assets. First, the agreement is not signed by all of the districts. This is undisputed and does not weigh heavily in support of the assertion that there was a meeting of the minds. Moreover, no other writing(s) were offered that reflect a meeting of the minds regarding this material provision. Finally, the superintendent incorporated the unexecuted agreement as part of his June 30, 2001, Report (Exhibit I). Paragraph 12 of the document, entitled "Binding Agreement," states, "This Agreement shall benefit and be binding

upon the Districts and their respective successors and permitted assigns. However, the parties recognize that there currently exists litigation brought by the Township of Waterford to obtain a share of the Building Assets and the parties agree, notwithstanding the foregoing sentence, to be bound by a final decision rendered in the litigation." The superintendent's June 30, 2001, Report and the draft agreement annexed thereto (Exhibit I) show that a controversy existed over the distribution of the assets before June 30, 2001. In fact, petitioner forwarded a letter to the superintendent on June 7, 2001, requesting that the final distribution of the liquid assets be made only to the non-building districts. Resp't Winslow's Br., Exhibit 1. Further, the referendum question posed to the voters did not contain any specific language that could be construed as a binding commitment to distribute the liquid assets one way or another.

In order for there to have been an enforceable oral agreement, there would have to have been an unequivocal acceptance of an offer (or a commitment), with the intent to be bound, incorporating mutually agreeable terms and conditions. *Weichert v. Ryan*, 128 *N.J.* 427, 435 (1992). The lack of a signed agreement, the confirmation of an existing dispute as of June 7, 2001, the confirmation of a dispute in the draft agreement appended to the superintendent's Report, and the lack of any other evidence leave no doubt that an enforceable oral agreement did not exist. Similarly, the referendum question did not bind the parties to a particular distribution plan. Accordingly, I **FIND** that no binding agreement existed pertaining to the distribution of the liquid assets.

Like Waterford, Berlin and Clementon are non-building districts, but they oppose the redistribution of liquid assets as proposed by Waterford. Berlin and Clementon are in send/receive relationships with a former building district (Pine Hill). The existence of a send/receive relationship between most of the constituent districts is a fact that was not present in *Union County*. Waterford is the only non-building district in this matter that is not in a post-dissolution send/receive relationship with a former building district. Based upon these differences in post-dissolution relationships, the interests of all of the non-building districts are not the same and, thus, this matter must be approached differently from *Union County* in this respect.

Berlin and Clementon assert that any change in the June 30, 2001, distribution of the liquid assets will adversely affect the former building districts. They argue that any cost increase visited upon the building districts will be passed through to the non-building districts in a send-receive relationship as increased tuition. But, the send/receive relationship results in another significant distinction that must be considered. Upon dissolution of the Regional District, a constituent district in a send/receive relationship derives a continuing benefit from the liquid assets bestowed upon the building district with which it has the send/receive relationship. The particular relationships before and after the dissolution are depicted in the superintendent's Report, at page 2, as follows:

Configuration of Building Districts/Sending Receiving Before Dissolution

Lower Camden County Regional Prior to July 1, 2001 Grades 7-12	Constituent Districts Prior to July 1, 2001 Grades K-6
Buildings	
District Admin. Offices Edgewood High School Edgewood Jr. High School MIS Building Overbrook High School Overbrook Jr. High School	Berlin Twp. Chesilhurst Clementon Lindenwold Pine Hill Waterford Winslow

Configuration of Building Districts/Sending Receiving for 7/1/01 to 6/30/02

Lindenwold School District 7/1/01 to 6/30/02 Grades K-11	Pine Hill School District 7/1/01 to 6/30/02 Grades K-12	Winslow School District 7/1/01 to 6/30/02 Grades K-12
Buildings From Dissolution	Buildings From Dissolution	Buildings From Dissolution
Overbrook Jr. High School	Overbrook Sr. High School MIS Building	Edgewood Jr. High School Edgewood Sr. High School District Admin. Building
Receiving Districts	Receiving Districts	Receiving Districts
NONE	Berlin Twp. Gr. 9-12 Clementon Gr. 9-12 Lindenwold Gr. 12 only Winslow Gr. 12 only	Chesilhurst Gr. 7-12 Waterford Gr. 8, 9, 10, 12*

* Waterford School District, after June 30, 2002, will send all students from grades seven through twelve to Hammonton School District in Atlantic County.

Configuration of Building Districts/Sending Receiving After 6/30/02

Lindenwold School District 7/1/01 to 6/30/02 Grades K-12	Pine Hill School District 7/1/01 to 6/30/02 Grades K-12	Winslow School District 7/1/01 to 6/30/02 Grades K-12
Buildings From Dissolution	Buildings From Dissolution	Buildings From Dissolution
Overbrook Jr. High School	Overbrook Sr. High School MIS Building	Edgewood Jr. High School Edgewood Sr. High School District Admin.
Receiving Districts	Receiving Districts	Receiving Districts
NONE	Berlin Twp. Gr. 9-12 Clementon Gr. 9-12	Chesilhurst Gr. 7-12

The newly formed districts are comprised of sending and receiving districts from the former Regional District. As such, they are equipped with proportionate shares of the buildings and related liquid assets from the former Regional District. Therefore, non-building districts that form a send/receive relationship with a building district are treated more fairly or equitably because they continue to derive a benefit from the assets they purchased. The newly formed configuration encompasses a proportionate share of the liquid assets from the Regional District. This alleviates the need for the new school district to purchase new assets. It also avoids added costs being passed through to the sending districts, which include the non-building districts. The net result is that non-building districts that have joined up with building districts will receive two benefits, that is, 1) the proportionate share of liquid assets cashed out and distributed through the superintendent's formula, and 2) the continued use of the assets retained by the building district through a newly formed send/receive relationship.

On the other hand, a non-building district that does not form a send/receive relationship with a building district does not receive the same proportionate benefit of the liquid assets from the Regional District. Rather, it must forge a new relationship outside of the former Regional District. This increases costs for the new or foreign receiving district. For example, Waterford now sends its students to the Hammonton district. Hammonton was not part of the Regional District and therefore must acquire sufficient liquid assets to serve the influx of new students from Waterford. There are significant costs incurred by Hammonton to accommodate the new students from Waterford, and these costs must be passed through to Waterford. Moreover,

Waterford does not benefit from the continued use of the liquid assets it purchased during its relationship with the former Regional District. Therefore, Waterford receives a smaller portion of distributed assets than it contributed as a percentage of ratables.

Accordingly, I **FIND**, based upon the facts of this matter, that a non-building district that does not form a send/receive relationship with a former building district does not proportionately share in the liquid assets of the dissolved Regional District because it must create a new send/receive relationship with a foreign district. I further **FIND** that when a non-building district has established a send/receive relationship with a building district of the Regional District, that relationship must be factored into the distribution formula. In the present matter, Berlin, Chesilhurst and Clementon are receiving a proportionate share of the liquid assets from the Regional District by virtue of the cash distributed by the superintendent combined with ongoing relationships with former building districts, through which they benefit from the building districts' liquid assets. As a consequence of the cash distribution and ongoing relationships, they are being treated fairly and equitably. It would serve no practical purpose to redistribute additional cash to the non-building districts that have formed send/receive relationships with former building districts and thereafter have that money passed through as higher tuition. This would be an inefficient remedy.

I **FIND** and **CONCLUDE** that Berlin, Chesilhurst and Clementon, as non-building districts, are in send/receive relationships with former building districts and therefore are benefiting from the liquid assets at issue. These relationships and corresponding benefits are sufficient and do not justify redistributing the liquid assets. I therefore **FIND** that these districts were treated fairly and equitably. Also, I note that Berlin and Clementon fully participated in the briefing process and oppose redistribution because of the financial impact redistribution would have.

REMEDIES

Having concluded that the applicable statutes and decisional law require redistribution of the liquid assets, consideration must be given to how much redistribution is required. The inequities and corresponding analysis for relief are best illustrated by the various tables submitted

by petitioner. Petitioner's Tables 4, 5 and 6 show the relative tax contributions and other related data for purposes of this analysis:

Non-Building District	% Tax Paid to Regional District	% of Proportional Total
Berlin Twp.	9.7021026	29.39
Chesilhurst	1.4751950	4.47
Clementon	5.4888015	16.63
Waterford Twp.	16.3416574	49.51
TOTAL	**33.0077565**	**100.00**

[Pet'r Br. at 15, Table 4: Proportional distribution of school taxes for non-building districts]

Non-Building District	% Tax Paid to Regional District	% of Proportional Total	Liquid Assets After Redistribution	Liquid Assets Before Redistribution	Increase
Berlin Twp.	9.7021026	29.39	$2,489,423	$821,703	$1,667,720
Chesilhurst	1.4751950	4.47	$378,514	$124,939	$253,575
Clementon	5.4888015	16.63	$1,408,349	$464,864	$943,485
Waterford Twp.	16.3416574	49.51	$4,193,039	$1,384,028	$2,809,011
TOTAL	**33.0077565**	**100.00**	**$8,469,326**		

[Pet'r Br. at 15, Table 5: Liquid assets for non-building districts before and after redistribution]

District	Real Estate	Liquid Assets After Redistribution	Total Assets	% Total Assets Received After Redistribution	% Tax Paid to Regional District	% Total Assets Received Before Distribution
Berlin	$0	$2,489,423	$2,489,423	3.51	9.7021026	1.16
Chesilhurst	$0	$378,514	$378,514	0.53	1.4751950	0.18
Clementon	$0	$1,408,349	$1,408,349	1.99	5.4888015	0.66
Lindenwold	$13,153,941	$0	$13,153,941	18.57	14.9252315	20.36
Pine Hill	$19,923,563	$0	$19,923,563	28.13	8.3458839	29.13
Waterford Twp.	$0	$4,193,039	$4,193,039	5.92	16.3416574	1.95
Winslow Twp.	$29,277,214	$0	$29,277,214	41.34	43.7211281	46.57
TOTAL	**$62,354,718**	**$8,469,326**	**$70,824,044**	**100.00**	**100.00**	**100.01**

[Pet'r Br. at 16, Table 6: Summary of assets distribution, with and without redistribution of liquid assets]

As the data shows, Waterford seeks to increase its proportional share of the total assets from 1.95% to 5.92%. Table 6. In real dollars the increase is significant. The redistribution would increase Waterford's share of the distribution from $1.3 million to $4.1 million, for a total increase of $2.8 million. Table 5. The redistribution would provide Waterford with 5.92% of

the assets after redistribution, whereas it contributed 16.34% towards the acquisition of these assets. Waterford would still realize a loss even upon redistribution. On balance, the redistribution sought by Waterford would better equalize the overall distribution to all parties. Upon redistribution, as shown in Table 6, the building districts would incur a slight loss rather than significant gains. *Compare* Table 6 *with* Table 3. For example, Winslow would receive 41.34% after redistribution compared with its contribution of 43.72%. Pine Hill would still reap a significant gain (8.34% contributed and 28.13% returned). Waterford would still realize a significant loss, but an increase from 1.95% to 5.92% would be more equitable and would move all of the constituent districts closer to parity. The tools or devices available to equalize the distribution of assets held by a regional school district are very limited, as recognized in *Union County*. Although not perfect or fair, the redistribution of some of the liquid assets from the building districts to Waterford is reasonable and consistent with the spirit and intent of *Union County*.

I **FIND** that petitioner has established by the preponderance of the credible evidence that the superintendent's June 30, 2001, Report containing the distribution of liquid assets from the Regional District should be modified and the liquid assets should be redistributed in accordance with the decision in *Union County*. The redistribution should be made only to Waterford and not to the other non-building districts because of their send/receive relationships.

DECISION AND ORDER

For the reasons set forth above, it is hereby **ORDERED** that the motion for partial summary decision filed by petitioner, seeking redistribution of the liquid assets to the non-building district of Waterford Township, is **GRANTED**. Waterford shall be awarded 5.92%, or $4,193,039, out of the total assets distributed to the constituent districts. The net increase of $2,809,011 shall be redistributed from the building districts to Waterford based upon the building districts' relative share calculated from their percentage of tax paid to the Regional District. (Table 6 – Winslow, 43.72%; Pine Hill, 8.34%; and Lindenwold, 14.92%.) The five-year installment payment schedule for the initial distribution of liquid assets, as determined by the Camden County superintendent of schools, remains unaffected by this Initial Decision. The redistribution of the additional $2,809,011 shall be paid in five yearly installments commencing

June 1, 2003. No interest shall be charged upon any installment before June 1, 2003. Any installment payment that is more than thirty days past due shall be charged the post-judgment interest rate set forth in the New Jersey Lawyers Diary.

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

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

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

3-6-03
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

March 20, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS CONSIDERED

For Petitioner:

Petitioner's Brief, dated October 31, 2002

Certification of John Armstrong, Esq., dated October 31, 2001 (including the Superintendent's June 30, 2001, Report)

Petitioner's Reply Brief, dated January 9, 2003

For Respondents:

Camden County Superintendent of School's Brief, dated November 15, 2002

Certification of Allison Colsey Eck, DAG, dated November 15, 2002

Joint Brief submitted by Berlin Township Board of Education and Borough of Clementon, dated December 18, 2002

Affidavit of Howard Paynter, Superintendent of Schools, Berlin Township

Affidavit of Paul Spaventa, Superintendent of Schools, Clementon District

Joint Brief submitted by Winslow Township Board of Education and Winslow Township Municipal Government, dated December 19, 2002

Letter Brief from Lindenwold Board of Education, dated December 17, 2002

Letter Brief from Pine Hill Board of Education, dated December 15, 2002

OAL DKT. NO. EDU 328-02
AGENCY DKT. NO. 418-10/01

IN THE MATTER OF THE DIVISION OF ASSETS AND LIABILITIES AMONG THE CONSTITUENT DISTRICTS OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exception and reply arguments were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Upon careful and independent review of the record in this matter, including all submissions before the OAL, as well as all *timely* exception arguments[1] and the replies thereto, the Commissioner determines to modify the Initial Decision as set forth herein.

Initially, the Commissioner notes that when submitted to the voters of the constituent districts, the referendum question did not specify a liquid asset distribution scheme; therefore, the issue is fairly raised by petitioner.[2] (Initial Decision at 3) Here petitioner, the Municipality of the Township of Waterford, challenges the distribution of the over $8.4 million in liquid assets to all seven districts, asserting that the more equitable distribution of those assets is to the non-building districts only, based upon their respective percentages of school taxes paid

[1] Counsel for the Boards of Education of the Township of Berlin and Borough of Clementon requested, and was granted, an extension of time in which to submit exceptions, in accordance with *N.J.A.C.* 1:1-18.8.

[2] In *Union County, supra*, the Court clarified that the holding in *Egg Harbor Bd. of Ed. v. Greater Egg Harbor, Etc.*, 188 *N.J. Super.* 92 (App. Div. 1982), stands for the proposition "that if a liquid asset distribution scheme is specified in a referendum question, that issue is 'off the table' if the referendum is approved; parties to a withdrawal from or dissolution of a regional district cannot later seek alteration of that scheme by the Superintendent of Schools or any other executive body." *In re Union County* at 14.

to the Regional District, without regard to the taxes paid by the building districts. (Petitioner's Brief in Support of Motion for Partial Summary Decision at 15-17) In this connection, the Commissioner acknowledges the argument of the respondent Boards of Education of the Township of Berlin and the Borough of Clementon that the informal agreement reached by the constituent districts to distribute the liquid assets proportionately among *all* seven districts should be honored, *not* because it represents a "binding contract," but because it represents the culmination of an "extensive consultative process" among the constituent districts, each of whom is responsible for providing a thorough and efficient education for its students. (Exceptions, Respondent Boards of Education of the Township of Berlin and the Borough of Clementon at 7-9) The Commissioner stresses, however, that while such an agreement may represent a *recommendation* to the County Superintendent, it is the County Superintendent who is specifically vested with the authority to distribute assets pursuant to *N.J.S.A.* 18A:13-62, subject to review by the Commissioner and State Board of Education.[3] *Union County, supra*, at 13.

Based on the record herein, the Commissioner concurs with the ALJ that the facts are sufficiently compelling to justify a deviation from the asset distribution ordered in the County Superintendent's June 30, 2001 Report, as authorized by the Court in *Union County, supra.* (Initial Decision at 11) There, the Supreme Court determined that "the overriding goal of the statutory scheme is to distribute equitably the regional district's assets and liabilities." *Union County* at 15. The Court acknowledged, however, "[that the statutory scheme] presumably can result in equalization for all constituent communities, including those without real property, only when the debt load is significant (or when all communities received real property)." (*Id.* at 16) Due to the relative absence of debt in *Union County*, the Court concluded:

[3] For this reason, the Commissioner finds the ALJ's discussion on pages 12 and 13 of the Initial Decision with respect to the enforceability of the agreement to be misplaced.

> Given the obvious purpose of the statutory scheme to distribute assets and liabilities equitably, and the generalized assumption in the statute that debt allocation is a sufficient mechanism for ensuring equity, we are persuaded that in these circumstances insistence on strict application of the asset distribution scheme in *N.J.S.A.* 18A:8-24 is unwarranted, particularly where, as here, the parties entering into dissolution have agreed to an alternative liquid asset distribution formula that represents a more equitable asset allocation. (*Id.* at 17)

The Commissioner is likewise persuaded by the undisputed facts in this matter that application of the principles set forth in *Union County* will serve to effectuate a more equitable distribution herein, where equalization cannot similarly be realized through debt allocation,[4] notwithstanding the lack of agreement by the constituent districts to depart from the statutory scheme, which agreement the Commissioner does not view as determinative in the Court's analysis. In so concluding, the Commissioner notes that he finds on this record no "policy justification for insisting on distributing the liquid assets to each municipality, and thereby exacerbating the overall disproportion of the municipalities' asset shares." *Union County, supra,* at 19.

The Commissioner cannot, however, accept the ALJ's position that involvement in a send-receive relationship, in effect, constitutes a quantifiable "asset" that must be factored into an equitable distribution vis-à-vis the non-building districts. The Commissioner, therefore,

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[4] In his June 30, 2001 Report, the County Superintendent noted, "There is no long-term debt regarding building/grounds/equipment to address with the exception of a Lease Purchase Agreement. On March 18, 1999, Lower Camden County entered into a school building lease purchase agreement to finance technology improvements in all four buildings. Certificates of Participation in the par amount of $2,750,000 were issued and the proceeds were used to finance technology improvements including the acquisition and installation of furnishings, equipment and site work. The distribution of debt was based on the equalized valuation of the three Building Districts and equipment received by each. [Exhibit E] is the breakdown of the percentage share of debt and the specific debt obligation for [the] 01-02 school year. As principal/interest obligations are due in future years, the percentage share of the debt will be used for this calculation.***" The report shows the principal/interest obligations for the 2001-2002 school year to be $83,610.57 for Lindenwold; $57,340.74 for Pine Hill and $228,061.19 for Winslow. (*Report of the County Superintendent of Schools on the Division of Assets and Liabilities Among the Constituent Districts of Lower Camden County Regional High School District No.* 1 at 3)

does not concur with the ALJ's discussion and findings at pages 13-16 of Initial Decision that the Boards of Education of the Township of Berlin, the Borough of Clementon and the Borough of Chesilhurst should not be included in a redistribution remedy. Rather, consistent with the Court's conclusions in *Union County, supra*, the Commissioner finds that the most equitable allocation of the former Regional District's assets, under these circumstances, would be to divide the total liquid assets among the four non-building districts in proportion to the percentages of school taxes that each of those non-building districts paid to the former regional district, without regard to the contributions of the building districts.

Accordingly, the Initial Decision of the ALJ is modified as set forth herein.[5] The Commissioner underscores that the five-year installment payment schedule for the initial distribution of liquid assets, as determined by the County Superintendent of Schools, shall remain unchanged by this decision,[6] and designated as "Payment Schedule I." (*See, Report of the County Superintendent of Schools on the Division of Assets and Liabilities Among the Constituent Districts of Lower Camden County Regional High School District No. 1* at Exhibit C2, showing a total of $2,795,535 in liquid assets to be distributed to the non-building districts.)

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[5] Pursuant to *N.J.A.C.* 1:1-14.10(j), however, the Commissioner declines to adopt the ALJ's interlocutory order dated November 25, 2002. On September 16, 2002, more than two months *after* the Board of Education of the Borough of Pine Hill Board was due to make its first of five payments in accordance with the County Superintendent's June 30, 2001 Report, the Board moved for a stay of the payments ordered in the June 30 report. (Pine Hill Board of Education's Motion for Stay, September 16, 2002) The ALJ entertained the motion, notwithstanding that: the motion was not made directly to the Commissioner; the Pine Hill Board was a respondent in this matter; the motion wholly failed to address the legal standard for granting such relief, *N.J.A.C.* 6A:3-1.6; and based on the pleadings filed herein, together with the Prehearing Order agreed upon by the parties (Initial Decision at 6), the issue raised by Pine Hill's motion was not before the ALJ. To the extent the Pine Hill Board of Education sought to challenge the distribution schedule ordered by the County Superintendent in his June 30, 2001 Report, it should have filed a Petition of Appeal before the Commissioner of Education pursuant to *N.J.A.C.* 6A:3-1 *et seq.*; however, *it did not*. Pine Hill's motion, therefore, should have been summarily dismissed.

[6] The County Superintendent's June 30, 2001 Report, reflecting the *original* distribution of liquid assets, directed that "payments among districts shall be made over a five year period **beginning July 1, 2002,** in 5 equal installments ***." (*Report of the County Superintendent of Schools on the Division of Assets and Liabilities Among the Constituent Districts of Lower Camden County Regional High School District No. 1* at 7) (emphasis added) ***Thus, to the extent any payments have not been made relative thereto, all boards in this matter are directed to immediately comply with the terms of the County Superintendent's Report.***

Of the total $8,469,326 in liquid assets, $5,673,792 remains to be *re*distributed, as per this decision, on "Payment Schedule II." Specifically, funds shall be redistributed from the liquid assets received by, and remaining in, the Board of Education of the Township of Winslow ($3,702,885), the Board of Education of the Borough of Pine Hill ($706,840) and the Board of Education of the Borough of Lindenwold ($1,264,067). Each building district shall make payments in five equal, annual installments, commencing July 1, 2004,[7] to **each** of the non-building districts as follows:

- 29.39% to the Board of Education of the Township of Berlin for a total increase of $1,667,720 over the five-year period;
- 4.47% to the Board of Education of the Borough of Chesilhurst for a total increase of $253,575 over the five-year period;
- 16.63 % to the Board of Education of the Borough of Clementon for a total increase of $943,485 over the five year period; and
- 49.51% to the Board of Education the Township of Waterford, for a total increase of $2,809, 011 over the five-year period.[8]

[7] Both the Board of Education of the Township of Winslow and the Board of Education of the Borough of Lindenwold indicate that, to the extent there is a redistribution remedy ordered by the Commissioner herein, payments should not begin until July 1, 2004 at the earliest, since the additional funds were not included in either the 2002-2003 or 2003-2004 school year budgets. (Winslow Exceptions at 4; Lindenwold Exceptions at 1)

[8] By way of example, the Board of Education of the Township of Winslow shall distribute its $3,702,885 in five equal installments of $740,577. For each of five years, Berlin shall receive 29.39% of $740,577, Chesilhurst shall receive 4.47% of $740,577, Clementon shall receive 16.63% of $740,577 and Waterford shall receive 49.51% of $740,577.

In so directing, the Commissioner notes he does not include any award of interest, which is governed by *N.J.A.C.* 6A:3-1.17.

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: 5/2/03

Date of Mailing: 5/2/03

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

#212-03E

212-03

OAL DKT. NO. EDU. 2437-03
AGENCY DKT. NO. 131-4/03

L.J., on behalf of minor child, S.J., and DAVID WICKHAM,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

lay 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING PETITIONERS' MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 2437-03

AGENCY DKT. NO. 131-4/03

L.J., ON BEHALF OF MINOR CHILD, S.J. AND DAVID WICKHAM,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,

Respondent.

Howard A. Teichman, Esq., for petitioners (Furlong and Krasny, attorneys)

Lawrence L. McIver, Esq., for respondent (Gilmore and Monahan, attorneys)

Record Closed: April 29, 2003 Decided: April 30, 2003

BEFORE **STEVEN C. REBACK**, ALJ:

PROCEDURAL HISTORY

On April 28, 2003, this matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Specifically, the transmission was for a petition for emergency relief filed on behalf of the petitioners seeking to overrule the respondent school district (hereinafter "Manchester") from precluding Mr.

Wickham from accompanying S.J., a minor and a student at Manchester Township High School, to the junior prom which is scheduled to be held on the evening of May 3, 2003. It should be emphasized at the outset that Manchester is *not* seeking to preclude S.J. from attending the junior prom. She qualifies in every respect; what the district is seeking to do is to preclude Mr. Wickham from attending as her prom date.

After the matter was transmitted to the OAL, it was received by my office late on the afternoon of the transmission, and it was accompanied by a motion and supporting documents submitted to the Commissioner of Education by petitioners on April 25, 2003. I did not receive any responsive papers from Manchester until the morning of April 29 when it submitted its brief and several affidavits and exhibits in support of its position. Because Mr. Teichman had not received one or more of those documents (without in any way suggesting that Manchester was guilty of any improper conduct), he was provided with one of the affidavits which he had not received and given a reasonable opportunity to review it before we proceeded. Oral argument was then conducted and concluded in the late morning of April 29, 2003, at which time the record on the motion closed. Because of the nature of the case, this decision fully disposes of all issues in dispute. There will be no further OAL proceedings.

STANDARD OF REVIEW

The standards for granting emergency relief or denying same is not dissimilar from those which adhere in the judicial forum. Pursuant to *N.J.A.C.* 1:1-12.6(a), emergent relief may be granted only when irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with the case. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. Typically, to prevail on an emergency relief motion with a preliminary injunction, the applicant must make a preliminary showing of a reasonable probability of ultimate success on the merits. However, that requirement is usually tempered by the principle that mere doubt of the claim's validity is not an adequate basis for refusing to maintain the status quo. So, frequently emergency relief is granted to prevent a decree on the merits from becoming futile or useless by preventing the res from destruction or impairment. Finally, in considering the granting of emergency relief, an agency

will weigh the relative hardship to the parties in granting or denying the relief. *See Crowe v. DiGioia,* 90 *N.J.* 126 (1982).

The factual matrix of this proceeding is based exclusively upon the affidavits submitted by counsel and accompanying exhibits, where appropriate. To the extent that there is a limited factual record, I shall set forth what I believe to be the operative facts in these proceedings. If a factual dispute does present itself, I shall make an effort to resolve that dispute and give reasons to support it and accompany that with an explicit finding of fact.

Accordingly, I **FIND**:

S.J. is a 17 year-old high school junior attending Manchester High School. She is a student in good standing and as such was given an invitation to attend the junior prom to be held on May 3, 2003 this year at a country club in Lakewood, New Jersey. S.J. learned about the prom and the various requirements to be met in order to attend either in late February or early March 2003. She completed the appropriate forms at about that time, and in late March of 2003, was once again notified that she was approved to attend and she had also paid the required amount of $90 for herself and her guest as admission to the prom.

Not long thereafter, she began to hear "rumors" floating through the school that her boyfriend, David Wickham, currently a student at a different high school and an adult for purposes of this proceeding, would be prohibited from attending the prom as her date. Upon hearing this information, S.J. met with Mr. Robert Conover, Vice Principal of Manchester, and following what was described as a consultation with Mr. Conover and the principal, S.J. was advised that indeed David Wickham would not be permitted to attend the prom. She was advised that the sole reason for such refusal, and it seemed to me that the same argument exclusively was offered at oral argument, was that his presence could jeopardize the safety of other students. No explanation was given as to how or why Mr. Wickham's presence would place other students in jeopardy. Subsequently, S.J.'s father, whose affidavit became part of the record in this proceeding, met with an official of Manchester and was advised that the high school administration had the final word on the matter, which was thereafter reaffirmed when he met with Mr. Conover. As is often the case, both S.J. and Mr. Wickham expended considerable time,

energy and money in preparation to attend the junior prom. The facts indicate that those expenditures exceeded $1,500 and are nonrefundable in whole or in part. When S.J. was advised that she would be permitted to attend the prom, in addition to a formal invitation, she was provided with a statement of rules concerning attendance, which was filed as Exhibit B with the petitioners' moving papers. Each of those criteria were met by S.J. and to the extent that they could be met by Mr. Wickham (one of the requirements is that a student have no more than 10 demerits on May 2). Obviously, since Mr. Wickham is not a student at the high school, he could not be measured under this standard. However, pursuant to the argument offered by counsel based upon his record while he was at that school, which ran for approximately two and a half years, he did not exceed the 10 demerit standard.

Mr. Wickham is currently a full-time student at a different high school where, based upon the record before me, he is a student in good standing and is not the subject of any particular identifiable disciplinary problems.

Manchester bases its decision that Mr. Wickham could present a danger to the safety of students and other persons attending the prom on his disciplinary record at Manchester. That record, attached to Exhibit B, serves as the sole basis for the Manchester decision to preclude Wickham from attending the prom with his girlfriend. A review of that record demonstrates that the primary problem Wickham experienced while at Manchester was tardiness and not attending class. Some 16 of the items noted in his disciplinary record relates to lateness, most of which occurred in 1999 when presumably he was a freshman. Others relate to cutting class and leaving school property. It would appear that during the course of his entire record, Mr. Wickham's primary infraction on which the Board ostensibly relied to justify its refusal to permit him to attend the junior prom was an incident which occurred on January 23, 2002. The disciplinary record only indicates "under infl. alc suspension." Obviously, this is a reference to a charge of being under the influence of alcohol while in school, and he may have been suspended one day although that is not clear because he had agreed to submit to a blood alcohol test, and it could be that he remained out of school until the results of that test were concluded. The uncontested facts asserted by the petitioners reveal that the results of the blood alcohol test was negative; that is, legally, there was no proof at all to indicate that Mr. Wickham was either under the influence of alcohol when he attended school on that date in January or was apparently under the influence of

alcohol on that day. The precipitator of the charge is a hearsay assertion related to David J. Walling, the principal of the Manchester Township High School, that is set forth at Paragraph 6 of his affidavit. He notes:

> On January 23, 2002, petitioner, David Wickham, was reported by a teacher as being under the influence of alcohol. Mr. Wickham smelled of alcohol and was sent for a screening later that day. During a meeting with Mr. Wickham's mother, Juanita Wands, it was admitted that David was drinking into the early morning hours before arriving at school.

Thus, the only support for a finding that Wickham was under the influence of alcohol was the olfactory sense of one teacher (who remains to this day not identified in this record) who perhaps smelled alcohol on Wickham's breath. That determination may have been correct. She may have smelled mouthwash. She may have smelled what she believed to have been alcohol. But what we do know is that whatever she did smell did not constitute any wrongdoing on Wickham's part as the result of the conclusions of the blood alcohol test. Nothing in Ms. Wickham's affidavit, which was submitted on behalf of her son, indicates that she ever advised representatives of the board of education that he was drinking on the previous evening. It should also be noted that based upon the representations of counsel, throughout his career at Manchester, Wickham's mother (the father does not live in the home) was never notified of any apparent misconduct on his part, the inference asked to be drawn is that nothing that occurred raised sufficient red flags in the eyes of the school district to alert the parents that they have a son who is a potential safety hazard and danger to other people. She notes as well that her son is currently attending Toms River Adult High School (as well as a vocational program elsewhere) and that his grades for the most recent marking period contain 2 A+, 1 A, 1 B and 1 C. Further, no disciplinary infractions at this current school have occurred.

The second basis under which Manchester looks to Mr. Wickham's record to justify its decision that on May 3, 2000, Wickham was "fighting." The notation beneath that reference, presumably made by the driver of the school bus where the fight apparently occurred, was that another student had made some remarks about Wickham's sister and a fight ensued. Police removed the students from the bus, mother was notified by phone and Wickham was picked up by his uncle. That incident occurred some three years ago. It is also unclear as to the circumstances surrounding that fight. No criminal charges were ever filed, and I have to assume

that it was a fist fight that was quickly quelled. I also asked Wickham whether he had ever been involved with criminal behavior and he noted that as a juvenile he was twice placed under arrest and on both occasions the charges were dropped, and on one occasion the arresting officer was relieved from duty. The assertion by Mr. Teichman that Wickham's mom when she went to the school to look at her son's disciplinary record was mistakenly given the record of another student is in my view irrelevant to this case. Respondent represented unequivocally that it based its judgment on David Wickham's disciplinary record, not on anyone else's. Upon inquiry, I was advised that the prom maintains security including members of the local police department, and that it is expected that there will be 200 to 300 persons in attendance.

ANALYSIS

It should at the very outset be noted that - tragically - public schools in America are not as safe as they once were and are perceived as unsafe. Crimes of the highest order have been committed by students in a variety of schools throughout the country. Could these have been averted had the school district been more sensitized to the child's disciplinary record? It is my view that no one can ever anticipate the actions of another. It is not surprising that many instances of horrific crimes have been committed by students with fine records. Thus, I commend Manchester on its concerns for the safety of the students and for looking at the reality of the school environment as a place no longer of nurturing and peace but sometimes of danger. Irrespective of its good faith, however, in order to justify a decision to ban an individual – whether that individual is a student or the significant other of a student – from attending a prom based exclusively on a disciplinary record comprised primarily of latenesses and cutting classes occurring in most instances some three years ago is in my view unreasonable. I, of course, do not know Mr. Wickham and he did not participate in the proceedings but he attended the courtroom, and it was clear to me that both he and S.J. were intensely concerned with whether or not this motion would or would not be granted. I take it that they have been romantically involved for a significant period of time. Whether this relationship will end in anything more than a high school romance remains to be seen and it really is not the point. What is the point is that it was clear that these kids care about one another deeply. It is beyond peradventure that the last thing Wickham would *ever* want to do at this very special event is to embarrass or in any way jeopardize S.J.'s reputation or make the prom anything but a night that will be relived during the

course of her adulthood and will be filled with wonderful memories. I also believe that the presence of municipal police authorities as security would be appropriate, not because of David Wickham but because when you have 200 or 300 kids at a prom, there is always the possibility that drinking will have taken place or some altercation would follow and there is a need for security, and I'm sure that the parents agree with that. That Wickham may have had an altercation with another student on a school bus several years ago because the other student presumably made some pejorative remarks about his sister, while it is not condoned, it is certainly understandable and in and of itself presents no justification to conclude that Wickham is a danger. In addition, the incident concerning alcohol was nothing more than an allegation which was ultimately disproven and would be disproven in a court of law or in an administrative proceeding were Mr. Wickham to be charged with such misconduct based upon the scientific findings and results of the blood alcohol test.

It is well settled in New Jersey that decisions of local boards of education are entitled to a presumption of correctness and are to stand undisturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." *J.M., By His Guardian, D.M. v. Hunterdon Central Regional High School District, Hunterdon County*, 96 *N.J.A.R.*2d (EDU) 415, 419; *R.A.M. and C.A.M. v. Board of Educ. of the Township of Tabernacle*, 94 *N.J.A.R.*2d (EDU) 573, 576 (*citing, Kopera v. West Orange Bd. of Educ.*, 60 *N.J.Super.* 288 (App. Div. 1960)). *See Boult v. Board of Educ. of Passaic City,* 136 *N.J.L.* 521(E. & A. 1948); *Fraser v. State Bd. of Educ.*, 133 *N.J.L.* 15 (Sup. Ct. 1945); *Offhouse v. State Bd. of Educ.*, 131 *N.J.L.* 391 (Sup. Ct. 1944); *Greenway v. Board of Educ. of the City of Camden*, 129 *N.J.L.* 461 (E. & A. 1943). Petitioner bears the burden of proving, by a preponderance of the evidence, that the respondent's action was "arbitrary, capricious or unreasonable." *J.M., supra,* 96 *N.J.A.R.*2d at 419.

In my view, the petitioner has succeeded in meeting this burden in the matter *sub judice.* The determination arrived at by Manchester that resulted in the opinion of the principal and vice principal to deny Wickham the right or the privilege, whichever way one wishes to describe it, to accompany his girlfriend to the junior prom was based exclusively upon his disciplinary record. That record does not approach the kind that would lead one to reasonably and intelligently conclude that this person presents a risk factor to other students or others attending the prom. He

had a punch out on a bus three years ago when he was a freshman defending his sister from insults and/or ridicule. He was, based upon the record, vindicated from the assertion he had imbibed alcohol or was under the influence of alcohol. Certainly, lateness and class cutting do not present a danger to others. It may present a danger to the student who engages in it. Thus, I **CONCLUDE** that the determination by Manchester, which exclusively premised its decision to preclude Wickham from attending the junior prom on the his disciplinary record was not predicated upon any rational nexus between his prior behavior – in most cases occurring years ago – and the potential that he could create problems at the prom. Plus, as I had indicated earlier, it seems to me that Wickham's worst nightmare would be to do anything inappropriate at the prom which would embarrass S.J. or in any way scar her memories of the experience or hold her up to ridicule by her classmates. Implicit in my statement is the assertion as well that were this matter to have gone to plenary hearing (which it will not because the matter will be moot as of May 3, 2003), it is my view that the petitioners present a very real likelihood of prevailing on the merits.

In addition, the equities of the parties are at issue here. The petitioners have expended in excess of $1,500, anticipating going to the prom, not to mention the expectation and energy expended since February of 2003 in looking forward to it and talking about it. It is fairly obvious that to deny Wickham the opportunity to attend will result in S.J. not attending either. Given the importance of prom to this generation of students, the equities clearly favor the petitioners, and with the security being what it was described to be at the prom, I think any risk is clearly outweighed by the harm imposed upon both petitioners in these proceedings.

I am not unaware of the administrative decision cited by respondent in *W.L.B. and K.B. on behalf of their minor son, W.M.B., and W.B. and J.B. on behalf of their minor daughter, M.B., v. The Board of Education of the Woodbury School District, Gloucester County,* 96 *N.J.A.R.*2d (EDU 695), final decision May 17, 1996. In that matter, basically, the Deputy Commissioner of Education ruled that a high school student who did not achieve the requisite number of credits is not entitled to emergent relief to attend the prom. In that decision, the Assistant Commissioner held that prohibition from attending a senior prom does not constitute irreparable harm. He also held that the petitioner in *W.M.B.* was unable to make a showing of the likelihood of success on the merits or establishing that the board's policy was arbitrary, capricious or unreasonable. In

addition, the decision was couched in a determination that in balancing the equities, greater harm would inure to the board of education than to the student if the motion were granted because the board had "an important interest in enforcing its policies to effectively operate its school to ensure academic achievement."

As an administrative law judge, I have an obligation to accord deference to the expertise of the agency head, and I do so in this matter as well. I respectfully, however, disagree that the decision in *W.M.B.* applies to the case at bar. That matter was decided seven years ago. Without assessing the change in American culture over those seven years, it is my view that in the case at bar, the interests of these petitioners having the prom door closed on them would indeed create lifelong irreparable damage. One cannot make light of high school memories. They are significant. They mark the end and the beginning of a new phase in life. In this matter, I have found that all of the other requirements to obtain injunctive relief have been met. In *W.L.B.* that was not the case. As noted previously, the petitioner did not demonstrate a likelihood of success on the merits and the petitioner was not able to demonstrate that the decision of the district was arbitrary, capricious and/or unreasonable. Based upon my reading of *W.L.B.*, I entirely agree with that holding. There, the requirement that was not met by the student and which was not in dispute was an academic requirement – he did not have the requisite number of credits which entitled him to attend the prom. Here, no one is seeking to undercut the authority of the district concerning academic standards. Rather, the decision to reverse the school district is based clearly on a decision arrived at which cannot find support in reason or in the record.

In addition to the notice I referred to during the factual discussion of this case, there was also a reference in the school handbook concerning nighttime activities. As attached to respondent's affidavit of David Walling as Exhibit A is a page of that manual which essentially indicates the following as relevant to this case:

> When you are attending any school function, you are expected to behave in a manner becoming young adults. Regular school rules are in effect. Guests not attending [the Manchester School System] need prior administrative approval to attend dance/proms.

It then goes on to discuss appropriate dress policies, properly remaining out of restricted areas, arranging for transportation at home, and it finally notes that students are responsible for the behavior of any guest brought to a school event. That is a reasonable policy statement. What is unreasonable is its application to the disciplinary record of David Wickham and to his current state of affairs. So that, with all respect accorded to the Commissioner of Education's office, I distinguish the case cited from the matter *sub judice* and do **FIND** that denial of the opportunity of S.J. to attend the prom with her friend does indeed result in irreparable injury to her and to him. Accordingly, and based upon the foregoing, it is **ORDERED** that the decision arrived at by Manchester precluding petitioner Wickham from attending the junior prom as a guest of S.J. be and is hereby **REVERSED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

4/30/03
DATE

STEVEN C. REBACK, ALJ

cmo

EXHIBITS

For Petitioners:

A Photocopy of the blood alcohol test administered to Mr. Wickham on 1/24/02 demonstrating a negative finding for alcohol or any other contraband

For Respondent:

A Page 12 of student handbook

B Disciplinary history of David Wickham's attendance at Manchester

OAL DKT. NO. EDU. 2437-03
AGENCY DKT. NO. 131-4/03

L.J., on behalf of minor child, S.J., and DAVID WICKHAM,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on April 29, 2003, and the Order of the Administrative Law Judge (ALJ) have been reviewed.[1]

Upon such review, the Commissioner determines to adopt the Order of the ALJ, in general, for the reasons stated in his Order, as he is persuaded that petitioner has satisfied the requisite standards for the granting of emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Commissioner notes that harm is "irreparable" when, as here, there can be no adequate remedy after-the-fact in law or in equity; monetary damages cannot adequately redress the intangibles of the lost prom experience after the event is over. Although the irreparable nature of the harm and the degree or severity of the harm are actually two separate factors to be

[1] It is noted that, by facsimile dated April 30, 2003, the Board submitted a Motion for Stay requesting that the decision of the ALJ, entered on April 30, 2003, be stayed pending the final decision of the Commissioner. The Board, additionally, submitted exceptions to the ALJ's Order. Pursuant to *N.J.A.C.* 1:1-12.6, the Order of the ALJ is a *recommended* decision, reviewable by the Commissioner after his consideration of the Order and audiotape of the hearing conducted at the OAL. *See N.J.A.C.* 1:1-12.6(i) and (j). Therefore, consideration of a Motion for Stay of the ALJ's decision is unnecessary. With respect to the Board's exception submission, *N.J.A.C.* 1:1-12.6 makes no provision for the filing of exceptions or reply exceptions to an emergent relief Order. As such, the Board's submission in this regard was not considered.

assessed, the two have frequently been addressed together in cases denying emergent relief. Therefore, in his consideration of irreparable harm herein, the Commissioner is cognizant that it is well-established that prohibition from attending a prom does not, in and of itself, rise to the necessary level of irreparable harm. As was stated in *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1996:

> the memories [petitioners] will have foregone as a result of not participating in ***extracurricular activities, do not provide [them] with the requisite harm warranting the extraordinary relief requested.***
> (*Domacasse* at 2)

Notwithstanding, the Commissioner, likewise, recognizes that "severe personal inconvenience" may also constitute irreparable harm sufficient to satisfy the criteria, under certain circumstances. *Crowe, supra* at 133. Here, as found by the ALJ, "S.J. learned about the prom and the various requirements to be met in order to attend either in late February or early March 2003. She completed the appropriate forms at about that time, and in late March of 2003, was once again notified that she was approved to attend and she had also paid the required amount of $90 for herself and her guest as admission to the prom." (ALJ's Order at 3) The record indicates that both of these submissions identified her intended date. As such, the administration was, or should have been, aware from her very first submission, that S.J.'s intended date for the prom was David Wickham. In reliance on what she could reasonably assume was the administration's approval of her application(s), S.J. and David Wickham, 17 and 18 years old, respectively, made extensive preparations and incurred considerable expense. The Commissioner also finds particularly troubling that the first indication S.J. received that David Wickham would not be permitted to attend the prom did not come from the administration but, rather, from "rumors" floating through the school. (ALJ's Order at 3) Under these particular circumstances, the

Commissioner finds and determines that petitioners have made a preliminary showing that they have experienced severe personal inconvenience sufficient to constitute irreparable harm.

Accordingly, petitioner's request for emergent relief is granted and the Board is hereby ordered to allow David Wickham to accompany S.J. to her junior prom on May 3, 2003. Because, as was noted by the ALJ, due to the nature of this case, this decision fully disposes of all issues in dispute between the parties, no further proceedings at the OAL are necessary, and this matter is, therefore, dismissed. The Clerk of the Office of Administrative Law is hereby requested to return the file pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/02/03

Date of Mailing: 5/02/03

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

213-03

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4650-98S

AGENCY DKT. NO. 134-5/98

PAMELA JUSTINIANO,

Petitioner,

v.

BOE OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY

Respondent.

Barbara E. Riefberg, Esq., for petitioner

Eric M. Bernstein, Esq., for respondent

Record Closed: March 11, 2003 Decided: March 11, 2003

BEFORE EDGAR R. HOLMES, ALJ:

This matter was transmitted to the Office of Administrative Law on August 14, 2002, for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

May 5, 2003

The parties have agreed to a settlement and have prepared a Stipulation of Settlement/Consent Order indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

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

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

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

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

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

3/11/03
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

March 20, 2003
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

WSS

CONFIDENTIAL

SETTLEMENT AGREEMENT AND GENERAL RELEASE

IT IS HEREBY AGREED by and between **PAMELA JUSTINIANO** ("Justiniano") and the **ATLANTIC CITY BOARD OF EDUCATION** ("Board"), for the good and sufficient consideration set forth below, as follows:

1. The Board, as used herein, shall at all times mean the Atlantic City Board of Education, its subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, designees, successors, heirs, executors and administrators whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith; and,

2. Justiniano, as used herein, shall mean Pamela Justiniano, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest; and,

3. Within thirty (30) working days of the Board's receipt of this Settlement Agreement and General Release, executed by Justiniano before a Notary Public, the Board shall pay to Justiniano an amount equal to ONE THOUSAND FIVE HUNDRED DOLLARS AND NO CENTS ($1,500.00). Justiniano and the Board acknowledge and agree that the payment mentioned above is in settlement of any and all claims that had been asserted, were asserted or may have been asserted or could be asserted by Justiniano for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of Justiniano's employment with the Board, as well as deriving from

the incidents related to the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S, for, but not limited to, violation of her civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 1964 and 1991, 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et. seq., the Fifth and Fourteenth Amendments to the United States Constitution, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq., the Tenure Protection Act, N.J.S.A. 18A:17-4 and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties. Justiniano and the Board expressly understand and agree that said payment includes any and all amounts that may be, could be or will be claimed by Justiniano or on her behalf, or by her attorneys, heirs, successors or assigns, against the Board. The payment mentioned above is in complete and full settlement of all amounts that Justiniano is or could be owed by the Board and Justiniano agrees that she will not seek any future compensation or benefits from the Board except what is stated explicitly herein. Further, Justiniano and the Board agree that this Settlement Agreement and General Release is contingent on and subject to approval and ratification by the Board; and,

4. (a) This settlement is intended as a resolution for any and all possible claims, actual or implicit, and Justiniano hereby waives any and all claims for lost wages, income or future earnings and any other benefits potentially available arising out of the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S. Justiniano also understands and agrees that any adjustments to her withholding or any estimated tax payments are her responsibility; and,

(b) In any action commenced by either party against the other to enforce the provisions of this paragraph, the Board or Justiniano, if it/she is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

5. Neither this Settlement Agreement and General Release, nor anything contained herein, shall be construed as an admission by the Board or Justiniano of any liability or unlawful conduct whatsoever. Justiniano and the Board further acknowledge that the parties enter into this Settlement Agreement and General Release solely to avoid further expensive, burdensome and protracted litigation. This Settlement Agreement and General Release is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between Justiniano and the Board as set forth herein or to enforce the terms of this Settlement Agreement and General Release; and,

6. Justiniano releases, acquits, gives up and forever discharges any and all claims and rights which she may have against the Board up to the time of the execution of this Settlement Agreement and General Release. Justiniano specifically releases the following claims:

Any and all damages, whether known or unknown at this date, arising from or in any way relating to the matter known as Pamela Justiniano v. Atlantic City Board of Education, Docket No. EDUOA-04650-98S or arising from Justiniano's employment with the Board, including, but not limited to, attorney fees pursuant to 42 U.S.C. §1983 and/or 42 U.S.C. §1988 and/or N.J.S.A. 10:5-1 et seq.

More specifically, in consideration of the payment specified in Paragraph 3 above and the entry into this Settlement Agreement and General Release by the Board, Justiniano hereby releases, acquits and forever discharges the Board of and from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorney's fees, judgments and demands whatsoever, in law or equity, which Justiniano ever had, now has, or may have, as of the date of this Settlement Agreement and General Release, as set forth more particularly in Paragraph 3.

7. Justiniano agrees not only to release, acquit and forever discharge the Board from any and all claims which arose from Justiniano's employment with the Board that Justiniano could make on her own behalf, but also those which have been or may be made against the Board by any other person or organization on her behalf. Justiniano specifically waives any right to become, and promises not to become, a member of any class in any case in which any claim is asserted against the Board, involving any event that has occurred on or before the date of this Settlement Agreement and General Release; and,

8. The Board affirms that, as of the date of execution of this Settlement Agreement and General Release, they have no knowledge of any pending class action against it to which Justiniano could be a potential class member, and,

9. Justiniano specifically acknowledges that the arrangement referred to in Paragraph 3 hereof constitutes additional consideration not otherwise owed to her but for this Settlement Agreement and General Release; and,

10. Unless directed to do so by court order or lawfully issued subpoena with notification to the Board at the time the lawfully issued subpoena was issued, Justiniano agrees that she will not give testimony or evidence against the Board in any proceeding with respect to any incidents related to any incidents/events involving Justiniano's employment with the Board; and,

11. Justiniano and her attorney(s) agree(s) and promise(s) that they will not disclose, either directly or indirectly, in any manner whatsoever, any information regarding either: (a) the substance or existence of his complaints, claims, charges and/or actions against the Board; or, (b) the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including, but not limited to, any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the public, except the office of the United States Attorney/Department of Justice for New Jersey or, if applicable, the New Jersey State Attorney General. This paragraph shall not

preclude Justiniano or her attorney(s) from disclosing the existence or terms of this Settlement Agreement and General Release to: (a) governmental authorities which require such information; and, (b) Justiniano's attorney, who shall also be obligated to keep this information confidential. Justiniano may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Justiniano and the Board." In the event Justiniano or her attorney violates this paragraph, Justiniano shall be obligated to pay forthwith to the Board all monies paid to Justiniano by the Board pursuant to this Agreement, as well as any and all attorneys' fees and costs incurred by the Board in obtaining this Agreement attempting to recover the amount referred to above. The Board may also commence an action for equitable relief as they deem appropriate. In the event the Board commences any such action, the remaining provisions of this Settlement Agreement and General Release shall remain in full force and effect; and,

12. The Board and its attorney(s) agree(s) and promise(s) that they will not disclose, either directly or indirectly, in any manner whatsoever, any information regarding either: (a) the substance or existence of Justiniano's complaints, claims, charges and/or actions against the Board; or, (b) the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including, but not limited to, any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the public, except the office of the United States Attorney/Department of Justice for New Jersey or, if applicable, the New Jersey State Attorney General. This paragraph shall not preclude the Board or its attorney(s) from disclosing the existence or terms of this Settlement Agreement and General Release to: (a) governmental authorities which require such information; and, (b) the Board's attorneys, who shall also be obligated to keep this information confidential. The Board may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Justiniano and the Board." In the event the Board or its attorneys violate this paragraph, the Board shall be

obligated to pay forthwith to Justiniano all attorneys' fees and costs incurred by Justiniano in obtaining this Agreement attempting to recover the amount referred to above. Justiniano may also commence an action for equitable relief as she deems appropriate. In the event Justiniano commences any such action, the remaining provisions of this Settlement Agreement and General Release shall remain in full force and effect; and,

13. This Settlement Agreement and General Release contains the full agreement of Justiniano and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Justiniano and the Board, which consent must be signed by Justiniano and the Board or their duly authorized agents; and,

14. The waiver by Justiniano and the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other; and,

15. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release; and,

16. Justiniano hereby acknowledges and agrees that she further expressly waives and assumes the risk of any and all claims or damages which exist as of this date for which Justiniano does not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially effect her decision to enter into this Settlement Agreement and General Release; and,

17. Justiniano represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Settlement Agreement and General Release; that Justiniano has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or

causes of action referred to in her verbal complaint(s) and/or in this Settlement Agreement and General Release; and,

18. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey; and,

19. Justiniano and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release; and,

20. This Settlement Agreement and General Release shall not be executed in counterparts and shall be enforceable only if executed by Justiniano and the Board; and,

21. This Settlement Agreement and General Release shall become effective immediately following execution by Justiniano and the Board and approval by all applicable Board officials, except as noted herein; and,

22. Justiniano and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the Settlement Agreement and General Release. As set forth in Paragraph 3, the Board has agreed to only pay the amounts herein mentioned to Justiniano. As further consideration for this Settlement Agreement and General Release, Justiniano and her attorney agree that this sum represents all of the monies which the Board has agreed to pay to Justiniano and her attorney and that any additional attorney's fees which may arise from the actions of Justiniano' attorney in connection with any matter arising from Justiniano' employment with the Board are to be borne by Justiniano; and,

23. This Settlement Agreement and General Release contains the entire agreement between Justiniano and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms,

corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties; and,

24. In entering into this Settlement Agreement and General Release, Justiniano has relied upon the legal advice of her attorney, who is the attorney of her own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by her attorneys and those terms are fully understood and voluntarily accepted; and,

25. All notices, demands and requests which are required and desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

For **PAMELA JUSTINIANO**:

Barbara Reifberg, Esq.
BARON, RIEFBERG & WARD
1307 White Horse Road
Vorhees, New Jersey 08043

For the **ATLANTIC CITY BOARD OF EDUCATION**:

Eric Martin Bernstein, Esq.
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
Two North Road
P.O. Box 4922
Warren, New Jersey 07059

IN WITNESS WHEREOF, Justiniano and the Board have hereunto set their hands.

Barbara Reifberg, Esq.

PAMELA JUSTINIANO

By: _____
Pamela Justiniano

Leslie Motz, Interim Business Administrator/
Board Secretary

ATLANTIC CITY BOARD OF EDUCATION

By: _____
James Herzog, Board President

N:\Clients\ACBOE (1752)\1009 Justiniano settlement agreement.doc

STATE OF NEW JERSEY)
) ss.
COUNTY OF)

I, JOYCE ST. JOHN, a Notary Public, do hereby certify that Pamela Justiniano, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 11 day of October, 2002.

Joyce M St John
Notary Public

Joyce M. St. John
Notary Public of New Jersey
My Commission Expires October 7, 2004

OAL DKT. NO. EDU. 4650-98S
AGENCY DKT. NO. 134-5/98

PAMELA JUSTINIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL), incorporating a Settlement Agreement and General Release, have been reviewed.

The Commissioner is unable to accept the written settlement agreement in its present form in that the language of such agreement, on its face (Term 3), specifies that the agreement, although signed by the Board President and the Interim Business Administrator/Board Secretary, requires final ratification by the Board. In the absence of any indication in the record that ratification has been accomplished, such language, making settlement contingent upon ratification of the Board, reveals that the settlement is not "fully dispositive of all issues in controversy" as required under *N.J.A.C.* 1:1-19.1(b). In that the Commissioner's approval would render this agreement a final decision pursuant to *N.J.A.C.* 1:1-19.1(d), the Commissioner finds that accord to its terms by all necessary entities must be accomplished prior to the Commissioner's approval of the settlement.[1] The Commissioner is

[1] Counsel for the Board was made aware of this deficiency by letter dated April 9, 2003 from the Director of the Bureau of Controversies and Disputes, such letter being sent certified and regular mail, with the certified copy

also compelled to comment on Terms 11 and 12 of this agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions are a matter of public record.

Accordingly, this matter is remanded to the OAL for revision of the settlement terms or other appropriate action in light of this decision.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/5/03

Date of Mailing: 5/5/03

having been acknowledged as received by L. Santos on April 14, 2003. Counsel was requested to provide a certified copy of the Board's resolution approving the proposed settlement within ten days of his receipt of the Director's letter. Counsel failed to respond to this request, neither supplying the necessary document nor in any manner explaining its absence, thereby necessitating remand of this matter.

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

243-03

IN THE MATTER OF FAYE BALL, :

EWING TOWNSHIP BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

MERCER COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act when, using her official title, she requested a delay in the release of a Commission decision. After considering the nature of the charge, the Commission recommended a penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

May 12, 2003

IN THE MATTER	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C12-02**
FAYE BALL, Ph.D.	:	
EWING TOWNSHIP BOARD OF EDUCATION	:	**DECISION**
MERCER COUNTY	:	
	:	

PROCEDURAL HISTORY

The above matter arises from a complaint filed by School Ethics Commission member Randy Beverly on May 20, 2002 alleging that Ewing Township Board of Education (Board) member, Dr. Faye Ball, violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq., when she e-mailed Lisa James-Beavers, Executive Director of the Commission, and requested the delay of the Commission's decision in *Ordini v. Vickner,* SEC Docket No. C36-01 (May 28, 2002). Mr. Beverly specifically alleged that the above conduct constitutes a violation of N.J.S.A. 18A:12-24(b).

Dr. Ball filed an answer to the complaint on July 15, 2002 admitting that she e-mailed Ms. James-Beavers, and asked that an attached letter to Chairperson Paul Garbarini be forwarded to the Commission. However, Dr. Ball denied that the intent of the letter was to delay Commission proceedings and asserted that the letter was intended to inform the Commission of her concerns regarding the efforts of certain Board members and the superintendent to expedite the release of a decision on C36-01 so that it would be available for public review prior to the April 16, 2002 Board election. Dr. Ball further asserted that she merely sought to request that the Commission not be persuaded to release an early decision as desired by the Board members. Dr. Ball denies that she violated any provision of the Act.

The Commission invited the parties to its October 29, 2002 meeting to present witnesses and testimony to aid in the Commission's investigation. Both parties appeared. Dr. Ball was represented by counsel, Barry Chatzinoff, Esq. Mr. Beverly appeared, *pro se.* After hearing testimony, the Commission voted at its public meeting to find probable cause to credit the allegation that Dr. Ball's conduct was in violation of N.J.S.A. 18A:12-24(b). The Commission determined that there were no material facts in dispute and directed Dr. Ball to submit a written statement, setting forth why the Commission should not find her in violation of N.J.S.A. 18A:12-24(b).

Dr. Ball submitted a timely response which was considered by the Commission at its meeting of February 25, 2003. It now concludes that Dr. Ball violated N.J.S.A. 18A:12-24(b) of the School Ethics Act for attempting to secure an unwarranted privilege for Dr. Vickner by requesting the delay of a Commission decision involving him.

FACTS

Dr. Faye Ball has been a member of the Board since April 2001. She has been employed by the New Jersey Department of Education as an Education Development Program Specialist II since 1994.

At the March 18, 2002 Board meeting, in its public session, Board members, Edgar Dunham, Vince Ordini and Bruce Buck questioned the status of a complaint that Mr. Ordini had filed against fellow Board member Edward Vickner, (C36-01)[1]. The Board members asked the district superintendent, Dr. Timothy R. Wade to contact the Commission to encourage the release of its decision before the April 16, 2002 Board election.

After the Board meeting, Dr. Ball sent an e-mail to the Executive Director of the Commission, dated March 19, 2002. In the letter attached thereto, Dr. Ball set forth:

> Please forgive my meddling into the School Ethics Commission business. However, at last night's Ewing School Board meeting, there were several innuendos made during public session between Mr. Dunham, Mr. Ordini, Mr. Buck, and Dr. Wade (superintendent). The end result was that, at the urging of Mr. Ordini and Mr. Buck, Dr. Wade agreed to call the School Ethics Commission to see if he could get an early decision regarding the above cited case. Dr. Wade mentioned that Mr. Ordini had received a fax about this case. I asked if the decision was public information and I was told no. However, it was apparent to me that several Board members and the administration seemed to be privy to a decision that had not yet been made public nor shared in executive session with the entire Board since the School District paid Mr. Ordini's legal fees.
>
> Based on these shenanigans, my intuition tells me that their intentions for requesting a speedy resolution to the above cited case is less than honorable. I truly believe that if the decision is not favorable, they will use it to smear Dr. Vickner as he seeks re-election. By the way, Mr. Buck is also running for re-election. Therefore, I respectfully request that the School Ethics Commission delay the release of the decision on the above cited matter until after the April 16 School Board Election. In this way, School Ethics Commission decisions can remain above the fray of the Ewing Township School Board. I have advised Dr. Vickner regarding my request and he is in agreement with me.
>
> Thank you, in advance, for your kind consideration.

---

[1] In C36-01 Vince Ordini alleged that Ewing Township board member, Edward Vickner, violated the School Ethics Act when during the public session of a board meeting, he participated in the discussion regarding the low stipends paid to the Team Leaders of the Fisher Middle School, of which his wife is a member. Complainant also alleged that the respondent disclosed his son's confidential student information to others in violation of the Code of Ethics.

In his memorandum to the Board, dated March 21, 2002, Dr. Wade reported that he had contacted the Commission and was advised that the Commission may act on the matter at its April 2, 2002 meeting.

At the Commission's October 29, 2002 meeting, Dr. Ball testified that she drafted the e-mail during her lunch hour and sent the e-mail during one of her breaks. Dr. Ball also faxed the letter to the Commission from her Department of Education office. New Jersey Department of Education policy provides that "personal use of State equipment shall not amount to more than de minimis, occasional use and may only be permitted during authorized break times, lunch periods or before or after work hours." The e-mail was signed, Faye Frieson Ball, Ph.D., HSPA, SRA, Education Development Specialist, Office of Assessment, NJDOE, and provided two work numbers. Dr. Ball testified that there is an automatic signature and identifying information attached to every e-mail she sends, but she did not intend for the signature or information to be a part of her e-mail. The letterhead identified Dr. Ball as a member of the Ewing Township Board of Education and provided her work e-mail address and phone number. Dr. Ball did not discuss the content of the letter she sent to the Commission with the superintendent, the Board Attorney or any member of the Board, except Dr. Vickner.

ANALYSIS

The Commission found probable cause to credit the allegation that Dr. Ball's e-mail to the Commission requesting it to delay its decision regarding C36-01 was in violation of N.J.S.A. 18A:12-24(b), which provides:

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others.

Dr. Ball testified that she used her computer at her Department of Education office to send the e-mail. Dr. Ball further testified that her computer at work has a function that automatically signs her name with her title and phone numbers when she sends e-mails, but she did not intend to sign the e-mail with that information. Dr. Ball also provided the Commission with a copy of the State policy that allows for minimal and occasional use of State equipment for personal purposes. Dr. Ball also testified that her only intent was to inform the Commission of the Board's plan to request an expedited decision, which she believed to be improper.

In her response to the finding of probable cause, Dr. Ball asserts that in previous matters involving violations of N.J.S.A. 18A:12-24(b) the Commission has considered whether attempts to secure unwarranted privileges were coupled with pressure or leverage.[2] Dr. Ball also argues that she had no authority or ability to pressure or influence the Commission and therefore did not have leverage.

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[2] See generally, Public Advisory Opinion A04-98, In the Matter of Melindo Persi (April 8, 1997), In the Matter of John Galish (September 23, 1997), In the Matter of Edward Mercer C33-96 (October 28, 1997), In the Matter of Ray Dawson C22/25-97 (March 30, 1998), Morales v. Campbell C26-99 (September 27, 2000), Maynard v. Glinsman C30-01 (October 23, 2001), Fenishel v. Hartsough C33-01 (December 18, 2001).

The Commission acknowledges the Department of Education's policy regarding employee use of State equipment and that there may be instances where State employees use State equipment to send e-mails that are unrelated to their job. However, the question is whether Dr. Ball attempted to use her official position as a Board member to secure some unwarranted privilege for herself or others. The letterhead of Dr. Ball's letter identified Dr. Ball as a member of the Board as well as a Department of Education employee. In the letter, Dr. Ball requested that the Commission "delay" the release of a decision that would "smear Dr. Vickner as he seeks re-election," until after the April 16, 2001 Board election. Dr. Ball also set forth in the letter that she had advised Dr. Vickner regarding her request and he was in agreement with it. Dr. Ball testified that she did not discuss the letter with any Board member other than Dr. Vickner, nor did she discuss it with the superintendent or the Board Attorney. She testified that she failed to do so because she was uncomfortable. Dr. Ball also testified that she did not seek authorization from the Board to send the letter.

While Dr. Ball argues that the only intent of the letter was to advise the Commission of the Board's conduct, she went beyond merely advising the Commission of the Board's alleged wrongdoing by independently seeking the delay of the decision. It is clear that Dr. Vickner would benefit from the delay of the public release of a decision that could have negatively influenced his campaign for re-election if it were released before the Board election.

The Commission acknowledges Dr. Ball's argument that in previous matters it has considered whether attempts to secure unwarranted privileges were coupled with leverage, which is also defined as influence. The Commission also recognizes that Dr. Ball did not have the authority to influence the Commission. However, the Commission notes that under N.J.S.A. 18A:12-24(b) the Commission need only find that the school official made an attempt to secure unwarranted privileges. The Commission, therefore, finds that Dr. Ball's request for a "delay" in the release of a Commission decision and her use of her official title as a Department of Education employee and a Board member on her letterhead in making that request, is sufficient evidence to show that she attempted to use her official position to influence the Commission to delay the issue of its decision in a matter that would have clearly benefited fellow Board member, Dr. Vickner.

Dr. Ball further argues that a finding of attempt requires that the particular result be achieved with a "purposeful mental state." The Commission finds that Dr. Ball's written request for a delay in Commission proceedings that would have benefited Dr. Vickner and the fact that she e-mailed and faxed the request to the Commission shows that she possessed a "purposeful mental state" to secure unwarranted privileges for Dr. Vickner.

DECISION

For the foregoing reasons, the Commission finds Dr. Faye Ball in violation of N.J.S.A. 18A:12-24(b) of the School Ethics Act for attempting to secure an unwarranted privilege for Dr. Edward Vickner by requesting the delay of a Commission decision involving him.

PENALTY

The Commission has considered the nature of the offense and notes that in her response, Dr. Ball now recognizes that her concerns could have been more appropriately presented by way of argument to the Board of Education, by contacting the Board Solicitor or by more formally presenting the issues in a complaint to the School Ethics Commission. The Commission finds that the appropriate penalty for Dr. Ball's violation in this case is a reprimand.

This decision, having been adopted by the School Ethics Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C12-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations that Dr. Ball violated N.J.S.A. 18A:12-24(b) of the School Ethics Act; and

Whereas, the Commission reviewed the written submissions of Dr. Ball in response to the finding of probable cause; and

Whereas, the Commission now finds that respondent violated the School Ethics Act and believes that a reprimand would be the appropriate penalty;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Dr. Faye Ball in violation of the Act and recommends that the Commissioner of Education impose a penalty of reprimand.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on March 25, 2003.*

Lisa James-Beavers
Executive Director

*Commissioners Robert Bender and Randy Beverly abstained from the vote on this decision.

IN THE MATTER OF FAYE BALL, :

EWING TOWNSHIP BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

MERCER COUNTY. : DECISION

:

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon respondent Dr. Faye Ball, member of the Ewing Township Board of Education, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act when she requested a delay in the release of a Commission decision. The Commission concluded that Dr. Ball's

> use of her official title as a Department of Education employee and a Board member on her letterhead in making that request, is sufficient evidence to show that she attempted to use her official position to influence the Commission to delay the issue of its decision in a matter that would have clearly benefited fellow board member, Dr. Vickner. (Commission Decision at 4)

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of the decision to file written comments on the recommended penalty for the Commissioner's consideration. However, no comments were submitted by respondent, or on her behalf.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner herein**. Only the Commission may determine whether

a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision.

Accordingly, IT IS hereby ORDERED that Dr. Faye Ball be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/03

Date of Mailing: 5/13/03

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

244-03

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANCES R. METALLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
UNION CITY, HUDSON COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of incapacity, excessive absenteeism, unbecoming conduct and other just cause against respondent teacher of mathematics. The Board filed a motion for summary decision pertinent to Count 1 of the tenure charges, incapacity because of chronic and excessive absenteeism.

The ALJ found that, based on the number of absences and the extended period of time of the absences, respondent's absences constituted excessive absenteeism and warranted dismissal. The ALJ concluded that respondent's absences constituted unbecoming conduct, neglect of duty, and/or other cause for the imposition of the penalty of termination. The ALJ ordered that petitioner's motion for partial summary decision regarding Count 1 of the pertinent tenure charges be granted and respondent be terminated.

The Commissioner noted that Count 3 of the tenure charges also alleges chronic and excessive absenteeism and that the ALJ's analysis is applicable to both charges. The Commissioner agreed with the findings and conclusions of the ALJ that the charges of chronic and excessive absenteeism set forth in Counts 1 and 3 were sustained and that such charges warranted respondent's removal from her tenured teaching position. The Commissioner concurred that chronic and excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal, even in instances where the absences were caused by legitimate medical reasons and where leaves of absence and sick days were approved. The Commissioner ordered respondent dismissed from her teaching position. Since the Commissioner found termination to be the appropriate penalty, it is unnecessary to require further litigation. The Commissioner dismissed Count 2 *without prejudice* in order to preserve the Board's right to move forward in the event that the determination on the adjudicated charges is reversed on appeal because the matter is being transmitted to the State Board of Examiners for its consideration. The Clerk of OAL was requested to return the file.

May 12, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
GRANTING MOTION FOR
PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 3454-01
AGENCY DKT. NO. 84-4/01

UNION CITY BOARD OF EDUCATION,

Petitioner,

v.

FRANCES R. METALLO,

Respondent.

Mitzy Galis-Menendez, Esq., for petitioner
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Douglas F. Ortelere, Esq., for respondent

BEFORE **DIANA C. SUKOVICH,** ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

This matter was opened by the filing of a motion for summary decision pertinent to Count 1 of tenure charges certified by petitioner on March 29, 2001 to the Commissioner of the Department of Education (DOE) against respondent, a tenured teacher of mathematics. Respondent filed an answer to the tenure charges with the DOE on April 20, 2001. The tenure charges consist of two charges. Charge 1 alleges excessive absenteeism during six school years, commencing with the 1994/95 school year and, at the time of the charges, continuing through the 2000-2001 school year. Charge 2 alleges unbecoming conduct by respondent, *i.e.*, that respondent encouraged students to cheat on a national mathematics examination administered in 1996. The DOE transmitted the matter to the Office of Administrative Law as a contested case. Petitioner filed its motion during the course of the proceedings.

The case has an extenuated history. Hearings were initially scheduled to commence in July 2001. Various adjournments were granted at respondent's request, initially, because she was hospitalized, and subsequently, because of documents submitted to the effect that she was not capable of assisting in her defense or participating in a hearing.

This judge directed that counsel appear on July 16, 2001, the first scheduled hearing date, to conduct hearing processes, more specifically, the taking of opening statements and the identification of exhibits to be moved into evidence, in light of pertinent statutory deadlines. *N.J.S.A.* 52:14B-10.1. I ruled, on the record, that consistent with general requirements of due process, the pertinent statutory provision should be interpreted to include the authority to adjourn matters if a respondent were not able to meaningfully participate in a matter because of medical conditions.

This judge previously had directed that respondent's counsel contact her physician and provide documentation of the specific status of her physical and mental conditions, including the expected date of her release from the hospital and her ability to proceed with a defense in the current matter. At the July 16, 2001 proceeding, respondent's counsel represented that he had been unable to ascertain her status and prognosis. Petitioner offered exhibits, and respondent's counsel stipulated to the authenticity of the pertinent attendance records. At the request of respondent's counsel, opening statements were not taken. Pertinent to Count 2, this judge directed, over objections of respondent's counsel, that petitioner be allowed to take the depositions of certain individuals. The balance of the July hearing dates were adjourned until August 10, 2001, pending respondent's release from the hospital. Her counsel was again directed to submit a document from her treating physician regarding her physical and mental status. Such was not provided at that time. A written order granting petitioner's motion to take depositions was issued on July 27, 2001.

Telephone conferences were conducted on August 1 and August 15, 2001. Respondent's counsel represented that respondent was still hospitalized. A physician's documentation was again requested, and subsequently scheduled hearings were adjourned.

Correspondence among the parties and this judge thereafter continued. Respondent's counsel provided several letters, on the letterhead of Nicholas A. Marchese, M.D., PC (Marchese), over time, referencing hospitalizations, for physical and psychological conditions, and Marchese's various conclusions that respondent was, and is, unable to participate in the current matter. Subsequent telephone conferences were conducted, during which requests by respondent that the matter be placed on the inactive list indefinitely were discussed, which requests were opposed by petitioner. Also discussed were requests of respondent that she not be required to respond to the pending motion for partial summary decision. After a series of written communications, this judge issued an order, on July 12, 2002, directing that any reply to petitioner's motion be filed no later than July 30, 2002. This judge also issued an order, on August 16, 2002, denying respondent's motions that the matter be placed on the inactive list, indefinitely, and that she not be required to respond to petitioner's motion. Respondent's counsel thereafter filed another motion that the matter be placed on the inactive list, which was denied by order issued on October 11, 2002.[1] Respondent did not file interlocutory appeals of this judge's rulings and orders. In addition, although respondent's counsel indicated, during certain conferences, that he might file a motion to be relieved as counsel, no such motion was filed. The pending motion should be decided at this point

FINDINGS OF FACT

A motion for summary decision may be granted when the papers, including any supporting affidavits, demonstrate that no genuine issue regarding any material fact exists and that the moving party is entitled to a decision as a matter of law. *N.J.A.C.* 1:1-12.5(b)

Attendance records were filed in support of the motion, the authenticity of which, as noted hereinabove, respondent did not dispute at the July 16, 2001 proceeding. Respondent does not dispute that she was absent on the days in question. Also, respondent's counsel does not address, nor dispute, an affidavit of Frank Vaccarino (Vaccarino), the Assistant Superintendent of respondent's district (District) and Supervisor of Instructional Personnel, filed in support of petitioner's motion. No reply,

[1] This judge was absent for extended periods of time from the fall of 2002 until early 2003 because of emergent family matters.

strictly speaking, to petitioner's motion was ever filed on behalf of respondent. However, it is appropriate to consider the documents from Marchese which were referenced by respondent throughout the proceedings and, to an extent, by petitioner.

I **FIND** the following to be facts.

Ronald Treanor (Treanor) is the Principal of the Woodrow Wilson School (Woodrow Wilson) in the District. Respondent taught at Woodrow Wilson during the 1995/96 school year, under Treanor's supervision, as a mathematics teacher for gifted and talented students. Initially, respondent was a teacher at petitioner's Sara N. Gilmore Elementary School (Gilmore).

Respondent was absent during the pertinent school years as follows: 52 days during the 1994/95 school year; 17 days during the 1995/96 school year; 41 days during the 1996/97 school year; 83 days during the 1997-98 school year; all of September and October and four and one-half days between November and June during the 1998/99 school year; 39 days between November 29, 1999 and January 31, 2000 and, subsequently, the remainder of the school year from February through June during the 1999/00 school year; the entire 2000/01 school year; and, at the very least, the entire school year from September through December 20, during the 2001/.02 school year, totaling approximately 650 days.

Respondent was taken to the emergency room of Christ Hospital in Jersey City, New Jersey, on or about February 2 and March 2 or 3, 1995, by ambulance, from school. In March, respondent complained of severe headaches, dizziness, nausea, and vomiting and was suffering from influenza. She was discharged on March 14, 1995. The diagnoses of one physician, Paul T. Itoop (Itoop), whose letterhead indicates he is a physician practicing in Internal Medicine and Chest Diseases, at that time, were severe hydration and malnutrition, probably because of anorexia nervosa, anxiety disorder, bronchial asthma, and headaches from migraine and blurred vision. The prognosis, at that point, was good, and medications were prescribed. Respondent was authorized to return to work on April 27, 1995.

Treanor met with respondent and her union representative on March 20, 1996 regarding allegations raised pertinent to a contest sponsored by the New Jersey Mathematical League, administered by respondent to students in the District during the 1995/96 school year. Petitioner, at some point, decided that "it would in the best interest of the students to transfer" respondent from Woodrow Wilson.

As of September 1996, respondent was assigned to kindergarten classes at Gilmore. At that time, she requested a transfer to grades five or six, indicating a preference for computer classes. She was advised by Anthony Mussara (Mussara), the then Acting Principal of Gilmore, of his preference not to change schedules without an investigation. He advised her, on September 18, 1996, that her schedule would not be changed and offered various assistance.

Mussara communicated with Vaccarino by letter dated October 4, 1996, advising of an incident at Gilmore during the morning that day. Respondent left school, feeling ill, after being seen by the school nurse.

On October 10, 1996, respondent, while at school, again was escorted to the nurse's office because she was ill. At various times during these incidents, Mussara called, and met with, respondent's father for assistance. A note of Itoop, dated October 10, 1996, reflected continued substantial medical and psychological conditions.

Mussara again communicated with Vaccarino by letter dated October 11, 1996, regarding an occurrence during the afternoon on October 9, 1996. Respondent, who was in the nurse's office, was apparently ill and extremely upset. She reiterated her concerns regarding her schedule. Vaccarino again indicated problems with changing her schedule but offered assistance in various respects. He was subsequently advised that petitioner had become ill during class on October 10, 1996 and was escorted to the nurse's office, obviously ill. Mussara subsequently received a physician's note and a note from Metallo. At that time, she was not scheduled to report for class assignment until October 16, 1996. Mussara requested assistance and guidance from Vaccarino, referencing the note of October 10, 1996 from Itoop. Mussara again discussed with her her request for a change in assignments.

By letter dated October 15, 1996, Mussara advised respondent that he had temporarily adjusted her teaching schedule, apparently in light of a request from a physician, so that all of her teaching assignments would be in one building, and so that her schedule would include additional fifth-grade classes. Mussara communicated with Vaccarino by letter dated October 16, 1996 regarding those determinations, referencing a prior meeting, on October 16, 1996, with respondent and a UCEA representative, as well as another individual. Mussara requested that respondent agree to a psychiatric examination, at petitioner's request. Metallo advised that she was "being treated by a separate physician for her disorder."

By letter dated October 29, 1996, Vaccarino advised respondent that, because she did not agree to a psychiatric examination, petitioner had to "take steps to ascertain whether you have a disability . . . which . . . impacts on your ability to perform the essential elements of your position and what accommodations, if any, are necessary as a result of the disability." Respondent was advised that she should appear on November 19 for a hearing before petitioner, that she could have a representative with her, that the hearing would be in executive session, unless she elected to have a public hearing, and that she should notify petitioner no later than the close of business on November 8 regarding the matter. By letter dated November 25, 1996, Vaccarino advised respondent of a vote by petitioner, at a meeting on November 21, 1996, to require that she undergo a psychiatric examination and that such was scheduled on November 27, 1996 at the offices of Dr. Vincent Ruiz (Ruiz).

By letter dated June 4, 1996, Vaccarino, then the Assistant Superintendent, advised respondent that a prior request by her for family leave because of medical reasons was granted. More specifically, an unpaid leave for the period commencing May 1, 1997 and ending June 30, 1997 was approved. Respondent was also advised that she had to utilize whatever paid leave benefits might be applicable and that if she needed additional leave time, she would be required to make an additional request for such.

Mussara communicated with Highton by letter dated May 13, 1997, regarding illness experienced by respondent while at school on April 30, 1997. Respondent was driven home by school personnel on that date and returned on May 1, 1997, when she

was escorted to the nurse's office. After a telephone call to one of respondent's physicians, respondent was again escorted home by school personnel and was subsequently admitted to Christ Hospital. Mussara's letter indicated that, at time, she was not to be released until at least May 16, 1997 and that no date had been set for her return to school

By letter dated May 13, 1997, Vaccarino advised respondent that, per petitioner's records, she had used all her accumulated sick days effective May 15, 1997 and would be taken off the payroll that date. Respondent was also advised that before she returned, a note from her physician, stating that she was able to perform her duties, was requested.

By letter dated July 18, 1997 to Vaccarino, respondent requested a "sabbatical leave" for the 1997/98 school year to obtain a Certificate in Administration and Supervision and attend mathematics workshops. Vaccarino responded by letter dated October 1, 1996, advising that the request could not be granted because it was not submitted timely pursuant to the pertinent contract. He noted, however, that respondent could apply during the then current school year for a sabbatical for the following year.

By letter dated August 12, 1997 to Vaccarino, respondent advised that she was "recuperating at home under the doctor's care" and would not return to school in September. She requested that she use her family medical leave for medical reasons so that she could "maintain my health benefits while being treated." Vaccarino advised respondent, by letter dated September 9, 1997, that for her request to be considered, she had to provide a medical certification from her physician, containing certain specified information.

By letter dated September 17, 1997 to petitioner, Marchese requested that respondent remain out of work on "sick leave" for 90 days. He noted that she had been under his care since September 10, 1997, that respondent related that her problems began subsequent to accusations of unprofessional conduct, and that she was unable to function, "on either social nor occupational levels due to severe psychological deficits." In reference to that matter, Vaccarino advised respondent, in

part, by letter dated September 22, 1997, that she was entitled to 12 weeks leave under State and federal medical leave acts, that she had already utilized seven of those weeks, that she would be entitled to five additional weeks, and that at the end of the five-week period, insurance coverage would be terminated and she would have the opportunity to purchase her own insurance under COBRA until she returned to work.

By letter dated February 6, 1998, Carl Johnson, petitioner's secretary, advised respondent that a request by her for a three-month medical leave of absence, from December 1, 1997 to March 1, 1998, had been approved by petitioner at a meeting held on January 27, 1998. Vaccarino subsequently advised respondent, by letter dated March 6, 1998, in which he noted that she had not returned, that she should advise, within seven days, when she would return to employment or whether she was in need of additional leave and if she did not respond, it would be assumed that she had "abandoned" her position. Apparently responding to that letter, respondent sent Vaccarino a letter dated March 10, 1998, noting, in part, that she planned to return for the 1998/99 school year and to "resume my position as a math classroom teacher as you promised" and requested "my placement to my regular position as classroom math teacher or at the high school level."

In March 1998, respondent wrote to Vaccarino, indicating that she intended to return to work, for the 1998/99 school year, from a prior leave of absence because of medical reasons, for the 1997/98 school year.

By letter dated August 25, 1998, Vaccarino informed respondent that prior to her return, it would be necessary for her to obtain a "comprehensive medical examination attesting to your physical as well as mental ability to perform your teaching position," that she should contact a referenced individual to schedule an appointment, and that the examination had to be completed before September 1, 1998, "or you will not be permitted to work." Respondent thereafter contacted Barbara Beck (Beck), secretary to petitioner's Superintendent, Thomas Highton (Highton), advising that she would not see physician of petitioner on her "own" time. In August 1998, respondent went to Vaccarino's office, with a physician's note, apparently from a personal physician. Vaccarino advised that respondent had to obtain clearance from respondent's physician pursuant to the pertinent collective bargaining agreement. Petitioner's physician

cleared respondent to return to work on September 2, 1998, pending a psychiatric examination, which was scheduled by Vaccarino with Dr. Charles Carluccio. In a note dated September 2, 1998, Itoop stated that respondent was able to return to work "WITH SOME LIMITATION TO CLIMBING STEPS." In a note dated September 4, 1998, he stated that respondent was able to return to "her work as a school teacher." Another physician, Napoleon Savescu (Savescu), whose letterhead referenced "MINOR EMERGENCIES – FAMILY MEDICAL CARE," in an undated note, stated that appellant was able to return to work "in a physical point of view, pending pysch. Evaluation pending RTW date 9/2/98". A Return to Work form completed by Savescu, dated September 2, 1998, referenced that respondent needed a psychiatric evaluation.

Vaccarino advised respondent, by letter dated September 9, 1998, referencing a "Return to work evaluation," that a psychiatric evaluation was scheduled with Carluccio on September 11, 1998 and that she should not report to work until the results had been received. Carluccio apparently completed the evaluation on the date scheduled. By letter dated September 15, 1998, referencing that evaluation, Vaccarino advised Metallo that the physician had determined she should be allowed to return to work under certain conditions. Respondent had to continue therapy with Marchese and submit notes to petitioner every six weeks, confirming continuing psychiatric treatment. "These notes shall continue for the duration of your therapy or until this office receives a letter signifying your completion of same. If you fail to supply any notes from your physician you will not be permitted to work." Respondent was requested to sign at the bottom of the letter, indicating her agreement to the conditions. Petitioner responded by letter of September 19, 1998, stating: "In your letter you do not specify a date of return and the school. Let me know the date of return and school." Vaccarino called her on September 22, advising her that she could start on September 23, as long as she agreed to the terms of her employment as set forth in the September 15, 1998 letter. Respondent did not sign the agreement and did not return to her teaching position.

By letter dated October 1, 1998 to Vaccarino, her then counsel, Richard Manfre, Esq. (Manfre), in part, requested a meeting to discuss respondent's "concerns about her proper teaching assignment and other related issues."

A meeting was held in Vaccarino's office on October 26, 1998 regarding the matter. Present were respondent, Manfre, a representative from the Union City Education Association (UCEA), and Vaccarino. Vaccarino indicated that respondent could not be assigned to her former position, at Woodrow Wilson School, because of allegations that she had cheated on a national mathematics contest. At the conclusion of the meeting, respondent's counsel apparently advised her to sign the agreement.

Subsequently, by letter dated October 27, 1998, Manfre advised Vaccarino that respondent would report to Gilmore on October 28 "to undertake her present teaching assignment," that she would, at that time, execute the September 15 letter accepting the employment conditions, and that counsel would contact Marchese to request that he provide petitioner with progress reports every six weeks. Respondent executed the referenced agreement on October 27, 1998.

Counsel for petitioner subsequently corresponded with respondent's current counsel, Douglas F. Ortelere, Esq., by letter dated January 3, 2000, regarding "Metallo Request for Extension of Compensation and Benefits." After referencing a federal family leave act, it was requested that respondent advise whether she wanted to apply for that leave benefit and, if so, provide referenced "appropriate medical documentation." Petitioner's counsel concluded with petitioner's "hope that Ms. Metallo recovers quickly from current medical condition and can resume her employment responsibilities."

Ortelere forwarded Vaccarino a letter from Marchese to Ortelere dated March 28, 2000, in support of respondent's "request for a further medical leave." The letter, which requested a leave of absence until December 31, 2000, noted that respondent was being treated for "the intense stress and accompanying depression that she states was caused by confrontations" with petitioner and her "teaching duties" as a mathematics teacher.

By letter dated April 20, 2000, petitioner's counsel advised respondent's counsel that her request to extend her unpaid leave of absence for medical reasons had been extended to the end of the then current school year, June 20, 2000, because a

substitute teacher was already present in the classroom and respondent's absence therefore would not "materially impact on the instruction." Petitioner concluded:

> While there is no question that Ms. Metallo's absences are medically necessary, the continued absence of Ms. Metallo impinges upon the District's obligation to provide educational services to the children of the city. The Board extends their wishes for a speedy recovery and sincerely hopes that Ms. Metallo can resume her teaching responsibilities for the upcoming school year. In the event that her leave does not conclude on the date stated above, she will be considered on an unauthorized leave of absence, subject to discharge.

By letter dated June 12, 2000 to Ortelere, another counsel of petitioner confirmed that respondent's unpaid leave of absence expired on June 22, 2000 and advised that because that date was the last date of the 1999/00 school term, respondent was expected to return to work in September for the next school year. Respondent's counsel, by letter dated August 31, 2000, requested that she be granted a further leave of absence pursuant to State and federal statutes.

Respondent's counsel, by letter dated September 4, 2000, referenced a September 1, 2000 telephone conference request for additional medical leave. The letter concluded that Marchese's letter of March 28, 2000 "clearly indicates that the Board of Education was placed on notice long ago regarding the medical need of Ms. Metallo to remain on leave past September 5, 2000." She requested a leave of absence until December 31, 2000.

By letter dated September 5, 2000, petitioner's counsel advised respondent's counsel of petitioner's position that respondent was ineligible to receive certain statutory leave, that if respondent wished to request additional leave, she must do so "in writing", and that petitioner "fully intends" for respondent to return to work in the then current term, which commenced September 5, 2000. Counsel also addressed certain assertions made by respondent's counsel in prior communications regarding the pertinent collective bargaining agreement.

By letter dated September 20, 2000, at which time respondent had not reported to work, Vaccarino advised respondent, in part, that if she did not indicate her intentions

within five days," . . . it will be assumed that you have abandoned your position and the board will act accordingly." Ortelere responded by letter dated September 25, 2000 to *Vaccarino*, stating, in part, that respondent was "not of the mind that she has abandoned her teaching position" and that she " . . . declares that the most recent request for leave was wrongfully denied by the Board of Education.".

By letter dated September 16, 2001 to respondent's current counsel, Marchese, whose letterhead indicates that he is a physician in Forensic and Adult Psychiatry, stated that respondent had then been recently hospitalized for physical and psychological problems; that her psychological treatment required that she receive electroshock treatments (ECTs); that it was Marchese's "understanding" that she had received eight to ten ECTs, which are "always accompanied" by incapacitating side effects frequently producing memory problems, confusion and forgetfulness; and that respondent was then unable to properly identify, understand proceedings, or participate in legal matters for at least two to three months.

By letter dated October 22, 2001 to respondent's counsel, Marchese stated that respondent was having "serious problems with her memory; that she had "mental blocks" prohibiting her from "coalescing" her thoughts in relation to expression; that she had an inability to concentrate and had inadequate attention span because of "very substantial stress" that Marchese's then evaluation "strongly suggests" that respondent was "mentally impaired" and not able to" handle legal matters"; and that she was unable to participate in a deposition, because of the results of ECTs. By a subsequent handwritten note dated October 22, 2001 to respondent's counsel, Marchese stated, in part, that respondent was "mentally or psychologically" unable to participate in legal matters and would not be able to do so "for a minimum" of four to five months.

Respondent communicated with the presiding judge in a separate legal matter involving the parties, in which respondent was the complainant, in the Appellate Division of the Superior Court. That matter was dismissed, with prejudice, by an order issued on November 9, 2001 by the presiding judge.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine controversies and disputes arising under the local school laws. *N.J.S.A.* 18A:6-9. A tenured local teacher shall not be dismissed, or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct, or "other just cause." *Id.* at § 6-10.

If tenure charges are proven, the kind and degree of penalty varies according to the specific problem. *In the Matter of the Tenure Hearing of William Kittell, School District of the Borough of Little Silver*, 1972 *S.L.D.* 531 Whether or not a board of education has taken corrective action may be a factor in determining the penalty. *Passaic Bd. of Educ. v. Viani, 92 N.J.A.R. 2d* (EDU) *76* (*Viani*).

Chronic or excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal. *Trenton Bd. Of Educ. V. Williamson*, 1986 *S.L.D.* 1462. *State-Operated School District of Jersey City v. Pellecchio*, 92 *N.J.A.R. 2d* (EDU) 267, *aff'd, N.J.A.R. 2d* (EDU) 30 (*Pellecchio). Viana, supra.* (*Pellecchio*). It has been recognized that frequent and excessive absences of teachers from regular activities disrupt the continuity of the educational process, even when the regular teacher returns to the classroom. *Pellechio, supra.* It is not necessary for a school district to prove a direct correlation between student achievement and a teacher's attendance to validate concerns about the effects of a teacher's absence on the educational program. As the Commissioner has recognized, " . . . the repeated absences of a teacher from his classroom, however legitimate, will have negative impact on instruction and compromise the basic purpose of the District in the most fundamental obligation of an educator to the student." *In the Matter of the Tenure Hearing of Jerome Day Kacprowicz*, 93 *N.J.A.R.* 2d (EDU) 147, (153) *aff'd*, State Board of Education, 93 *N.J.A.R.* 2d, (EDU) 604 *aff'd*, App. Div. 95 *N.J.A.R. 2d* (EDU) 105. *See also, State-Operated School District of Paterson v. Scott Watson*, 93 *N.J.A.R.* 2d (EDU) 362 (*Watson*). *Viani, supra.* Excessive absenteeism of a teacher disrupts the continuity of the instructional process. *In the matter of the Tenure Hearing of Katherine Weilly, School District of the City of Jersey City*, 1977 *S.L.D.* 403. A

tenured employee may be dismissed when the underlining reasons for the absenteeism indicate there is a likelihood that the conduct will continue in the future. *Pellechio, supra. Viani, supra.* Dismissal may be warranted even without an opportunity to improve attendance. *Bd. of Educ. of the City of Camden v. Rucker,* 94 *N.J.A.R.* 2d (EDU) 190, *aff'd, State Board of Education*, 95 *N.J.A.R.* 2d (EDU) 350. Excessive absenteeism constitutes valid grounds for dismissal of a tenured teacher even if the absences were excused or caused by legitimate reasons due to personal illness or were approved leave or sick days to which the teacher was entitled or the individual was entitled to days off pursuant to a contract. *Kapowitz, supra. Pellecchio, supra. Rucker, supra.* Action may also be taken against a teacher for excessive absenteeism even if such were the result of work-related injuries. *Kochman v. Bd. of Education of the Borough of Keansburg,* 94 *N.J.A.R.* 2d (EDU) 154, State Board of Education, *aff'd*, App. Div. 95 *N.J.A.R.* 2d (EDU) 212. *Board of Education of the Twp. of Irvington v. Pearson*, 97 *N.J.A.R.* 2d (EDU) 329.

The determination of what constitutes excessive absenteeism initially falls within the prerogative and discretionary authority of the local board of education. *Pellecchio, supra.* There are no absolute standards. *In the matter of the Tenure Hearing of Monica Meade-Stephens*, 92 *N.J.A.R.*(EDU) 550. However, the sheer number of a teacher's absences may warrant dismissal. *Watson, supra.*

It is clear, based on the number of absences and the extended period of time, that respondent's absences constitute excessive absenteeism, although one may empathize with health problems she is experiencing, and although some of those absences were pursuant to approved leaves. The sheer number, as petitioner argues, constitutes such a detrimental impact on students in the District to warrant dismissal. A portion of those absences, it is reasonable to conclude, may, in addition, have been related, at least in part, to disputes regarding respondent's assignments. Over an extended period of time, petitioner advised respondent of its position regarding her absences, giving clear notice that her position was in jeopardy, and attempted to accommodate respondent's concerns regarding assignments. At this point, based on the extended absences, and the fact that respondent has not, to date, returned to her position, I am persuaded, pursuant to the applicable decisional law, that petitioner's

motion for partial summary decision should be granted and respondent's position with the District should be terminated.

CONCLUSIONS

I **CONCLUDE** that respondent's absences constitute unbecoming conduct, neglect of duty, and/or other cause for the imposition of a penalty, that, such penalty should be a termination, and that petitioner's motion for partial summary decision regarding Count 1 of the pertinent tenure charges should be granted.

ORDER

It is hereby **ORDERED** that petitioner's motion for partial summary decision regarding Count 1 of the pertinent tenure charges be and is hereby **GRANTED** and that respondent be terminated.

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

March 27, 2003
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

mh/cb

OAL DKT. NO. EDU 3454-01
AGENCY DKT NO. 84-4/01

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANCES R. METALLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
UNION CITY, HUDSON COUNTY.	:	

This matter is before the Commissioner by virtue of a request by the Board for interlocutory review of the Administrative Law Judge's (ALJ) Order Granting the Board's Motion for Partial Summary Decision regarding Count 1 in the within tenure matter.[1] By letter of April 10, 2003, the Director of the Bureau of Controversies and Disputes notified the parties that the Commissioner had determined to grant the Board's request for interlocutory review. Because such review has the potential for fully disposing of this case, the parties were advised that the ALJ's Order Granting Motion for Partial Summary Decision would be considered as a Partial Summary Decision under *N.J.A.C.* 1:1-12.5(e) and the parties were, therefore, requested to submit exceptions to the ALJ's Order by April 23, 2003, with replies due by April 30, 2003.[2]

On April 28, 2003, counsel for respondent called the Bureau of Controversies and Disputes and requested an extension until the end of that business day for the filing of exceptions. Counsel was advised that, since exceptions were due on April 23 and the request was, therefore, being made *nunc pro tunc*, he would need to obtain the Board's consent, put his request in writing noting the Board's consent and file such request with his exceptions by the end of that business day.

[1] Respondent filed a letter opposing the Board's request for interlocutory review.

[2] In order to provide for the filing and consideration of the requested exceptions, the Commissioner obtained a 20-day extension for his review from the Director of the Office of Administrative Law.

Respondent's exceptions were received via facsimile at 3:02 p.m. on April 28 with an explanation that a call to his adversary to obtain the Board's consent for the requested extension had not been returned because petitioner's counsel was not in the office. In response, counsel for the Board submitted a letter, dated April 28, 2003 and received via facsimile on April 29, 2003, stating that:

> Mr. Ortelere represents that he contacted this firm seeking an extension of time within which to file exceptions and received no response from me. I have voice mail and a full-time secretary. I received no message from Mr. Ortelere.

The Commissioner notes that the exceptions submitted by respondent are comprised of a one-page, three-paragraph letter reiterating arguments previously expressed before the ALJ, and the September 18, 2002 affidavit of Nicholas A. Marchese, M.D., which is already a part of the record. Given that respondent's arguments and Dr. Marchese's affidavit are contained in the record transmitted to the Commissioner by the Office of Administrative Law (OAL), it is unnecessary to resolve any disputes concerning consent and timeliness.

Thereafter, on April 30, 2003, respondent initiated a conference call and asked that the Commissioner review the ALJ's Orders of August 16, 2002 and October 11, 2002, denying respondent's request to place this matter on the inactive list.[3] The parties were informed that respondent's request for review of the ALJ's determinations denying respondent's requests to place the matter on the inactive list would be addressed within the context of this decision.

Initially, the Commissioner observes that, although the ALJ states that the tenure charges certified against respondent consist of two counts, in actuality, the Board certified three counts in its tenure charges. (ALJ's Order at 1 and Petitioner's Certified Tenure Charges at 1-8) Count 1 alleges that respondent is guilty of incapacity because of chronic and excessive absenteeism, which, although predominately due to legitimate medical reasons, adversely affects

[3] Respondent did not request interlocutory review of these Orders at the time of issuance.

the students in the District. (Petitioner's Certified Tenure Charges at 1-6) Count 2 alleges that respondent is guilty of unbecoming conduct because she encouraged her students to cheat on a national mathematics examination administered in 1996. (*Id.* at 6-7) Count 3 alleges that respondent is guilty of other just cause for dismissal because her chronic and excessive absenteeism threatens the integrity of the educational process by disrupting the continuity of the instructional process. (*Id.* at 8) However, in that Counts 1 and 3 are substantively the same charge, that of chronic and excessive absenteeism, the Commissioner finds that the analysis set forth in the Initial Decision is applicable to both charges.

Upon a careful and independent review of the record of this matter and the Order Granting Motion for Partial Summary Decision of the OAL, the Commissioner agrees with the well-reasoned findings and conclusions of the ALJ that the charges of chronic and excessive absenteeism certified by the Board on March 29, 2001, have been sustained and that such charges warrant respondent's removal from her tenured teaching position. In so determining, the Commissioner emphasizes that respondent does not dispute that she was absent approximately 650 school days during a six-year period. (Initial Decision at 4) As set forth by the ALJ, chronic and excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal, even in instances where the absences were caused by legitimate medical reasons and where leaves of absence and sick days were approved. *Trenton, supra; Pellecchio, supra; Kapowitz, supra and Rucker, supra.* (*Id.* at 13-14)

In light of the Commissioner's conclusion that termination is the appropriate penalty with respect to these charges, it is unnecessary to require further litigation of the remaining charge certified by the Board at this time. The Commissioner, however, dismisses Count 2 *without prejudice* in order to preserve the Board's right to move forward in the event that the determination on the adjudicated charges is reversed on appeal. This is of particular import since this matter will be transmitted to the State Board of Examiners for its consideration

under *N.J.A.C.* 6:11-3.6(a)(1) and, as such, that body's review will be limited solely to the adjudicated charges.

Accordingly, for the reasons expressed by the ALJ, the Commissioner adopts the recommendation of the OAL and directs that respondent be dismissed from her teaching position with the Union City School District. The remaining charge, Count 2, is hereby dismissed, without prejudice. Given the Commissioner's determination in this matter, respondent's request for review of the denial of her request for this matter to be placed on the inactive list is moot. Since no further proceedings at the OAL are necessary, therefore, the Clerk of the OAL is hereby requested to return the file pursuant to *N.J.A.C.* 1:1-3.3.

Moreover, the Commissioner further directs that this matter be forwarded to the State Board of Examiners in accordance with the above-referenced regulatory provision for any action it deems appropriate.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 5/12/03

Date of Mailing: 5/13/03

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

241-03

241-03

STEFANIE WHEATON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

May 13, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8383-02
AGENCY DKT. NO. 274-9/02

STEFANIE WHEATON
Petitioner,
v.
FAIRFIELD TOWNSHIP BOARD OF EDUCATION,
CUMBERALND COUNTY
Respondent,

Theodore E. Baker, Esquire, for petitioner (Lummis, Krell & Baker, attorneys)

Samuel J. Serata, Esquire, for respondent (Cumberland County Counsel)

Record Closed: February 20, 2003 Decided: April 3, 2003

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted by the Department of Education to the Office of Administrative Law on December 9, 2002 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement marked filed on February 20, 2003.

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

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

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

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

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

4-3-03
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

April 9, 2003
DATE

M. Kathleen Duncan Esq.
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

Samuel J. Serata
20 Franklin Street
Bridgeton, new Jersey 08302
(856)451-6444
Attorney for Respondent, Board of Education
of Fairfield Township, Cumberland County

STEFANIE WHEATON, Petitioner, vs. THE BOARD OF EDUCATION OF FAIRFIELD TOWNSHIP, CUMBERLAND COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Docket No. 274-9/02 OAL Docket No.: EDUOR 08383-02S SETTLEMENT AGREEMENT

The parties in the above-captioned matter have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in cotroversy between them:

1. Reinstatement of Stefanie Wheaton on January 2, 2003 as an elementary school teacher in the School District.

2. Stefanie Wheaton shall receive back pay from September 1, 2002, at such rates as were effective for a teacher with Stefanie Wheaton's experience and years of service in accordance with the collective bargaining agreement as well as pension contributing insurance coverage and benefits retroactive to September 1, 2002. Retroactive insurance coverage may be provided by the Board of Education directly in lieu of a health insurance carrier to the same extent as health insurance otherwise provided to a teacher with the same experience as the petitioner.

3. Stefanie Wheaton waives all claims against the respondent with regard to this matter, including any award of back pay, except as herein specifically provided, counsel fees and other monetary relief except as otherwise provided herein.

4. In addition the pending grievance which is at the arbitration level will be voluntarily dismissed; and the pending action in which the Fairfield Township Education Association

charges the respondent with unfair labor practice charge now pending before the Public Employment Relations Commission of the State of New Jersey, Docket No. 274-9/02 in which reinstatement of Stefanie Wheaton is the relief sought, which will be settled by her reinstatement.

5. Stefanie Wheaton will sign a Release of all claims against respondent as well as all claims against agents servants or employees of respondent.

6. Both parties agree to waive the right to file exceptions and cross-exceptions.

7. This agreement shall be implemented immediately and shall become final upon the approval of the Commissioner of Education.

Stefanie Wheaton, Appellant

Samuel J. Serata, Attorney for Respondent,
Board of Education of Fairfield Township
(Cumberland County)

Lummis, Krell & Baker, Attorneys for
Appellant

By:_____
Theodore E. Baker, a Member of the Firm

N/A

SAMUEL J. SERATA
Attorney at Law
20 Franklin Street
Bridgeton, New Jersey 08302
Telephone: (856) 451-6444
Mobile: (609) 774-1930
Fax: (856) 451-0110

February 18, 2003

Joanne M. Restivo, Deputy Clerk
Office of Administrative Law
Quakerbridge Plaza, Bldg 9
Quakerbridge Road, P.O. Box 049
Mercverville, NJ 08625-0049

Re: Stefanie Wheaton v. T/Ship of Fairfield BOE, Cumberland County
OAL Docket No.: EDUOR 08383-026
Agency Ref. No.: 274-9/02

Dear Ms. Restivo:

As promised by telephone a few weeks ago, I enclose original Settlement Agreement in the above matter. Please file and refer back to the Commissioner for approval.

Thank you for your attention to this.

Very truly yours,

SAMUEL J. SERATA

SJS/m
Enc.
C: Theodore E. Baker, Esq.
Carol Fredericks, Business Administrator

OAL DKT. NO. EDU 8383-02
AGENCY DKT. NO. 274-9/02

STEFANIE WHEATON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5|13|03

Date of Mailing: 5|13|03

246-03

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board alleged that respondent Board, with whom petitioner is involved in a sending/receiving relationship, improperly included litigation costs in its calculation of the tuition rate to be charged petitioner. The County Superintendent stated it was her belief that respondent acted within its legal rights. Respondent contended the petition was untimely filed.

The ALJ concluded that petitioner was entitled to summary decision on the issue of attorney's fees and that the petition was not filed untimely. The ALJ determined that respondent was not permitted to include in the tuition rate that it charges petitioner any legal fees, costs or expenses associated with litigation between the parties or their agents. Although the governing regulation that addresses the method for determining tuition rates, *N.J.A.C.* 6A:23-3.1, does not list legal expenses as an exclusion, the ALJ noted that it is well-settled, under the "American Rule," in the United States and in New Jersey that each party will bear the cost of its own litigation fees. Moreover, in considering the argument of the State that the County Superintendent's decision regarding the propriety of legal fees should not be disturbed because the decision was not arbitrary or capricious, the ALJ found that the Commissioner and the ALJ are not required to defer to a determination of the County Superintendent or apply an arbitrary and capricious standard.

The Commissioner concurred with the determination of the ALJ with clarification. Initially, the Commissioner found, and noted that the parties herein did not dispute, that because legal costs and fees are not specifically enumerated in *N.J.A.C.* 6A:23-3.1(b)(1) as an exclusion from the calculation of actual cost per student figure for tuition purposes, such costs and fees associated with litigation, against or brought by third parties concerning high school matters, are appropriately included in the tuition calculation. The Commissioner, however, concluded, as did the ALJ, that with respect to legal costs and fees directly attributable to litigation between the parties, inclusion of such costs and fees was prohibited by the "American Rule."

May 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY JUDGMENT

OAL DKT.NO. EDU 5944-02

AGENCY DKT. NO.188-6/02

BOROUGH OF LINCOLN PARK BOARD OF EDUCATION, MORRIS COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY AND NEW JERSEY DEPARTMENT OF EDUCATION

Respondents,

Nathanya G. Simon, Esq. for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler attorneys)

Dennis A. Collins, Esq., for respondent (Boonton Board of Education)

Sarah G. Crowley, for respondent (Deputy Attorney General for New Jersey Department of Education)

Record Closed: March 24, 2003 Decided: April 2, 2003

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Petitioner, Board of Education of the Borough of Lincoln Park ("Lincoln Park"), operates a K-8 school district. Respondent, Board of Education Of The Town of Boonton ("Boonton"), operates a K-12 school district. Lincoln Park and Boonton have been engaged in a longstanding sending-receiving relationship, pursuant to *N.J.S.A.* 18A:38-19, based on a tuition rate of the actual cost per pupil. Lincoln Park sends approximately 329 students in grades 9-12 to Boonton High School, which amount to approximately 52% of the Boonton High School Student body. One member of the Lincoln Park Board of Education serves as its representative on the Boonton Board of Education.

The most recent sending and receiving agreement between Lincoln Park and Boonton is dated April 14, 1999, and covers the seven-year period commencing with the 1999-2000 school year and terminating at the end of the 2005-2006 school year. A provision in the 1999 contract states that "[t]uition rates shall be provided to Lincoln Park by Boonton in an amount not in excess of the actual cost per pupil as determined under rules prescribed under *N.J.A.C* 6:20-1 *et seq.*[1] and *N.J.S.A.* 18A:38-19." However, the contract does not refer to any specific inclusions or exclusions in calculating the actual cost per pupil when determining the tuition that Boonton will charge Lincoln Park.[2] The previous contract between the parties in 1989 delineated many expenses that would be included or excluded from the calculation of the actual cost per pupil in determining the tuition rate. Any costs incurred as the result of a dispute between the parties, such as attorney's fees, accounting fees or other professional fees, where specifically excluded under the 1989 agreement.[3]

Over the past several years Lincoln Park and Boonton have been involved in several law suits against each other to wit: *English v. Boonton Board of Education, Dkt. No* 01-3478 (3rd. Cir. 2002); *Lincoln Park Board of Education v. Boonton Board of Education, Dkt. No.* MRS-C-217-00 (*Chancery Division*); *Stranz/Nielson v. Boonton Board of Education, Dkt. No.* MRS-L-1270-02 (*Law*

[1] N.J.A.C 6:20-1 et seq. is the predecessor to the current N.J.A.C. 6A:23-1 et seq.
[2] See April 14, 1999 Agreement, ¶ M(1) on p.12.
[3] See 1989 Agreement, ¶ 6E(c)(17) on p.8.

Division); and *Board of Ed. Of the Town of Boonton v. Bd. Of Ed. Of the Borough of Lincoln Park, EDUOT* 9211-02N.

On or about January 22, 2002, Boonton advised Lincoln Park of its tentative tuition charge for the 2002-2003 school year. Boonton included certain legal fees associated with litigation concerning high school matters in the tuition rate calculation for that school year amounting to approximately $200,000.00 or $600.00 per pupil. (This figure included legal fees incurred by Boonton in litigation involving Lincoln Park in the amount of $183,675.00). At some point Boonton prepared a flyer entitled "Boonton High School Litigation Update" and distributed it to the student body. The flyer contained the following language:

> To date, although the legal costs and feasibility costs have amounted to over $200,000.00, they have been covered without sacrificing current or future programs offered our students or the community. In fact, all costs incurred are allowable charges in the high school tuition rate and therefore, will be paid back to Boonton in the future by Lincoln Park once the final tuition rate for this school year is certified by the State Department of Education.[4]

On or about March 21, 2002, Lincoln Park's Superintendent, Dr. Joyce Valenza, sent a letter to the Morris County Superintendent of Schools, Dr. Rene Rovtar, questioning the legality of including these legal fees in the calculation of the tuition rate. Dr. Rene Rovtar responded by letter, dated March 26, 2002, stating that it was her belief that Boonton acted within its legal rights by including these legal fees in the calculation of tuition.

Lincoln Park filed a Verified Petition of Appeal with the Commissioner of Education against Boonton and the State Department of Education on June 24, 2002. In its petition, Lincoln Park challenged Boonton's practice of including legal fees and costs incurred by Boonton relating to litigation between the parties

[4] See undated "Boonton High School Litigation Update."

in its calculation of the tuition to be charged to Lincoln Park pursuant to the sending-receiving relationship of the parties. The State Department of Education filed its Answer on or about July 8, 2002, and Boonton filed its Answer on July 11, 2002. The case was subsequently transmitted to the Office of Administrative Law (OAL) as a contested matter. The State Department of Education filed a motion for summary decision on January15, 2003, and Boonton followed suit with its own motion for summary decision on January 23, 2003. On February 19, 2003, Lincoln Park filed its response to the respondents' motions for summary decision and cross-moved for summary decision. Oral argument was heard on the cross-motions on March 24, 2003.

ISSUES AND LEGAL DISCUSSION

Legal Issues and Arguments of the Parties

1. The first issue raised is whether this matter can be decided on Summary Motion. While the parties dispute who should be granted Summary Judgment, they agree that, as a matter of law, there is no genuine issues of material fact with respect to the controversies involved in this matter.[5]

2. The second issue involved is whether the Petition of Lincoln Park was timely filed.

   The respondent argues that according to *N.J.A.C.* 6A:4-1.3(a) the appeal had to be filed within 30 days "of the filing date of the decision being appealed." The decision of the Morris County Superintendent of Schools was dated March 26, 2002, therefore, the appeal was out of time. In the alternative, Boonton argues that appeals of municipal actions must be brought as actions in lieu of prerogative writs in the Law Division and the time for filing is forty-five days from the accrual of the right to appeal. Rule 4:69-6(a).

[5] Lincoln Park asserted that if the issue of who drew up the current contract was germane, then an issue of material fact existed. However, since this issue is not determinative, summary judgment can be granted.

The petitioner's position is that *N.J.A.C.* 6A:4-1.3(a) is wholly inapplicable to the case because it deals with appeals from final decisions of the Commissioner, or of the Board of Examiners or of the School Ethics Commission. Here Lincoln Park sought a determination from the County Superintendent pursuant to *N.J.A.C.* 6A:23-3.1(f)(5). Sec. 1.3(d) of this regulation allows for a petition to be filed no later than the 90th day from the date of receipt of the notice of final order (March 26, 2002). In addition, they argue that, since the legal fees and costs will continue to be charged by Boonton, the continuing violation doctrine applies and is an equitable exception to the Statute Of Limitations. Finally, since Lincoln Park is not appealing Boonton's decision to retain attorneys and experts, this matter is not one that falls within the purview of an action in lieu of prerogative writs.

3. The third issue is whether in calculating the tuition rate for residents of the sending district, who attend high school in the receiving district, it is proper to include the legal fees and costs incurred by the receiving district as a result of litigation between the sending and the receiving districts.

Lincoln Park argues that it would be contrary to well-settled law and public policy for Lincoln Park to have to pay for legal fees incurred by Boonton in litigation between the parties. They assert that New Jersey has a strong policy disfavoring shifting attorney's fees. Under the "American Rule" the prevailing litigant is not entitled to collect attorneys' fees from the loser. What Boonton has attempted to do is exactly what the "American Rule" prohibits. They further argue that the fact that the regulation, *N.J.A.C.* 6A:23-3.1, which lists certain items, which are to be excluded from the tuition rate, is silent on attorney's fees does not mean that the regulation allows this type of legal fee. According to Lincoln Park there must be express, clear and

unequivocal authorization for such fee-shifting. Therefore, the fact that the sending-receiving contract between Lincoln Park and Boonton is silent on this issue of attorney's fees as well should be construed to mean that attorney's fees are not allowed as a tuition expenses.

In addition, Lincoln Park argues that to permit Boonton to include these legal fees in its tuition calculation would have a chilling effect on Lincoln Park's exercise of its statutory right to sue. The inclusion of the legal fees in Lincoln Park's tuition rate would be "inherently inequitable", especially since the district has no effective mechanism to challenge the legal fees or to determine who will render the legal services that are incurred.

The position of the Respondent is that *N.J.A.C.* 6A:23-3.1 governs the setting of tuition for public schools in sending-receiving relationships. The regulation requires the calculation of the "actual cost per student" and that "all expenditures" with certain exclusions are to be included in the calculation of actual cost. Since the regulation does not list attorney's fees as an exclusion, there is no basis for excluding attorney's fees from the calculation of "actual cost per student". If the Court were to find in favor of Lincoln Park that would be creating another exclusion, which is a not listed in the regulation. The Respondents argue that the term in the regulation requiring the inclusion of "General administration and business and other support services" in the calculation of tuition cost points to the inclusion of attorneys' fees. In addition, the contract between the parties closely tracks the regulation. Therefore, on a contractual basis, as well as by regulation, attorney fees are an allowable expense. The Respondents also assert that including fees in the tuition calculations is not the shifting of fees in violation of the "American Rule" because no Court awarded attorney's fees.

4. The fourth issue is: Does the Commissioner of Education (Administrative Law Judge) have jurisdiction to hear the reasonableness of attorney's fees incurred by a receiving district? If jurisdiction exists, are the attorney's fees reasonable?

Lincoln Park argues that, based on case law, the Commissioner of Education (A.L.J.) does not have authority to enter an award for attorney fees. The inclusion of attorney fees in the tuition rate is tantamount to the Commissioner of Education (A.L.J.) awarding fees to Boonton. In addition, Lincoln Park asserts that there is no case law that requires the Commissioner of Education (A.L.J.) to defer to a determination of the County Superintendent or to apply an arbitrary and capricious standard of review to his/her determination.

Boonton argues that including attorney's fees in the tuition calculations is not an award of attorney fees and therefore the jurisdiction of the Commissioner of Education (A.L.J.) to assess the reasonableness of fees is not at issue. As a corollary to these arguments the State asserts that the Administrative Law Court should defer to the determination of the County Superintendent and should not overturn his/her decision unless it is arbitrary or capricious. The State further asserts that if the reasonableness of attorney's fees is going to be decided by the Court, they should be dismissed since they have no part in that issue.

DISCUSSION

1. STANDARD FOR SUMMARY DECISION

The rules governing practice in the OAL provide that a Motion for Summary Decision may be granted if there is no genuine issue of material fact and the moving party is entitle to prevail as a matter of law. This provision mirrors the language of Rule 4:46-2 and the Supreme Court's decision in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67

(1954). Under *N.J.A.C.* 1:1-12.5(b), the determination to grant Summary Judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, *i.e.*, the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in *Brill v. Guardian Life Insurance Co. of American*, 142 *N.J.* 520, 523 (1995), set the standard to be applied when deciding a Motion for Summary Judgment.

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

If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See *Bowles v. City of Camden,* 993 F. Suppl. 255, 261 (*D.N.J.* 1998).

Based on the Briefs and Affidavits presented by the parties, and having considered the Oral Argument of the Parties, I **FIND**, that there is no genuine issue of material fact and the matter can be decided on Summary Decision.

2. TIMELY FILING OF THE PETITION

Boonton argues that the Petition of Appeal is time barred. They base their conclusion on the 30-day limitation set forth in *N.J.A.C.* 6A:4-1.3(a). This section states that: " final decisions of the Commissioner, or of the Board of Examiners, or of the School Ethics Commission shall be taken within 30-days of the filing date of the decision from which appeal is taken." I believe that Boonton's reliance on this regulation is misplaced. Lincoln Park is not appealing a final decision of the Commissioner or the Board of Examiners or of the School Ethics

Commission. Instead, Lincoln Park disputed the charging of legal fees to the County Superintendent, pursuant to *N.J.A.C.* 6A:23-3.1(f)(5). By correspondence dated March 26, 2002, the County Superintendent stated that it was her opinion that Boonton had acted within its legal right by including the legal fees in the calculation of tuition. Both parties have set forth March 26, 2002 as the triggering date for the running of time to file an appeal. It is the March 26, 2002 decision from which Lincoln Park filed its appeal on June 22, 2002. The Regulation that is applicable to this matter is *N.J.A.C.* 6A:3-1.3(d), which calls for a 90-day time period to file an appeal. The petition was filed on June 24, 2002, which is within the 90-day time limitation. Therefore, Lincoln Park's petition was timely filed.

3. INCLUSION OF LEGAL FEES AND COSTS INCURRED BY BOONTON IN THE TUITION RATE FOR LINCOLN PARK'S STUDENTS

The statute applicable to the tuition of pupils attending a public school in another school district, other than where such pupils reside, is *N.J.S.A.* 18A:38-19, which provides in part:

> Whenever the pupils of any school district are attending public school in another district, within or without the state, pursuant to this article, the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board, and such tuition shall be paid by the custodian of school moneys of the sending district out of any moneys in his hands available for current expenses of the district upon order issued by the board of education of the sending district, signed by its president and secretary, in favor of the custodian of school moneys of the receiving district.

N.J.A.C. 6A:23-3.1 is the governing regulation that addresses the method for determining tuition rates for regular public schools. The relevant part of the regulation states that "[a]ll expenditures for each purpose except Federal and State special revenue fund expenditures and those specifically excluded in (e)5

below shall be included." *N.J.A.C.* 6A:23-3.1(b)1. The exclusions in *N.J.A.C.* 6A:23-3.19(e)5 are as follows:

> Expenditures shall be excluded from the actual cost per student for tuition purposes for the following items:
>
> i. Transportation to and from school, which is paid by the resident district board of education;
>
> ii Employee retirement and social security contributions for TPAF members, which are fully funded by the State;
>
> iii. Principal on lease purchase agreements;
>
> iv. Tuition;
>
> v. Community services;
>
> vi. Resource rooms, which are determined pursuant to (e)9 below and permitted as a separate charge over and above tuition for general education classes;
>
> vii. Accredited adult education programs and non-accredited adult and evening programs; and;
>
> viii. Extraordinary services provided to special education students for which a district board of education may bill directly.

Legal expenses do not appear in these exclusions or elsewhere in this regulation either. Thus, the regulation is silent on this issue and it is unclear whether this issue was contemplated when *N.J.A.C.* 6A:23-3.1 was proposed and adopted.

It is well settled, under the "American Rule," in the United States and in New Jersey, that each party will bear the cost of its own litigation fees. *In re Estate of Lash*, 169 *N.J.* 20, 30-31 (2001).

> Since 1948, New Jersey has consistently adhered to the general principle that 'legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable absent express authorization by statute, court rule or contract.' *Balsey v. North Hunterdon Regional School Bd. of Ed.*, 225 *N.J. Super.* 221, 226 (App. Div. 1988), reversed on other grounds, 117 *N.J.* 568 (1990)(quoting *State Dept. of Environmental Protection v. Ventron Corp*, 94 *N.J.* 473, 504 (1983)).

Here there is no express authorization by statute or court rule to support the shifting of legal expenses. The relevant regulation, in its silence on this issue, simply does not set forth such legal costs as being excluded in the calculation of tuition. This does not rise to the level of an express authorization for the shifting of legal expenses in this matter.

Despite the "American Rule," a party may agree by contract to pay the other party's attorney fees. *North Bergen Rex Transport, Inc. v. Trailer Leasing Co.,* 158 *N.J.* 561, 570 (1999). However, such contractual agreements will be strictly construed in light of the general policy disfavoring awards of attorney fees. *Ibid.* See also *Community Realty Management, Inc. v. Harris*, 155 *N.J.* 212, 234 (1998) (A written lease must expressly permit a landlord to recover reasonable attorney fees and damages before a court may consider those expenses as additional rent and absent such agreement it is unlikely that the parties contemplated the issue).

In the current contract between Boonton and Lincoln Park there is no mention of whether attorney fees and legal costs would be included in the calculation of tuition that would be charged to Lincoln Park. The contract merely provides that the tuition would be calculated pursuant to *N.J.A.C.* 6A:23-3.1. Such a provision cannot be considered an express authorization for the shifting of legal expenses. Also, the fact that the 1989, contract specifically excluded

from the tuition calculation any legal expenses incurred due to litigation between Boonton and Lincoln Park, does not mean that Lincoln Park expressly agreed to the inclusion of such expenses under the current contract merely because the contract is silent with regard to such expenses. The fact that the regulation does not specifically exclude such expenses, and the fact that the previous contract specifically excluded these legal fees, along with a host of other exclusions and inclusions, do not provide the express statutory, regulatory or contractual authorization required to make the inclusion of such expenses in the tuition calculation proper.

As for the assertion of Boonton and the State that the including of fees in the high school tuition rate is not fee shifting because "no Court awarded attorney's fees" and/or "neither district has sued the other for payment of fees incurred in connection with the ongoing litigation", I **FIND** this argument disingenuous. As Boonton has pointed out, the prohibition against fee shifting is not always discussed in the context of Court awards. In many cases Courts are asked to decide if legal fees are recoverable under the terms of a contract. *See Kellam Associates v. Angel Products, LLC*, 2002 *WL* 142281 (App. Div. 1983). In addition, the legal fees, which Boonton wishes to shift to Lincoln Park, were incurred in connection with litigation between the parties, even though the lawsuits did not involve suits for fees. By wrapping the legal fees in terms of "administrative costs", the Respondents cannot change the essential nature of the charge. The calculation of the legal fees in the tuition charged to Lincoln Park students is fee shifting and is not allowed under the "American Rule," unless expressly indicated. Boonton has argued that, if the Court does not allow the inclusion of attorney's fees, in this case, it is in effect making another exclusion from administrative costs, which is not listed in the code. Thus, the Court is essentially legislating. This argument would be valid if it referred to other costs. However, the "American Rule," is an overarching policy that is implicit in all legal matters *i.e.* that each litigant will pay its own legal fees and costs unless there is express, clear and unequivocal authorization for such fee-shifting. Therefore, in

this matter, the Court is not making another exclusion, it is merely recognizing a long established legal exception.

Boonton further argues that, if attorney's fees are not included in the high school budget, there is no other budgetary slot to allocate them to except the K-8 budget, where they do not belong. It is not the Court's function to determine the fine points of the school district's budget, other than to determine whether or not a particular charge is allowable. Here we find that it is not.

Although, I have already **CONCLUDED** that Boonton cannot include legal fees incurred in the litigation with Lincoln Park in the calculation of the tuition for Lincoln Park students, I will briefly comment on the argument put forth by the State regarding the decision of the County Superintendent. The State argues that the County Superintendent's decision regarding the propriety of legal fees should not be disturbed, because the decision was not arbitrary or capricious. They site *N.J.A.C.* 6A:23-3.1(f)(5), which says that the county superintendent has the authority to "mediate" all disputes that arise from the determination of the tentative tuition charge. There are no cases cited which have found that the Commissioner of Education is required to defer to a determination of the County Superintendent or apply an arbitrary and capricious standard. Since the Administrative Law Judge (A.L.J.) stands in the shoes of the Commissioner, for the purposes of this Summary Decision Motion, it follows that the A.L.J., is not required to defer to the conclusion reached by the County Superintendent. See *N.J.S.A.* 18A:6-9. In addition, the State's argument that the court has a limited role in reviewing the decisions rendered by an administrative agency is equally inapplicable. The cases cited by the State deal with judicial review of administrative decisions. *See Atlantic City Medical Ctr. V. Squarrell*, 349 *N.J. Super* 16, 22 (App. Div. 2002) and *In re Code Enforcement Officer* (M00410), 349 *N.J. Super* 426, 431 (App. Div. 2002). The present matter is still before an Administrative body *i.e.* the A.L.J., and therefore, the cases cited do not apply to this matter.

4. THE JURISDICTION OF THE COMMISSIONER OF EDUCATION AND THE ALJ TO HEAR THE ISSUE OF THE REASONABLENESS OF ATTORNEY'S FEES INCURRED BY BOONTON

It is well settled that the Commissioner of Education and thus the A.L.J. do not have the authority to enter an award for attorney fees or legal costs. *See Balsey v. North Hunterdon Bd. of Ed.*, 117 *N.J.* 434, 442-43 (1990), and *Convery v. Perth Amboy Bd. of Ed.*, 1974 *S.L.D.* 372, 377. Therefore, it follows that the A.L.J. would not have the jurisdiction to determine whether such attorney fees are reasonable, because the A.L.J., lacks the authority to award such fees regardless of how reasonable they may be.[6]

CONCLUSION AND ORDER

For the reasons previously stated, I therefore, **CONCLUDE**, that Lincoln Park is entitled to Summary Decision on the issue of Attorney's fees. I further **CONCLUDE**, that the Respondents' motions for Summary Decision shall be denied.

It is hereby **ORDERED** that the respondent, Boonton Board of Education is not permitted to include in the tuition rate that it charges to petitioner, Lincoln Park Board of Education, any legal fees, cost or expenses associated with litigation between the parties or their agents.

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

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

[6] Lincoln Park's request that the A.L.J., determine the reasonableness of attorney's fees and the State's request that it be dismissed from that portion of the case; if that was an issue, are inapplicable, since the Administrative Law Court does not have jurisdiction.

forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

4/8/03
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

April 4, 2003
DATE

M.K. Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR - 8 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

OAL DKT. NO. EDU 5944-02
AGENCY DKT. NO. 188-6/02

BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Boonton's exceptions and those of the Department, along with Lincoln Park's reply thereto were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4.[1]

Upon his full and independent review, the Commissioner concurs with the determination of the ALJ herein that the Boonton Board is not permitted to include any legal fees, costs or expenses associated with litigation between the parties or their agents in the tuition rate which it charges to Lincoln Park. However, after consideration of the parties' submissions in this matter, the Commissioner is compelled to clarify the parameters of this determination in order to eliminate any potential confusion.

[1] The parties' exceptions essentially recast and reiterate their arguments advanced before the Administrative Law Judge (ALJ) below. In that the Commissioner finds that the ALJ reviewed and considered such arguments in her Initial Decision, they will not be revisited herein.

As recognized by the ALJ, *N.J.A.C.* 6A:23-3.1 governs the setting of tuition for public schools in sending/receiving relationships, and requires the calculation of the "actual cost per student." This regulation directs that *all expenditures*, other than Federal and State special revenue fund expenditures, with certain enumerated exceptions, be included in the calculation of actual cost per student. *N.J.A.C.* 6A:23-3.1(b)(1). Attorney costs and fees are not included as an exception. The Commissioner finds, and the parties here do not dispute, that because legal costs and fees are not specifically enumerated in this regulation as an exclusion from the computation of the actual cost per student figure for tuition purposes, such costs and fees associated with litigation, against or brought by third parties, concerning high school matters, are appropriately included in the tuition rate calculation. However, with respect to legal costs and fees directly attributable to litigation *between the parties*, the Commissioner concludes, as did the ALJ, that a long recognized "overarching" policy consideration must be superimposed. As found by the ALJ:

> It is well settled, under the "American Rule," in the United States and in New Jersey, that each party will bear the cost of its own litigation fees. *In re Estate of Lash*, 169 *N.J.* 20, 30-31 (2001).
>
> > Since 1948, New Jersey has consistently adhered to the general principle that 'legal expenses, whether for the compensation of attorneys or otherwise, are not recoverable *absent express authorization by statute, court rule or contract.*' [*Balsley*] *v. North Hunterdon Regional School Bd. of Ed.*, 225 *N.J. Super.* 221, 226 (App. Div. 1988), reversed on other grounds, 117 *N.J.* 568 (1990) (quoting *State Dept. of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983)). (emphasis supplied) (Initial Decision at 11)

As *N.J.A.C.* 6A:23-3.1 provides computation authorization implicitly as opposed to explicitly, the express clear and unequivocal authorization requirement contemplated by the "American Rule" for the shifting of legal fees as between parties is not satisfied. As noted by the ALJ, the

parties' sending/receiving contract, similarly, fails to provide the requisite "express" authorization for this particular category of expenses. Consequently, it is hereby held that absent express legal authorization, a receiving district in a sending/receiving relationship is not permitted to charge the sending district for its legal costs in either pursuing or defending litigation against the sending district.

Accordingly, the Initial Decision of the OAL, as clarified herein, is adopted.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/03

Date of Mailing: 5/15/03

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

247-03

K.C. and C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents, whose son J.C. was suspended for assault and possession of a weapon, alleged the Board improperly transferred him from Lakewood High School to an alternative placement. The Board contended the petition was untimely filed.

The ALJ found that petitioners were officially notified in a letter dated November 25, 2002 of the transfer but did not file a petition of appeal until March 6, 2003, clearly more than 90 days after the notice of the action. Moreover, the ALJ found that no compelling or extraordinary circumstances existed for waiving the 90-day rule. Petition was dismissed.

The Commissioner adopted the Initial Decision as his own.

May 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00739-03S
AGENCY DKT. 75-3/03

K.C. and C.C., ON BEHALF OF MINOR CHILD, J.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,
Respondent.

Thomas W. Sumners, Jr., Esq., for petitioners (Sumners George, attorneys)
Michael I. Inzelbuch, Esq., for respondent

Record Closed: April 3, 2003 Decided: April 4, 2003

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter originally came before the Office of Administrative Law ("OAL") as an emergent matter transmitted for hearing by the Commissioner of the Department of Education ("Commissioner"). Emergency relief was denied in an interlocutory order issued on March 17, 2003. In that order, I noted that while the parties had not addressed the issue in either written or oral presentations produced in connection with the emergency proceeding, there did appear to be a question as to whether the petitioners had filed their petition for relief with the Commissioner beyond the ninety days permitted for seeking relief pursuant to *N.J.A.C.* 6A:3-1.3 (d). That regulation specifically requires that any petition for relief be filed "no later than the 90th day from receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing."

In this case, the petitioners allege that the respondent Board of Education ("Board") improperly transferred their son from Lakewood High School to an alternative placement, namely the Project Opportunity Program, or "POP". This program is operated for the Board by a private contractor, Sylvan Learning Center. However, the Lakewood students attending POP receive a Lakewood diploma and in some instances can take courses at Lakewood High. It is not disputed at this time that POP is an in-district alternative placement. The transfer occurred after the student was first suspended for disciplinary reasons arising from an incident in which he was charged with assault and also with possession of a weapon.

The petitioners complain that their son's rights were violated in two instances, first when he was suspended for ten days in November 2002 and then, after what they view as a legally deficient "hearing" before the Superintendent on November 25, 2002, when he was transferred to POP. The parents were officially notified of the transfer in a letter dated November 25, 2002. That letter read in part, "[A]t the superintendent's review hearing on Tuesday, November 25, 2002, it was agreed that J. would enroll in POP for the remainder of the school year." It was also noted that he could then reapply to Lakewood High and his readmission would be determined based upon his academic performance, attendance and behavior at POP.

The petition for relief was filed with the Department of Education on March 6, 2003. Ninety days from November 25, 2002, was February 23, 2003. Therefore, the petition for relief was clearly filed after the ninetieth day following the petitioners receiving notice of the action by the district, through its superintendent.

In response to my invitation, counsel for both parties have filed written statements concerning the effect of the ninety-day rule on this case. Counsel for the petitioners argues that the rule should be waived, because this case involves important constitutional or other matters of fundamental public importance that go beyond the concerns of these particular parties. Additionally, counsel contends that the parents were not informed by the Board that they had only ninety days in which to challenge the transfer and that since the Board was in a far better position to know this important information, the parents should not be held liable for their ignorance, as the Board should have informed them of this requirement.

Counsel for the respondent notes, however, that case law cited in the interlocutory order denying emergent relief finds that there are no federal constitutional issues implicated in an in-district transfer accomplished for disciplinary reasons. *Nevares v. San Marcos Consolidated Independent School District*, 111 *F.*3d 25 (5th Cir. 1997); *Zamora v. Pomeroy*, 639 *F.*2d 662 (10th Cir. 1981).

The 90-day rule requiring timely filing of petitions for relief from the Commissioner has received much attention in the courts and has been upheld as a firm and seldom waived requirement that implements important policy goals of repose and certainty. It has been strictly applied, *Gordon v. Passaic Township Bd. of Educ.*, 1985 *S.L.D.* 1929, 1931, *aff'd* No. A-3294-84T7 (N.J. App. Div. May 27, 1986), *cert. den.*, 105 *N.J.* 534; *Elmwood Park Bd. of Educ. v. Farrell*, 95 *N.J.A.R.*2d (EDU) 375, 377. It has been relaxed in certain circumstances where the Commissioner deems its application inappropriate or unnecessary or where its application may result in injustice. However, while the ability exists for the relaxation of the rule, the cases demonstrate that the rule is only relaxed in very limited, indeed, in "exceptional"or "compelling" circumstances.

In the present case, the petitioners complain about alleged violations of procedures in regard to a ten-day suspension. As that suspension has long since ended, the real core issue here is the transfer of the student from the High School to the district's alternative POP program. As the case law reflects, the federal constitutional concerns that are involved in decisions to suspend or expel a student are not applicable in an in-district transfer. As noted in the emergent decisions, no claim is made here that the transfer has resulted in a deprivation of the student's right under the New Jersey Constitution to a thorough and efficient education. Thus, in respect to the transfer, no constitutional rights or matters of compelling public interest that affect others are at stake. In these circumstances, no compelling or extraordinary circumstances exist for waiving the 90-day rule. Further, the suggestion that the parents, who did not appeal from the Superintendent's transfer notice to the Lakewood Board of Education, failed to exercise their right to appeal the transfer notice to the Commissioner within the allowable time frame due to their ignorance of the clear regulation that addresses the need for timely appeals is hardly a reason to waive a strictly applied time limitation that is only waived in instances of extremely

compelling circumstances. The interests of justice will not be compromised by the application of this long-standing rule in this case. Therefore, the petition is **DISMISSED**.

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

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

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

April 4, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

April 9, 2003
DATE

M. Kathleen Duncan (ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBITS

None

OAL DKT. NO. EDU 00739-03
AGENCY DKT. NO. 75-3/03

K.C. and C.C., on behalf of minor child, J.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners sought and were granted an extension of time within which to file exceptions to the Initial Decision. Such exceptions and replies thereto were filed in accordance with the extended timelines and were fully considered by the Commissioner in his determination herein.

Upon his full and independent review of the record, the Commissioner concurs with the determination of the Administrative Law Judge, for the reasons cogently articulated in his decision, that the within petition is time-barred and that relaxation of the 90-day timeline set forth in *N.J.A.C.* 6A:3-1.3(d) is not warranted under the circumstances of this case.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/03

Date of Mailing: 5/19/03

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

248-03

ELIZABETH SCHERBA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 19, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7878-02
AGENCY DKT. NO. 247-8/20

ELIZABETH SHERBA,
Petitioner,
v.

BOARD OF EDUCATION OF THE BOROUCH OF LODI, BERGEN COUNTY,
Respondent.

Kathleen P. Garvey, Esq. for petitioner
(Marotta, Garvey & Cipoletta, attorneys)

William R. Nunno, Esq., for respondent

Record Closed: April 15, 2003 Decided: April 17, 2003

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 1, 2002 for determination as a contested case. Hearing dates were scheduled for March 17-19, 2003. A telephone conference was conducted on March 17th, 2003.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Stipulation of Settlement and Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

4-17-03
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

4-23-03
DATE

M. Kathleen Duncan (by)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 2 8 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

MAROTTA & GARVEY
115 RIVER ROAD, BLDG. 3
EDGEWATER, NJ 07020
(201) 943-6300
ATTORNEYS FOR PETITIONER

ELIZABETH SCHERBA, Petitioner, v. BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DOCKET NO.: 07878-02N STIPULATION OF SETTLEMENT

The matter in difference in the above entitled action having been amicably resolved and settled by and between the parties, it is hereby agreed that the same be dismissed.

MAROTTA & GARVEY

William R. Nunno, Esq.
Attorney for Respondent

Kathleen P. Garvey, Esq.
Attorney for Petitioner

SETTLEMENT AGREEMENT

This Settlement Agreement and Release ("Agreement"), dated March , 2003, is made and entered into between Elisabeth Scherba ("Scherba") and the Board of Education of the Borough of Lodi ("Board"). This Agreement is made pursuant to the following terms and conditions.

WHEREAS, Scherba was employed by the Board on September 15, 2000 as a school nurse assigned to the Roosevelt School; and

WHEREAS, on or about May 10, 2002 the Board voted to not renew the employment contract of Scherba for the school year 2002-2003; and

WHEREAS, Scherba filed a petition with the New Jersey Commissioner of Education on or about August 8, 2002 challenging the non-renewal of her employment contract for the school year 2002-2003; and

WHEREAS, the Board filed an answer to the petition and the matter was transferred to the Office of Administrative Law, docket number EDUDQ 07878-02N; and

WHEREAS, the parties elected to settle all outstanding matters and allegations in dispute in lieu of litigating the matter pending in the Office of Administrative Law; and

WHEREAS, the Board and Scherba deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations upon the settlement of the matter pending in the Office of Administrative Law; and

NOW, THEREFORE, with the intent to be legally bound hereby, and in consideration of the mutual promises and covenants contained

herein, Scherba and the Board, agree to the terms and conditions as hereinbelow set forth:

FIRST: Scherba shall and does hereby dismiss her Petition filed with the New Jersey Commissioner of Education with prejudice and shall file any and all documents required by the New Jersey Office of Administrative Law to the effect. The Board and Scherba hereby release and give up any and all claims against each other resulting from anything which has happened up to now concerning the nonrenewal of Scherba's employment contract for the 2002-2003 school year.

SECOND: The Board does hereby hire Scherba as a school nurse for as and of April 3, 2003.

THIRD: As of the date of the commencement of her employment with the Board, Scherba shall be placed on Step 3 of the Teachers Salary Guide 2002-2003. Beginning in September, 2003, Scherba shall be placed on Step 4 of the Teachers Salary Guide 2003-2004.

FOURTH: The employment contract for Scherba shall be renewed, and she shall not be dismissed or reduced in compensation, except for inefficiency, incapacity, unbecoming conduct or other just cause.

FIFTH: The letter dated May 30, 2002 from the Superintendent of Schools to Scherba shall be removed and expunged from Scherba's permanent personnel record.

SIXTH: As of the date of the commencement of her employment with the Board, Scherba shall receive full health care coverage as set forth in Article XIV of the Agreement between the Lodi Board of

Education and The Lodi Education Association ("Agreement"). In accordance with Article XXV A3 the Board shall pay the premiums on behalf of Scherba to assure uninterrupted participation and coverage as and of the date of hire.

SEVENTH: As of the date of separation of employment with the Board, Scherba had ~~one and~~ 2 pc sick days accumulated. As of the date of the commencement of employment with the Board, Scherba shall be entitled to the accumulated sick days and ten (10) sick days for non-tenured personnel as set forth in Article XX of the Agreement and two (2) personnel days as set forth in Article XX of the Agreement.

EIGHTH: It is recognized by the parties hereto that, due to the events that have occurred, there has been an interruption in the employment of Scherba which effects her pension status. Therefore, it is agreed between the parties that should there be an opportunity to either waive this period of interruption in employment, or credit Scherba with time so as to not adversely affect the pension status of Scherba without cost to the Board, then, in such event, it is agreed that this Settlement Agreement shall be amended to reflect such change.

NINTH: The Board shall make every effort to assign Scherba as the school nurse to the Roosevelt School.

NOW THEREFORE, the parties, by their designated representatives do set forth their signatures in confirmation of the above recitals and agreements to be effective on February 26, 2003.

3

In the presence of:

Elizabeth Scherba

Elizabeth Scherba

In the presence of:

LODI BOARD OF EDUCATION

Joseph Capizzi, Secretary

Carmine DeRosa, President

STATE OF NEW JERSEY, COUNTY OF BERGEN SS:

I CERTIFY that on , 2003, Elizabeth Scherba personally came before me and acknowledged under oath, to my satisfaction, that this person is named in and personally signed this document.

Notary public

STATE OF NEW JERSEY, COUNTY OF BERGEN SS:

I CERTIFY that on March 31, 2003. Joseph Capizzi, Secretary of the Lodi Board of Education, personally came before me and acknowledged under oath to my satisfaction that he is the Secretary of the Lodi Board of Education, that he is the attesting witness to the signing of this Agreement by Carmine De Rosa who is the President of the Lodi Board of Education and that this Agreement was signed and delivered by the Board as its voluntary act duly authorized by a proper resolution of the Lodi Board of Education.

Joseph Capizzi

Sworn and subscribed to before me this 31 day of March, 2003.

Susan Verdina
Notary Public SUSAN VERDINA
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES 5/19/04

OAL DKT. NO. EDU 7878-02
AGENCY DKT. NO. 247-8/02

ELIZABETH SCHERBA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LODI, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 5|19|03

Date of Mailing: 5|19|03

249-03

BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY, BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	
	:	

May 19, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 5473-02

AGENCY DKT. NO. 59-3/02

BOARD OF EDUCATION OF ROXBURY TOWNSHIP,

Petitioner,

v.

BOARD OF EDUCATION OF MOUNT OLIVE, MORRIS COUNTY, RANDOLPH TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondents.

Thomas O. Johnston, Esq., appearing for Petitioner (Porzio, Bromberg & Newman, attorneys)

Marc H. Zitomer, Esq., appearing for Respondent Mount Olive Township Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Joann Lynch, Esq., appearing for Respondent Randolph Township Board of Education (Kenney, Gross, Kovats & Campbell, attorneys)

Allison C. Eck, Deputy Attorney General, appearing for Respondent State Department of Education (Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

Record Closed: April 14, 2003 Decided: April 15, 2003

BEFORE **MARGARET M. HAYDEN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on June 18, 2002 for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for March 3, 2003 at the OAL, 33 Washington Street, Newark, New Jersey. At the hearing, settlement discussions were held and a settlement was reached. The parties having agreed and stipulated, as indicated by their signatures on the attached Stipulation of Dismissal, that this matter should be dismissed.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the dismissal should be approved. I approve the dismissal and, therefore, it is hereby **ORDERED** that this matter be and hereby is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

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

April 15, 2003
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

April 21, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 22 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner Roxbury Township Board of Education

ROXBURY TOWNSHIP BOARD OF EDUCATION, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, MOUNT OLIVE TOWNSHIP BOARD OF EDUCATION AND RANDOLPH BOARD OF EDUCATION, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 59-3/02 OAL DOCKET NO. EDUOT 05473-02N **STIPULATION OF DISMISSAL WITHOUT PREJUDICE**

The matter in difference in the above-entitled action having been amicably adjusted by and between petitioner Roxbury Township Board of Education, and respondents, New Jersey Department of Education, Mount Olive Township Board of Education and Randolph Board of Education, it is hereby stipulated and agreed by and between these respective parties, that this action, including all claims asserted herein, be and is hereby dismissed without prejudice and without costs as against or in favor of any party.

By: _____
Thomas O. Johnston, Esq.
PORZIO, BROMBERG & NEWMAN, P.C.

Attorneys for Petitioner
Roxbury Board of Education

Dated: 4/10, 2003

By: _____
Marc H. Zitomer, Esq.
SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER, LLP
Attorneys for Respondent Mt. Olive Township Board of Education

Dated: 7/25/, 2003

Per telephone Hearing, Acting Attorney General of the State of New Jersey

By: _____
Allison Colsey Eck, Esq.
NEW JERSEY DEPARTMENT of LAW and PUBLIC SAFETY – DIVISION of LAW
Attorneys for Respondent New Jersey Department of Education

Dated: 4/3/03, 2003

By: _____
Joann Lynch, Esq.
KENNEY GROSS KOVATZ & CAMPBELL

Attorneys for Respondent Randolph Board of Education

Dated: 3/28/03, 2003

OAL DKT. NO. EDU 5473-02
AGENCY DKT. NO. 59-3/02

BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY, BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the record of this matter, Initial Decision and Stipulation of Dismissal Without Prejudice, indicating that this matter has "been amicably adjusted by and between" the parties. Noting, however, the absence of any document containing the terms of the parties' agreement so as to permit his review under *N.J.A.C.* 1:1-19.1, the Commissioner shall, instead, consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2. The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5|19|03

Date of Mailing: 5|19|03

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

250-05

IN THE MATTER OF THE TENURE	:	
HEARING OF VANESSA ALLEN (HART),	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF IRVINGTON, ESSEX COUNTY.	:	DECISION
_____	:	

May 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3880-01
AGENCY DKT. NO. 114-5/01

IN THE MATTER OF THE TENURE HEARINGOF VANESSA ALLEN, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY

Raymond L. Hamlin, Esq., for petitioner (Hunt, Hamlin & Ridley, attorneys)

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

Record Closed: April 14, 2003 Decided: April 15, 2003

BEFORE **BARRY N. FRANK,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 25, 2001 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement.

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

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

I **CONCLUDE** that the agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. Accordingly, I approve the settlement and

ORDER that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

April 15, 2003
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

April 21, 2003
DATE

M. Kathleen Duncan Esq
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 22 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

J-1

OXFELD COHEN, PC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Respondent

BEFORE THE COMMSSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY
OAL DKT. NO. EDU 38880-01
AGENCY DKT. NO. 114-5/01

IN THE MATTER OF THE TENURE HEARING	:	
OF VANESSA HART, SCHOOL DISTRICT OF	:	SETTLEMENT AGREEMENT
THE TOWNSHIP OF IRVINGTON, ESSEX	:	
COUNTY.	:	

WHEREAS, Vanessa Hart and the Irvington Board of Education, ("the Board") have amicably agreed to resolve their differences, and hereby stipulate and agree that the matter entitled In the Matter of the Tenure Hearing of Vanessa Hart, School District of the Township of Irvington, Docket Number EDU-03880-01N, Agency Ref. No. 114-5/01, shall be settled upon the terms and conditions stated herein;

WHEREAS, the Irvington Board of Education has agreed after due consideration to settle all claims related to the employment of Vanessa Hart in connection with her duties and responsibilities as Lead Secretary and the decision to prefer tenure charges against Vanessa Hart pursuant to N.J.S.A. 18A:6-11 and the Irvington Board of Education and Vanessa Hart have determined that it would be in the best interests of the Irvington Board of Education and Vanessa Hart to enter into such settlement.

NOW THEREFORE, the parties mutually covenant and agree as follows:

1. Vanessa Hart was hired as a secretary for the Irvington Board of Education on or about February 23, 1993.

2. On April 26, 2001, the Board of Education voted to prefer Tenure Charges against Vanessa Hart pursuant to N.J.S.A. 18A:6-11.

3. The Irvington Board of Education and Vanessa Hart, through discussions between their respective counsel determined that it would be most beneficial to the parties involved to enter into the within agreement.

4. In furtherance of the within settlement, the following shall be agreed by and between Vanessa Hart and the Irvington Board of Education:

a. The Irvington Board of Education shall withdraw the tenure charges which were filed against Vanessa Hart.

b. The Irvington Board of Education shall transfer Vanessa Hart from the position of Lead Secretary at Irvington High School to another lead secretary position, or to another secretarial position while maintaining Vanessa Hart on the lead secretary salary guide, at another school within the Irvington School District. As of the date of this agreement, Vanessa Hart will be transferred to Berkeley Terrace School. However, nothing regarding this transfer shall be construed to eliminate the Irvington Board of Education's managerial prerogative to transfer Vanessa Hart to any other school within the district in the event it determines in its sole discretion that another transfer would be warranted.

c. The Irvington Board of Education and Vanessa Hart agree that she will waive any claim which she may have for back pay which was lost as a result of her

suspension without pay, a period of 120 days, as well as any claim for pay after December 2001. The Board will pay to Hart back pay for the period from September 2001 through December 2001 ~~less mitigation~~ in the gross amount of $5,000.00.

d. The Irvington Board of Education and Vanessa Hart agree that her employment and adjustment increment shall be withheld during the year 2001/2002 academic year. She will return to work at the same salary she received in the 2000-2001 school year.

e. Hart will receive credit for four unused sick days for the months of September through December 2001, to be added to those days accumulated as of the date of certification of charges, as well as credit for one week of vacation.

5. The Irvington Board of Education, after fully considering this matter, has concluded that it is in the best interests of the Irvington Board of Education to settle the within matter involving Vanessa Hart in view of the potential escalation of substantial legal and administrative costs, personnel time and that the parties' interest would be better served in resolving this matter through the within settlement which resolves all issues involving the Irvington Board of Education and Vanessa Hart which are currently in dispute.

6. The within settlement agreement shall satisfy the matter entitled; In the Matter of the Tenure Hearing of Vanessa Hart, EDU-03880-01N, Agency Ref. No. 114-5/01.

7. Both parties acknowledge that should anyone inquire about whether Vanessa Hart was ever the subject of tenure charges, the parties will acknowledge same and

advise that the matter was settled. There shall be no comment from any employee or agent of the Irvington Board of Education which casts a negative light upon Vanessa Hart. Any deviation from this provision by the Irvington Board of Education, its employees, agents and/or servants shall subject the Board of Education to penalties as determined by a court of competent jurisdiction, which may include damages, plus attorney's fees and cost of suit.

8. It is understood that neither the execution of this Agreement or any other action taken by the Irvington Board of Education in connection with this settlement constitutes an admission by the Board of any violation of any law, duty or obligation or that any decision or action with respect to Vanessa Hart was unwarranted, unjustified, retaliatory, discriminatory or otherwise unlawful. The Board specifically disclaims any liability to Vanessa Hart.

9. The parties have entered into this Settlement Agreement solely to compromise the disputed claims. No findings of any kind have been made or issued by any court regarding the merits of the claims of this action and neither party purports to be the prevailing party in this action.

10. Both parties to this Agreement and their counsel participated in the negotiation and drafting of this Agreement as equals. No particular party shall be deemed to be the drafter or provider of this Agreement and the parties agree that the Agreement shall not be construed against any particular party.

11. This Agreement sets forth the entire agreement between Vanessa Hart and the Irvington Board of Education and supersedes all prior agreements or

understandings, if any, between the parties regarding the subject matter of this Agreement. This Agreement shall be construed in accordance with the laws of the State of New Jersey.

12. The parties acknowledge that they have consulted with their respective attorneys regarding this Agreement and that the terms of this Agreement have been explained to them and that they have represented to their attorneys that they have read this Agreement and agree to be bound by them.

13. Vanessa Hart and the Irvington Board of Education shall not release any claims that either may have for the enforcement of this Agreement and both maintain all rights to enforce this Agreement should there be a breach by either party.

IN WITNESS WHEREOF the parties hereunder have signed this Agreement as their voluntarily act and agree to be bound thereby.

Witness 4/3/03

VANESSA HART 4/3/03

Witness

, President
Irvington Board of Education

Dated: 4/10/03

Raymond L. Hamlin, Esq.
Board of Education
Attorney

OAL DKT. NO. EDU 3880-01
AGENCY DKT. NO. 114-5/01

IN THE MATTER OF THE TENURE	:	
HEARING OF VANESSA ALLEN (HART),	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF IRVINGTON, ESSEX COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms of the Board and respondent, a tenured secretary, since the record reflects that such terms comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/03

Date of Mailing: 5/19/03

253-03

253-03

J.G., ON BEHALF OF A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning grandmother challenged the Board's refusal to reinstate A.S. into the regular education program at West Deptford High School following a disciplinary suspension. The matter was consolidated with special education dispute – the Board claimed J.G. would not consent to have A.S. evaluated. The Board sought dismissal of the petition because J.G. lacked standing; custody of A.S. had been transferred to his father, C.S. Moreover, the Board alleged the appeals were filed untimely.

The ALJ granted summary decision to the Board and ordered the consolidated matter dismissed. The ALJ determined that when A.S. refused to cooperate on the special education evaluation, the Board acted expeditiously for the benefit of the larger student population. The ALJ found that petitioner lacked standing since the appeal was made seven months after the child was expelled and J.G. no longer had custody at that time. In addition, seven months was well beyond the 90-day limitations period for filing.

The Commissioner, even assuming *arguendo* that petitioner had standing to bring the appeal, concurred with the ALJ that the petition was untimely filed. The matter was dismissed.

May 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION and DECISION

OAL DKT. NOS. EDU 8370-02

AND EDS 8369-02

AGENCY DKT. NOS. 379-11/02

AND 2003 7144

CONSOLIDATED

J.G. o/b/o A.S.,

Petitioner,

v.

WEST DEPTFORD TOWNSHIP BOARD OF EDUCATION,

Respondent.

Lee Ginsburg, Esq., on behalf of petitioner (Camden Regional Legal Services, Inc., attorneys)

Robert A. Muccilli, Esq., on behalf of respondent (Capehart and Scatchard, attorneys)

Record Closed: February 24, 2003 Decided: April 4, 2003

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of complaints filed by petitioner with the Bureau of Controversies and Disputes, pursuant to *N.J.S.A.* 18A:6-9, and with the Director of the Office of Special Education, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.*

§§ 1400-87. The matters were separately referred to the Office of Administrative Law as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15. Respondent has filed a motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5; *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995), and the cases were consolidated for purposes of decision. Although the transmittal includes a request for expedited/emergent relief, the parties agreed that it was more practical to proceed directly to the summary decision issues. The last papers in this regard were received on February 24, 2003.

The basic facts are undisputed. In April 2002, A.S. was sixteen years old and he attended tenth grade in West Deptford High School. On April 8, 2002, a teacher observed A.S. and another student pass items in a suspicious manner and she notified Howard Cohen, the principal. Mr. Cohen and an assistant principal met with A.S. and asked him to open two bags in his possession. When he declined, attempts were made to contact his grandmother, J.G., who had residential custody of him, and when that failed, his mother L.S. was called and she came to school. L.S. instructed her son to open the two bags and the contents included eight cellophane packets of what appeared to be marijuana, some money and a utility knife. Mr. Cohen gave A.S. an opportunity to explain his conduct, but he said nothing. The school police officer later confirmed that the cellophane packets contained marijuana.

A disciplinary hearing before the Board of Education was first scheduled on April 15, 2002, and was adjourned to April 22, 2002, to amend the charges. Notice of the charges, of the right to appear with counsel, of potential witnesses, of the right to examine and cross-examine, and of the time, date and place of hearing were provided to petitioner. Resp't Br. Ex. E.

Principal Cohen also referred the matter to the Child Study Team (CST) for evaluation and J.G. received notice of this in a letter of April 9, 2002. Included with the notice was a Department of Education pamphlet entitled "Parents Rights in Special Education" (PRISE). Resp't Br. Ex. C. The CST scheduled a meeting for April 11, 2002, which petitioner cancelled. The meeting was rescheduled for April 30, 2002, but was also cancelled. The affidavit of Joyce Feder, director of special education for the District, relates that the meeting was cancelled because petitioner informed the CST on April 29, 2002, that "she would not put A.S. through the special education process." In her affidavit J.G. denies saying any such thing; to the contrary, she

claims to have wanted this evaluation. She merely told the CST that she feared the process would be rushed just to have results available for the Board disciplinary hearing. She wanted a fair and comprehensive set of evaluations.

On April 22, 2002, the Board of Education convened to review the charges against A.S. L.S. and J.G. spoke on his behalf and indicated that he would not testify, on the advice of counsel. They agreed that it was not necessary to proceed with the liability phase of the hearing as the conduct giving rise to the charges was not being challenged. After receiving A.S.'s disciplinary history, which reflects a number of prior infractions, the Board voted to expel A.S. from school. This decision was confirmed in a letter dated April 24, 2002. The Board offered to place A.S. in the Gloucester County Alternative School for the 2002/03 school year. A.S. was accepted by the Alternative School and the Board made a tuition payment and arranged for transportation. J.G. rejected the placement.

There is something of a dispute about the special education discussion at the Board hearing. The minutes reflect that L.S. and J.G. informed the Board that they would not consent to have A.S. classified. Resp't Reply Br. Ex. A. This version of events is supported by affidavits from George Faunce, superintendent of schools, and Alan Schmoll, Esq., attorney to the Board, both of whom were present that evening. J.G. asserts that she said no such thing. Rather, she simply repeated her earlier statement to the CST that she did not believe the evaluation should be hurried to accommodate the disciplinary proceedings.

After the expulsion petitioner sought to have her grandson admitted to the Paulsboro school district, where she has some contacts. These efforts continued for a few months, but ultimately proved unsuccessful. Petitioner then decided to transfer residential guardianship for A.S. to his father, C.S., who rented an apartment in Deptford Township, in the hope that A.S. could attend school there. The Chancery Division effected this change on October 31, 2002. On October 30, 2002, J.G. withdrew A.S. from West Deptford High School and authorized the release of records to Deptford High School. C.S. registered A.S. in the Deptford Township public schools, but they in turn placed A.S. at the Gloucester County Alternative School pending further evaluation. At this writing A.S. continues in the Alternative School. This is the substance of the record for purposes of the motion.

The motion papers raise a number of legal issues. Initially, respondent argues that Camden Regional Legal Services must be removed from the case. Regulations governing legal services to the poor prohibit representation in fee-generating litigation unless certain specified requirements are met, particularly, as relates here, that the matter has been rejected by at least two private attorneys, 45 *C.F.R.* § 1609.3 (2002). J.G.'s affidavit asserts that she contacted eight attorneys who were either unwilling to represent her under any circumstances, or required advance payments that she could not afford. This declaration in the absence of contrary facts is adequate to defeat respondent's argument.

Respondent next argues that the matter must be dismissed because J.G. lacks standing. The petitions were both filed on or about November 26, 2002, and at that point residential custody had already been transferred to C.S. I agree.

J.G. was given temporary residential custody of A.S. by order of the Chancery Division, Family Part, dated August 17, 2000. When custody was transferred back to C.S. on October 31, 2002, J.G. lost the necessary status to bring an action. Only a parent or person acting in the place of a parent with whom the child lives has standing under the IDEA to bring a due process action for a minor child, 20 *U.S.C.* § 1415(f)(1). A like standard applies in regular education proceedings, *N.J.A.C.* 6A:3-1.3(a)(2).

Petitioner believes that the Chancery Division orders are unclear regarding custody. The August 17, 2000, order makes J.G. "[the] primary residential guardian with both plaintiff and defendant having joint custody rights." The subsequent Chancery Division order grants "residential custody" to the father effective October 31, 2002. Resp't Br. Ex. H. Counsel infers that the failure to restate the word "primary" in the second order reserves that status in J.G. and that she still controls questions of residence. The argument is strained. The Chancery Division's two orders are fairly straightforward. On August 17, 2000, J.G. was given residential guardianship with both parents retaining joint custody. This residential guardianship terminated on October 31, 2002, by agreement of all parties and went to the father. When read in context, the silence of the second order regarding the word "primary" cannot be seen as a reservation of control in the grandmother. Moreover, A.S. enrolled in the Deptford Township schools and

petitioner's brief concedes that the transfer of residential custody was undertaken to effectuate this purpose.

Petitioner argues also that if standing is denied then respondent will have benefited from its violations because the transfer of residential guardianship was only undertaken to avoid the delays associated with vindicating a student's rights. This argument forgets that emergent relief proceedings were available to J.G. in April 2002. It is not acceptable to file an appeal some seven months after a child has been expelled and then argue that delays in adjudicating such matters forced an alternative course. Although delays do occur, matters are regularly reviewed in the OAL and before the Commissioner on an expedited basis.

Finally, with respect to the standing issue, counsel for petitioner argues that if she does not have standing, the matter should be held in abeyance to give the father an opportunity to file a motion to intervene, or to substitute himself for her. This position is speculative and, worse, it proposes a wasteful course of action. If petitioner had some cure for the obvious standing problem presented by these facts then counsel ought to have moved to affect this before time and money were spent to analyze the issue. This is not an academic exercise.

Respondent argues next that pursuant to *N.J.A.C.* 6A:3-1.3(d) appeals must be filed no later than ninety days following receipt of the final order, ruling or other action complained of. There is no dispute that petitioner was verbally informed of the expulsion on April 22, 2002, and that this was confirmed by letter of April 24, 2002. Thus, petitioner had until the latter part of July to file and did not do so until November 26, 2002. Petitioner counters that the ninety-day limitations period does not apply to IDEA claims under *Bernardsville Board of Education v. J.H.*, 42 *F.*3d 149 (3d Cir. 1994), and that the thrust of her claims relates to respondent's failure to treat A.S. as a child with a potential disability.

While petitioner argues, for purposes of defeating the ninety-day rule, that her claims fall predominantly under the IDEA and are inextricably linked to it, she nonetheless also filed a petition with the Bureau of Controversies and Disputes. These issues relate to perceived inadequacies in notice and the opportunity to be heard before the Board, and with a little care, they can be disengaged from the IDEA claims. The ninety-day limitations period does apply to

these issues, the filing was clearly untimely, and the rule is generally applied with some strictness, *Kaprow v. Berkeley Township Bd. of Educ.*, 131 *N.J.* 572 (1993); *Riely v. Hunterdon Central High School Bd. of Educ.*, 173 *N.J. Super.* 109 (App. Div. 1980). Thus, the matter filed with the Division of Controversies and Disputes alleging procedural defects in notice and the opportunity to be heard should be dismissed for this reason alone. Moreover, these issues are also substantively bogus. The minutes of the Board meeting in question note that A.S. did not speak, on the advice of counsel, nor did his mother or grandmother present a defense. In his affidavit Mr. Schmoll certifies that he explained petitioner's procedural rights to her, and that she agreed to proceed to the penalty phase of hearing without presenting a defense. Petitioner has acknowledged in her own affidavit that she said little at the expulsion hearing because factually A.S. was caught with the items the school asserted he had. Given these circumstances the Board's action fell well within its broad discretionary authority, *Thomas v. Morris Bd. of Educ.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

Regarding the IDEA issues, it is true that the court in *Bernardsville* would not apply the ninety-day rule to a request for reimbursement filed two years after a unilateral placement. The court preferred to apply a rule of reason to such applications and then held that two years was too long. The instant matter is highly time sensitive and the public interest, as well as the individual interests of the parties, demands that such questions be brought to repose quickly. Seven months is a very long time to delay bringing an action of this type. The school semester in which the events occurred was over, the summer had passed and A.S. was well into the next semester in another district. I would suggest that a delay of this length is unreasonable under *Bernardsville.*

Finally, it is insufficient, under *Brill, supra*, 142 *N.J.* 520, to meet substantive assertions in a summary decision motion with bald opposing statements; rather, the response must raise a genuine fact question. Here, it is undisputed that Mr. Cohen sent petitioner notice that he had referred the matter to the CST, that the PRISE pamphlet accompanied this letter, and that two meetings were scheduled to discuss the referral. The director of special education for the District adds that petitioner refused to participate in this process and the meetings were cancelled for this reason. The referral was raised again at the Board meeting convened to hear the disciplinary

charges and petitioner's affidavit recalls that this was because one of the Board members inquired. The minutes then reflect that petitioner informed the Board that she would not pursue this avenue.

It is clear from this recitation that respondent stood ready to evaluate A.S. in order to determine whether any disability drove his conduct. For a legitimate fact question to arise I must find reasonably plausible the assertion that all of this stopped when petitioner insisted that the work be done professionally. There are no contemporaneous papers from petitioner affirming a desire for evaluation, or explaining that her comments were being misunderstood. The PRISE pamphlet that she received describes the process at some length and in plain English; if she had wanted to proceed with evaluation it would have been relatively easy to make this wish known. Thus, I find that petitioner was unwilling to have A.S. considered for classification and she then went on to pursue alternatives, first in Paulsboro and then in Deptford. As it happens, A.S. was ultimately placed in the Gloucester County Alternative School, an option first offered by respondent.

The IDEA contemplates that each side will cooperate in the evaluation process, in the development of an individualized education program (IEP), and in placement, *see, e.g.*, *Patricia P. v. Oak Park Bd. of Educ.*, 203 *F.*3d 462 (7th Cir. 2000). Absent basic cooperation the process can bog down. Respondent was here faced with a student found to have marijuana and a knife on school premises. Given petitioner's opposition to evaluation for special education purposes, respondent acted expeditiously for the benefit of the larger student population. I perceive no error in this.

Based on the foregoing, summary decision is granted in favor of respondent and it is ordered that both petitions be dismissed.

Those portions of the decision that bear on the IDEA are final pursuant to 20 *U.S.C.A.* § 1415(i)(1)(A) and 34 *C.F.R.* § 300.510 (2001) and are appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a district court of the United States. 20 *U.S.C.A.* § 1415(i)(2); 34 *C.F.R.* § 300.512 (2001). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

I hereby **FILE** the portions of this opinion subject to the Commissioner's review with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

4/4/03
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

April 9, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NOS. EDU 8370-02 AND EDS 8369-02 (CONSOLIDATED)
AGENCY DKT. NOS. 379-11/02 AND 2003 7144

J.G., ON BEHALF OF A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record, and assuming, *arguendo*, petitioner had standing to bring the within appeal, the Commissioner concurs with the Administrative Law Judge that, to the extent petitioner seeks relief pursuant to *N.J.S.A.* 18:6-9, the Petition of Appeal was untimely filed. *N.J.A.C.* 6A:3-1.3(d). The Commissioner additionally finds there is nothing in this matter to warrant relaxation of the 90-day filing requirement. Accordingly, the matter is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5|20|03

Date of Mailing: 5|21|03

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

256-03

256-03R

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,

PETITIONER,

V.

UNITY CHARTER SCHOOL, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

In earlier proceeding, petitioning District alleged enrollment of Charter School was racially imbalanced; prior to development of a case record, the District and Charter School mutually agreed to establishment of a racially tiered lottery system for selection of new Charter School students. The Commissioner rejected the proposed agreement as a remedy not sufficiently supported by the underlying record, remanding the matter to the Office of Administrative Law for further fact-finding and argument without precluding the possibility of settlement through a remedy narrowly tailored to address demonstrated deficiencies.

On remand, the ALJ recommended approval of the parties' original agreement based on briefs and stipulations of fact submitted to the record in response to the Commissioner's directive.

Considering the record on remand, the Commissioner again rejected the proposed agreement, and, further, dismissed the District's petition. The Commissioner found that the proposed settlement, without any basis on record sufficient to warrant remedy, established an admissions system impermissibly relying upon race as the sole determinant of student eligibility. In dismissing the petition altogether, the Commissioner held that the District's allegations of racial imbalance were based on an inapplicable standard and an erroneous understanding of the Charter School Program Act and relevant decisional law.

May 22, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
REMAND SETTLEMENT
OAL DKT. NOS.: EDU 1797-02
ORIGINAL DKT. NO. : EDU 7310-01

BOARD OF EDUCATION OF THE MORRIS COUNTY SCHOOL DISTRICT, MORRIS COUNTY

Petitioner,
v.

UNITY CHARTER SCHOOL, MORRIS COUNTY,

Respondent.

John Geppart, Esq., for petitioner

David Gantz, Esq., for respondent

Record Closed: January 6, 2003 Decided: January 13, 2003

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF CASE

This matter was transmitted to the Office of Administrative Law (OAL) on February 4, 2002 as a result of a remand of a settlement rejected by the Commissioner of Education.

During the penancy of the remand the parties settled their differences in accordance with the instructions contained in the Commissioner's decision of January 11, 2002.

Having reviewed the stipulated facts, certifications submitted, and exhibits attached to both I **FIND** (a) that they are consistent with law, (b) that they fully disclose of all the issues in controversy and (c) that they were voluntarily entered into by the parties.

I note further that the stipulations of facts was accompanied by a verbal representation from both sides at the time of a concluding conference that no further factual findings were necessary from the Office of Administrative Law and that in the of opinion of the petitioner and respondent the proposed stipulation of facts completely support the original consent order submitted.

Accordingly, I **CONCLUDE** that the consent order supported by the stipulation of facts and briefs submitted meet the requirements of *N.J.A.C.* 1:1-19.1 after hereby approves same.

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

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

1/13/03
DATE

JEFFREY A GERSON, ALJ

Receipt Acknowledged:

1-13-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 14 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

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MORRIS SCHOOL DISTRICT BOARD OF EDUCATION,
Petitioner,

v.

UNITY CHARTER SCHOOL,
Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY
Agency Docket No. 157-6/01

OFFICE OF ADMINISTRATIVE LAW
Docket No. EDU OT 07310-01N

STIPULATION OF FACTS

1. Unity Charter School ("Unity"), a public charter school created under the Charter School Programs Act, opened in September 1998. Unity is located at 340 Speedwell Avenue, Morristown, New Jersey, which is within the boundaries of the Morris School District ("District").

2. The individuals comprising Unity's student population change throughout the school year as a result of a parent's decision to withdraw their child from Unity. Once a student leaves Unity, he or she is then replaced with a student from Unity's waiting list. Consequently, the racial/ethnic composition of Unity's student population may change as old students leave and new students enroll.[1] For this same reason, the number of District students attending Unity may fluctuate throughout the school year depending on whether the student who leaves, or the student from the waiting list, comes from the District.

[1] Because the student body at Unity does change throughout the school year, the percentages contained in the Stipulation of Facts concerning majority/minority representation at Unity do not necessarily reflect percentages for the entire school year. Rather they represent a percentage or range of percentages for a certain period of time during the particular school year identified.

3. During the 1997-98 school year, grades K-8 of the District were comprised of 60% white students and 40% minority students.

4. In the 1998-99 school year, Unity conducted its registration for the first time. Unity's overall student population fluctuated between 86.11% to 88.5% white students and 11.5% to 13.89% minority students. During that year, Unity enrolled at any given time, approximately 35 and then 36 District students, of whom 31 and then 32 were white. The percentages varied between 86.5% to 88.6% white students to 11.4% to 13.5% minority students. Many of these students who left the District to attend Unity came from the Hillcrest-Hamilton school attendance area. The student population in the Morris School District for grades K-8 in the 1998-99 school year was 58.6% white students and 41.4% minority students.

5. Recognizing shifts in residential demographics over the past three decades, the District established and opened a seventh school, a Multiage Magnet School, and implemented intra-district choice for the 1999-2000 school year. This program initiative was designed to create additional space in each of the six neighborhood schools for a growing student population and increase flexibility for the assignment of students to balance enrollment composition.

6. For the 1999-2000 school year, Unity's enrollment consisted of 79% white students, and 21% minority students. The Morris School District student population at the Unity Charter school was 91.4% white students and 8.6% minority students. The District's K-8 enrollment for the same school year was 56.8% white students, and 43.2% minority students.

7. In the 2000-2001 school year, Unity had ninety students enrolled; fifty-two of who were from the District. Overall, Unity had 15, and at times, 17 minority students, which made the minority population vary between 16.67% and 19% and the white population vary between 81% and 83.3%. Of the thirty-eight students who were not from the District, three to

four were minority. Of the fifty-two students from the District, twelve to thirteen were minority. The District student population at Unity fluctuated between 75% to 77% white students and 23% to 25% minority students. The District's overall K-8 student population was 57.4% white students and 42.6% minority students.

8. In the spring of 2001, the District contacted the Office of Charter Schools in an effort to resolve the racial balancing issues. The District and Unity met with the head of the Office of Charter Schools to discuss the racial balance issues. The matter was not resolved through the efforts of the Office of Charter Schools.

9. In the 2001-2002 school year, Unity had ninety-six students enrolled, fifty of whom were from the District. The overall Unity student population consisted of 15.6% minority students and 84.4% white students. Of the fifty District students, eleven were minority and thirty-nine were white. Of the remaining forty-six students who were not from the District, four were minority and forty-two were white. The total population of District students at Unity consisted of 78% white students and 22% minority students. The District's total K-8 student population in the 2001-2002 school year was 57.1% white students and 42.9% minority students.

10. For the 2002-2003 school year, Unity currently has ninety-six students enrolled; forty-three of who are from the District. The overall Unity student population consists of 17.7% minority students and 82.3% white students. Of the forty-three students from the District, seven are minority and thirty-six are white. Of the fifty-three students at Unity who are not from the District, ten are minority and forty-three are white. The total population of District students at Unity is 83.7% white students and 16.3% minority students. The overall Morris School District student population for grades K-2 is 57% white students and 43% minority students, which is comprised of the population of Alfred Vail School (57% white students and 43% minority

students); Hillcrest School (52% white students and 48% minority students), Woodland School (59% white students and 41% minority students); Normandy School (59% white students and 41% minority students). The overall Morris School District population for grades 3-5 is 57% white students and 43% minority students, which represents the population of Sussex School (57% white students and 42% minority students), Hamilton School (55% white students and 45% minority students), Jefferson School (57% white students and 43% minority students), and Normandy School (57% white students and 42% minority students). The student population in grades 6-8 is 57% white students and 43% minority students. The fall enrollment reports of the Morris School District for grades K-8 and the fall enrollment statistics for the District on the New Jersey Department of Education website for the years 1998 through 2002 are incorporated herein by reference.

11. In conclusion the following chart demonstrates the racial composition of the District and Unity since 1997-98:

School Year	Morris School District K-8 (White/Minority)	Unity Charter School (White/Minority)	Morris School District Students at Unity Charter School (White/Minority)
1997-98	60%/40%	Not Yet Open	Not Yet Open
1998-99	58.6%/41.4%	86.11% to 88.5%/ 11.5% to 13.89%	86.5% to 88.6%/ 11.4% to 13.5%
1999-2000	56.8%/43.2%	79%/21%	91.4%/8.6%
2000-20001	57.4%/42.6%	81% to 83.3%/ 16.67% to 19%	75% to 77%/ 23% to 25%
2001-2002	57.1%/42.9%	84.4%/15.6%	78%/22%
2002-2003	57%/43%	82.3%/17.7%	83.7%/16.3%

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OAL DKT. NO. EDU 1797-02 (EDU 7310-01 ON REMAND)
AGENCY DKT. NO. 157-6/01

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
UNITY CHARTER SCHOOL, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL), recommending that the Commissioner approve a previously rejected Consent Order in light of the briefs and stipulation of facts submitted by the parties on remand, have been reviewed.[1]

Upon such review, the Commissioner is once again compelled to reject the proposed Order, and, further, to dismiss the Petition of Appeal.

In his prior decision, the Commissioner had commended the parties' cooperative efforts toward seeking increased student diversity in the charter school's student population, but was unable to accept the parties' proposed Order because it established a system employing race as a paramount factor in student admissions notwithstanding an absence of proofs that the school did not reflect a racial cross-section of the community's school-age population, *N.J.S.A.* 18A:36A-8(e), or that the school's existence created a negative impact on the racial

[1] The record also includes a supplemental Certification of William Feldman, brought to the record by the parties' mutual request subsequent to issuance of the Initial Decision. The certification describes both the actual results of the lottery conducted on January 16, 2003, and the results as they would have been had the proposed Consent Order been in effect at the time of the drawing.

composition of District public schools. The Commissioner further observed that the parties had failed to identify the cause(s) of the school's enrollment disparity, leaving him unable to determine whether the proposed remedy was narrowly tailored to address such cause(s).[2] Consequently, the Commissioner remanded the matter to the OAL for development of a factual record, with legal analysis as necessary, so as to permit him to make an informed determination on the appropriateness of any proposed agreement, or, alternatively, for proceedings on the merits if a conforming settlement could not be reached.[3]

In response to the Commissioner's directive, the parties submitted to the record on remand before the Administrative Law Judge (ALJ) a Stipulation of Facts setting forth the respective enrollments, broken down by percentage into "white" and "minority" groupings, of the Morris School District (District), and of the Unity Charter School (Unity), as well as the number of District students at Unity for 1997-98 through 2002-03. Additionally, the District submitted a letter brief in support of the Consent Order together with a Certification of Dr. Dennis Clancy with exhibits, while Unity submitted a letter brief and Certification of Susan Lausell, to which the District replied with additional statistics further breaking down the previously stipulated "minority" numbers into "Black" and "National Origin" categories.

In his Initial Decision on Remand, the ALJ recommended approval of the original Consent Order for reasons reproduced in their entirety below:

> During the penancy [*sic*] of the remand the parties settled their differences in accordance with the instructions contained in the Commissioner's decision of January 11, 2002.

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[2]The Commissioner noted by way of example that disparities caused by insufficient outreach would likely be addressed through remedies quite different from those addressing inability to retain minority students once admitted.

[3] The Commissioner additionally clarified that an approvable Consent Order could not include a provision for indefinite extension by the parties without assessment of the agreement's effectiveness, and that any proposed Order concerning recruitment, enrollment or wait-listing of students was tantamount to an application for charter amendment, *N.J.A.C.* 6A:11-2.6, so that any Order ultimately approved by the Commissioner would be deemed to have amended Unity's charter. On this point, see Note 5 below.

> Having reviewed the stipulated facts, certifications submitted, and exhibits attached to both I FIND (a) that they are consistent with law, (b) that they fully disclose [*sic*] of all of the issues in controversy and (c) that they were voluntarily entered into by the parties.
>
> I note further that the stipulations [*sic*] of facts was accompanied by a verbal representation from both sides at the time of a concluding conference that no further factual findings were necessary from the Office of Administrative Law and that in the opinion of the petitioner and respondent the proposed stipulation of facts completely support [*sic*] the original consent order submitted.
>
> (Initial Decision at 2)

Thus, notwithstanding the Commissioner's prior directive, the Initial Decision offers neither analysis nor explication as to why the parties' proposed order is acceptable under the facts pled. This is particularly troublesome because the arguments and statistical analyses presented by the parties on remand reiterate or, at best, slightly elaborate, facts and positions already set forth in the pleadings and accompanying documents filed at the initiation of this matter in 2001, and because the Consent Order provides for precisely the relief requested by the District in its petition alleging violations of law, a request to which Unity is clearly acquiescing solely because it views increased student diversity as a desirable goal, not because it in any way credits the District's allegations against it or the District's interpretation of controlling law. Thus, there has been not even a facial showing, in satisfaction of the Commissioner's specific directive, that a remedy is warranted because Unity does not reflect a racial cross-section of "the community's school age population," *N.J.S.A.* 18A:36A-8(e), or its existence creates a negative impact on the racial composition of the student body in the District. Indeed, the Initial Decision does nothing more than memorialize the parties' own agreement that their originally-submitted Consent Order was adequately supported for purposes of acceptance by the Commissioner.

It is, therefore, necessary for the Commissioner here to review both the provisions of the proposed settlement and the positions of the parties with respect to it.

The proposed Order establishes an admissions system providing for Unity students to be selected by lottery from separate White, Black and National Origin tiers, with new students to be selected, according to the number of seats available, from the tier(s) needed to bring the proportionate number of Unity students in each category to the same level as exists in the Morris School District; separate waiting lists are to be maintained for the purpose of filling, with an applicant from the proportionally lacking tier, any vacancy later created by a departing student.[4] The Order would remain in effect for two years from the date of its approval by the Commissioner, but the parties may extend it "for an additional period of time by providing written notice of their mutual consent to the office of the New Jersey Commissioner of Education prior to the expiration of the original two years." (Consent Order at 4)[5]

In support of the Order, the District alleges that Unity is not "racially balanced with its district of residence, the Morris School District***, in violation of the Charter School Program Act (CSPA) and the *State Guidelines on the Desegregation and Integration of Public Schools* (*Guidelines*)." (Petition of Appeal at 2) It contends that *Jenkins v. the Township of Morris Sch. Dist. and the Bd. of Educ.*, 58 *N.J.* 483 (1971) and *In the Matter of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 *N.J.* 316 (2000), act to require Unity to achieve racial balance with the District pursuant to the *Guidelines*. (*Id.* at 5) The

[4] In the submission referenced at Note 1 above, the parties represented that, had this system been in effect when Unity conducted its January 2003 lottery, all five minority applicants (of 13 total) would have been selected for Unity's seven kindergarten vacancies instead of only one; both minority applicants (of 29 total) would have been selected for Unity's five first-grade vacancies instead of none; and half the minority applicants (4 of 21 total) would have been selected for Unity's two second-grade vacancies instead of none. Thus, under the current "blind" lottery, with 14 slots available, only one minority student was selected; whereas, if the proposed tiered system had been in effect, that number would have risen to nine.

[5] The District objects to the Commissioner's prior characterization of this language (see Note 3 above) as creating an agreement of potentially indefinite duration, claiming that it "actually provides for an initial two-year duration after which the parties must agree in writing to continue the terms of the Order and again obtain approval from the Commissioner of Education." (District Brief at 4, 12) The Commissioner observes that the clause at issue provides solely for *notice* to the Commissioner of the *parties'* intention to continue the Order.

District further contends that Unity adversely impacts the District by accepting a large number of white students from the District while the percentage of Unity minority students is "much lower" than the minority population of the District, and that Unity's sibling preference policy materially exacerbates the situation. (*Id.* at 6-7) As relief, the District seeks an order implementing a three-tiered lottery system, selection of minority students from a tiered waiting list, "possibly abolishing the sibling selection process" and any other relief the Commissioner deems "equitable and just to effectuate racial balancing under the *Guidelines*." (*Id.* at 7) In support of its allegations of *de facto* segregation and its prayer for relief, the District offers the Certification of Dr. Dennis Clancy, describing the respective racial compositions of various grade levels in Unity as compared to those in the District, together with a proposed calculation of the appropriate balance for Unity under the *Guidelines* and a memorandum of law more fully setting out the District's position. In its brief on remand, the District essentially reiterates these same arguments, additionally stressing its unique status as the only district in New Jersey expressly created to address racial imbalance (District's Brief on Remand at 2, 5), and noting the Department's response to the District's comment on rules proposed in August 2002 by the State Board of Education to address racial balance in charter schools: "*To achieve the requisite racial balancing between the charter school and the district of residence, the Department will implement procedures consistent with the existing Guidelines.*" (emphasis in text) (*Id.* at 3, quoting 34 *N.J.R.* 3806(a))

In addition to denying the conclusions of law imbedded in the District's petition, Unity counters that the charter school law does not require it to be in racial balance with the actual student enrollment of the District, and that the District has not made an adequate showing of adverse impact on the racial balancing of the District's student population. (Answer to

Petition at 5 and *passim*) Unity's answer also incorporates a letter from the Vice President of the Board of Trustees, setting out Unity's position with regard to the allegations made by the District. In that letter, Unity contends that it has, as already demonstrated through prior litigation and required annual reports, "aggressively" attempted to recruit students from all segments of the Morristown and Morris Township communities; however, it also concedes that "its student body unfortunately does not adequately mirror the community in which it is located." Therefore, Unity does not oppose – indeed, it endorses – the District's request for a multi-tiered or weighted lottery to select students to fill charter school openings with the aim of attaining greater diversity. (Letter of David A. Bolson at 1) Unity further states:

> Two additional points need to be clarified. First, MSD [Morris School District] has alleged in its Petition, on more than one occasion, that Unity has had an adverse impact upon racial balancing at MSD. However, the evidence provided by MSD proves the contrary. MSD cannot show how a school of 90 children, only 52 of whom are drawn from MSD, can adversely impact a school population of more than 4,000. According to Dr. Clancy's own certification, the racial composition of the K-8th grade student body at MSD is 58.91% white and 41.09% minority. Also, according to the statistics contained in the same certification, if Unity were to cease operations and all its MSD students returned to the various schools within MSD, the K-8th grade racial makeup at MSD would only go to 59.24% white and 40.76% minority – less than a 0.4% change. Clearly, Unity has virtually no impact on MSD's racial balance.
>
> Secondly, since, as Dr. Clancy describes, MSD has the means and mechanism to balance its schools, it will never be "out of balance" with itself. MSD rues, however, that MSD is out of balance with Unity. It is the position of Unity that it has no legal or moral obligation to be in racial balance with MSD. We believe that it is the legal and moral obligation of Unity to be in racial balance with the community in which we reside. This is an important distinction. First of all, although MSD applicants get preference in admission, Unity receives numerous applicants from out-of-district students and is required to accept them if space is available. Currently, approximately 45% of Unity students are from out-of-district. Additionally, Unity is attracting students who were not even part of the public school system. Currently, approximately 10% of Unity students were home-schooled prior to attending Unity and an additional 10% came to Unity from private schools. There is no rational argument to be made, nor reasonable formula to be concocted, that would attain "balance" with MSD under these circumstances. (Letter of David A. Bolson at 2)

Unity reiterates and elaborates these arguments in its brief on remand, additionally contesting the District's interpretation of *Englewood* and the accuracy of its calculations based on the *Guidelines*, since those calculations, even presuming for purposes of settlement proceedings that the *Guidelines* apply to Unity, do not fully address all the categories of students and grade-level organizations required in their application.[6] (Unity Brief on Remand at 3-5) Unity concludes by noting that although it and the District "may disagree on the law, the two sides do agree on one thing: that the representation of minorities at Unity should increase" and that "entry of the Consent Order will help make that goal a reality." (*Id.* at 5)

Thus, in the District's case because it seeks a remedy for alleged violations of law and in Unity's case because it would like to have more minority enrollees than the existing "blind" lottery has thus far generated, the parties have agreed to an admissions mechanism based on predetermined ratios, with the assignment of specified numbers of seats to students of corresponding racial categories.

However, notwithstanding the motivation of the parties and their commendable cooperation in attempting to achieve their goal, the Commissioner cannot issue an Order granting absolute preference to certain charter school applicants solely on the basis of race or national origin merely because the parties agree he should do so. Although it is beyond dispute that the State has a compelling interest in preventing segregation, and that maintenance of diverse student populations is critical to provision of a thorough and efficient system of public education, it is also true that, as a general proposition, conditioning student admission *exclusively* on membership in a particular racial or ethnic group, as the proposed lottery does, is unlikely to withstand legal scrutiny except, possibly, under the narrowest and most compelling of

[6] It was in response to this objection that the District subsequently submitted the more refined breakdown of student enrollments referenced at page 5 above.

circumstances; certainly, such conditioning cannot be adopted simply as a means of increasing student diversity, particularly when it takes the form of a "quota" system of a type already found impermissible in various jurisdictions based upon federal law.[7] Accordingly, the Commissioner must look to the arguments and proofs presented in support of the District's claim that Unity is in violation of law prohibiting segregation.

The District's claim rests on two prongs, one pertaining to the composition of Unity itself and the other to its impact on the District. As expressed by the State Board in a prior proceeding challenging the Commissioner's initial approval of Unity's charter:

> There are two distinct aspects to the District's claims of racial imbalance. Its central claim is that the Commissioner could not properly approve the charter because such approval permitted the operation of a segregated school. The focus of this claim is the racial composition of the pupil population of Unity Charter School. However, the District is also contending that the Commissioner's approval was improper because the availability of the option of enrolling in the Charter School may result in a negative impact on the racial composition of the student population that continues to attend the District's schools. (*In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County,* State Board decision of July 7, 1999, Slip Opinion at 13)

On the composition of Unity's student population, the District relies on two contentions, the first relating to the role of the *Guidelines*, and the second to the population on which the calculations therein are to be based. Specifically, the District contends that the New Jersey Supreme Court, in its decision in *Englewood, supra,* held the CSPA "[to require] that a charter school's admission policy 'seek a pupil population similar to the pupil population that the *Guidelines* seek for New Jersey school districts,'" so that, when the *Guidelines* are applied to Unity, Unity's percentages of white/minority/national origin students must be comparable to

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[7] Black, Watt Lesley, Jr., Ph.D. and Frank R. Kemerer, Ph.D., "Legally Defensible Approaches to Racial Diversity in Charter School Enrollments," *West's Education Law Reporter*, Vol. 172, No.2, February 27, 2003, 575-609. In light of the State Board's decision in *IMO Final Grant, infra*, the Commissioner is unpersuaded by the District's contention that existence of a desegregation order for the District renders inapposite any ruling where such an order was not in place. (District's Brief at 3-5)

those of the public schools of the District (District's Brief at 6); in other words, if Unity's student percentages do not "match" the *Guidelines*, the school is, by definition, segregated. (District's Brief on Remand at 11) A reading of the cited passage in context, however, yields an altogether different result. At the conclusion of a discussion reviewing New Jersey's long and vigorous State policy against discrimination and segregation, the Court pointed to the *Guidelines* as the State's model for ensuring consistency between the percentages for various racial groups within a district's overall pupil population and the percentages for the same pupil groups in a district's various schools, so as to promote learning environments in which students are educated among a mix of children reflective of the overall district composition for that organizational level. Turning to charter schools, the Court opined that:

> With charter schools, the Legislature *sought to achieve a comparable result.* Balancing the desire to prevent discrimination on the basis of race in admission policies with a concomitant desire to prevent racial segregation in the charter school, the Act provides:
>
> > The admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community's school age population, including racial and academic factors. [N.J.S.A. 18A:36A-8e.]
>
> ***
>
> As a result of the comments elicited from the joint hearing,***[the language cited quoted above] was added, reflecting the importance that the legislators placed on the need to maintain racial balance in the charter schools. *In using, as the pertinent reference, "a cross section of the community's school age population including racial and academic factors," the Act requires that a charter school's admission policy seek a pupil population similar to the pupil population that the Guidelines seek for New Jersey's school districts.* We see nothing in the Act or its history that is discordant with the State's policy of maintaining nonsegregated public schools in our communities.*** (emphasis supplied) (*Englewood, supra,* at 325-27)

Thus, the Court found *not* that the percentage calculations set out in the *Guidelines* control charter school enrollments based on comparison to enrollments at the school's district of residence, as claimed by the District, but that the CSPA and the *Guidelines* are analogous in

purpose, both seeking for each individual school a broad representation of students from the larger community; in other words, that the CSPA was specifically and successfully structured to accomplish for charter schools what the *Guidelines* accomplish for public school districts.

On this point, the Court's holding in *Englewood* is entirely consistent with the prior holding of the State Board of Education, affirmed by the Appellate Division of Superior Court, in a related matter involving the very parties and issues appearing herein. In its July 7, 1999 decision entitled *In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County*, the State Board of Education held:

> In [finding that the District failed to establish the validity of its claims of racial imbalance], *we reject the District's argument that the question of whether Unity Charter School is segregated should be resolved by application of the Department's desegregation guidelines.* Those guidelines were designed to ensure that the student populations attending school within a district were not segregated as a result of their assignment by the district to specific schools. *This is not the situation confronting a charter school, which may recruit students from more than one district and which does not distribute its students by assigning them to different schools.*
>
> *In point of fact, in the case of a charter school, the student makes the "assignment" by choosing to enroll in the charter school. Moreover, the conceptual foundation of the charter school program rests on the policy determination to provide students and their parents with the opportunity to make this choice.*
>
> This does not mean that, from an educational policy perspective, having a diverse student population is not important in the context of a charter school. *In addition to prohibiting discrimination, N.J.S.A. 18A:36A-7; N.J.S.A. 18A:36A-11, the Legislature recognized the significance of achieving such diversity by requiring charter schools to have an admission policy that "...to the maximum extent practicable, seek[s] the enrollment of a cross section of the community's school age population, including race and academic factors." N.J.S.A.* 18A:36A-8(e). In this respect, we stress that the District has not questioned the efforts that Unity has made to attract such a student population. Nor has the District alleged that Unity has in fact discriminated in either its recruitment efforts or its admissions. (emphasis supplied) (Slip Opinion at 14-15)

That the Appellate Division shared the understanding of *Englewood* set forth by the Commissioner above is indicated by its affirmance, in a ruling purposely delayed until the Supreme Court had ruled in *Englewood, supra,* of the State Board expressly "for the reasons stated in *Englewood* decided on June 28, 2000 and the State Board's 22-page opinion of July 7, 1999." *In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County*, Superior Court, Appellate Division, A-6212-98T1, Slip Opinion at 3. Therefore, at this juncture, there can be no question the District's interpretation of *Englewood*, on which its claim of racial imbalance within Unity rests, is unsustainable. The specific formulas of the *Guidelines* do not apply in the present circumstance,[8] and even to the extent that the *Guidelines* may be viewed as a general gauge of desirable mixes of children for particular types of communities, the student population for purposes of comparison with a charter school is not the public school enrollment of the district of residence, but "the community's school age population," a group for which no comparison can here be made, since the present record is virtually devoid of information about it.

Nor is the tenuousness of the District's position altered by its claim that, in recently adopting amendments to the regulations governing charter schools, the State Board of Education endorsed the District's view by stating, in response to comments submitted by the District, that it would "*implement procedures consistent with the existing Guidelines*" in order to "*achieve the requisite racial balancing between the charter school and the district of residence.*" (emphasis in text) (District's Brief on Remand at 3, Certification of Dr. Dennis Clancy at 5-6)

[8] Also worth noting in this context is that the Guidelines (at 14) prohibit creating or sustaining other discrimination in efforts to correct imbalanced enrollments, and that, had the parties' proposed lottery been carried out, as set forth in their own submission (see Note 4 above), no non-minority student would even have been *eligible* to enter the *drawing* for a second-grade seat, in clear contravention of *N.J.S.A.* 18A:38-5.1 (no child to be excluded from any school on basis of race).

The referenced exchange reads in its entirety as follows:

> 3. COMMENT: At proposed N.J.A.C. 6A:11-4.4, the commenter recommends that the rule be amended to provide a procedure whereby racial balancing between the charter school and the district of residence is to be considered and achieved under the existing New Jersey State Guidelines on the Desegregation and Integration of Public Schools (Guidelines). (3) [Identifying commenter as Mr. John G. Geppert, Jr., Attorney, Wiley, Malehorn and Sirota]
>
> RESPONSE: The Department acknowledges the commenter's concern. In accordance with N.J.A.C. 6A:11-2.2(c), the Commissioner will assess the composition of a charter school and the segregative effect that the loss of the students may have on its district of residence. To achieve the requisite racial balancing between the charter school and the district of residence, the Department will implement procedures consistent with the existing Guidelines.
> (34 *N.J. Reg.* 3806(a))

Contrary to the District's representation, in this response, the State Board is not agreeing that the *Guidelines* will be specifically applied to conform a charter school's student enrollment to the racial balance of its district of residence. Rather, the State Board "acknowledges the commenter's concern" by reiterating the principles of *Englewood* with respect to the Commissioner's obligation to ensure that a charter school is not itself segregated and that it does not have a segregative effect on its district of residence,[9] and, in that context, assuring that racial balance assessments will be undertaken "consistent with" the *Guidelines*, that is, with a recognition of the common purpose of the CSPA and the *Guidelines* as held by the *Englewood* Court.

The first prong of the District's attack on Unity, therefore, must fail. The CSPA addresses, in a way that has withstood scrutiny by New Jersey's highest Court, the equally important but potentially competing interests of racial balance and neutrality in admissions by requiring that a charter school solicit an applicant pool reflective of a cross-section of the larger community, but then finally select its students from that pool on a random basis; that is, by

[9] See discussion at 16-17 below.

creating, to the fullest extent possible, a diverse applicant pool from which each applicant then has an equal opportunity to compete for the limited number of seats available:

> A charter school shall be open to all students on a space available basis and shall not discriminate in its admission policies or practices on the basis of intellectual or athletic ability, measures of achievement or aptitude, status as a handicapped person, proficiency in the English language, or any other basis that would be illegal if used by a school district***. (*N.J.S.A.* 18A:36A-7)
>
> ***If there are more applications to enroll in the charter school than there are spaces available, the charter school shall select students to attend using a random selection process.***The admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community's school age population including racial and academic factors. (*N.J.S.A.* 18A:36A-8a and 36A-8e)

Just as the law distinguishes the applicant pool from the results of the selection process, with diversity attained through the former and not the latter, so it is by the former, evidenced by the charter school's recruiting methods, that compliance with the law must in the first instance be gauged. As stated by the *Englewood* Court:

> ***The Department's Guidelines require continuing assessment of a school district's efforts to maintain racial balance among its schools. Continuing assessment of the charter school's pupil population and impact on the district of residence must also occur. Obviously, *if a charter school were to recruit systematically only pupils of a particular race or national origin, the Commissioner would be obliged to stop that activity* and, if necessary, to revoke the approval of a charter school engaging in such tactics.*** (emphasis supplied) (*Englewood, supra,* at 328)

In the present matter, there is neither evidence nor allegation that Unity is *not* seeking a diverse, representative applicant pool (indeed, quite the contrary); nor is there evidence or allegation that Unity is not retaining minority students once admitted.

Additionally, reported experience has shown that the method of combining a "blind" lottery with a diverse applicant pool may not necessarily produce the mix of students desired in a particular charter school, but neither is it likely to result in a segregated school.

(Black and Kemerer at 600, Note 7 *supra*) That experience appears to have been borne out by Unity. Since the first year of its operation in 1998-99, Unity has maintained a white/minority balance of about 82-85% white to about 15-18% minority:

Year	White	Minority
1998-1999	86.11% - 88.5%	11.5% - 13.89%
1999-2000	79%	21%
2000-2001	81% - 83.3%	16.67% - 19%
2001-2002	84.4%	15.6%
2002-2003	82.3%	17.7%

(Stipulation of Facts at 4)

This balance, while it may not reflect the level of diversity ideally sought by the parties, is clearly sufficient to ensure that Unity students are not attending an unlawfully segregated school, and that they are in a position to enjoy the benefits of a diverse student body.

Turning to the second prong of the District's claim, the question of negative impact on the racial composition of the student population of the District, the Court has clearly stated:

> The Commissioner must consider the impact that the movement of pupils to a charter school would have on the district of residence. That impact must be assessed when the Commissioner initially reviews a charter school for approval to open, and on an annual basis thereafter. The Department's Guidelines require continuing assessment of a school district's efforts to maintain racial balance among its schools. Continuing assessment of the charter school's***impact on the district of residence must also occur. Obviously, ***the Commissioner [must] be prepared to act *if the de facto effect of a charter school were to affect a racial balance precariously maintained in a charter school's district of residence.* The Commissioner's obligation to oversee the promotion of racial balance in our public schools to ensure that public school pupils are not subjected to segregation includes any type of school within the rubric of the public school designation. (emphasis supplied) (*Englewood, supra,* at 328)

Similarly, the State Board has held:

> In this respect, we emphasize that, as the Appellate Division stated in *Patrick Douglas Charter School, supra,* Slip Op. at 12:

> [I]f and when the charter school in any particular district results in a skewed or undesirable racial mix in the existing district, the Commissioner has the power – independently of the powers granted by the Charter School Program Act – to take remedial action.

(*In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra,* Slip Opinion at 15, *citations omitted*)

Thus, there is no question here of whether the Commissioner has the obligation or authority to act in the face of demonstrated segregation, only the question of whether the present record supports the District's claim.

In this regard, as it did with its challenge based on application of the *Guidelines*, the District previously made its claim to the State Board in the context of challenging the Commissioner's initial approval of Unity's charter. On that occasion, the State Board held:

> ***After carefully reviewing the District's claims of racial imbalance on the basis of the record as supplemented, we find that it has failed to establish the validity of these claims.
>
> ***
>
> We recognize that the parties are not in agreement as to the proportion of Unity students that are minority. Nor is there agreement as to the racial composition of the Morris School District and the proper unit within the District by which to measure its racial balance in relation to Unity's. Nonetheless, even accepting the District's view on these questions,[13] it has not provided minimal substantiation for its claims. Given the opportunity that we have afforded the District in these proceedings to pursue its claims and to provide adequate support for them,***we deny its claims of improper racial imbalance.
>
> ***
>
> [T]here is no indication that the option of attending Unity has had any impact on the racial composition of the District's student population. Given the number of students from the Morris School District who are enrolled in the Charter School, and based on the District's statistics, we cannot discern even a minimal impact on the racial composition of the District.
>
> [13]The District contends that only 14% of Unity's student population is minority as compared to the District's overall enrollment of 40% minority. In its last submission, the District urges the State Board to use its K-2 minority enrollment of 46% as the basis for measuring the adequacy of the diversity achieved by Unity. However, we cannot discern any basis for evaluating the racial composition of the District's student population and any impact thereon solely by reference to its K-2 enrollment.
>
> Moreover, a 46% minority enrollment, in and of itself, does not represent a concentration of minority students in the District such that remedial measures would be required and, as set

> forth above, the District has not shown that the small number of students from the District who are attending Unity have had any impact on the racial composition of the District's student population.
>
> (*In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra,* Slip Opinion at 13-15, *citations omitted*)

The Appellate Division, in the decision referenced at pages 13-14 above, upheld the State Board's opinion without prejudice to the District's ability to make a "new presentation within the Guidelines of *Englewood*" so as to provide a "more suitable vehicle for effective consideration of [its] claims." *In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra*, Slip Opinion at 3. For the District to prevail herein, then, it must demonstrate that the *de facto* effect of Unity is to affect a racial balance precariously maintained in the District. (*Englewood, supra,* at 328)

The evidence submitted by the District in support of its claim is fully incorporated into the Petition of Appeal, the pertinent portions of which read as follows:

> 5. In order to demonstrate a continuing *de facto* segregation effect, the District herein provides information on the racial composition of Unity and the MSD [the District] from the time Unity opened in 1998 to the present.
> 6. Attached as Exhibit B to the Certification of Dr. Dennis Clancy is a true copy of the enrollment data for Unity and the MSD in the 1998-1999 school year. In the 1998-99 school year, Unity conducted its registration for the first time. Many of the 35 students that left the MSD to attend Unity came from the Hillcrest-Hamilton school attendance area as set forth below. Seven of the eight kindergarten students were white. As a result, the kindergarten class at Hillcrest School, from which a large amount of MSD students were removed to enroll in Unity, was nearly a fifty-fifty split of white and minority students. *See* Exhibit B, charts #2 and #3. Five of the seven first grade students who went to Unity were white. Of the four second graders, three students were white and one was minority. The only third grade student that went to Unity was white. Three fourth grade students attended Unity and all were white. Of the two fifth grade students attending Unity, one was white and one was minority. All ten middle school students were white.
> 7. District-wide for the 1998-99 school year, the Unity Charter School enrolled 35 MSD students of which 32 or 91% were white. The minority population of District students at Unity was 9%, with only 3% African-American and 6% National Origin. *See* Exhibit B to Certification of Dr. Dennis Clancy, chart #1. These percentages are in stark contrast to those within the District for

grades K-8, which was approximately 59% White, 20% African-American, and 21% National Origin. *See* Exhibit B to Certification of Dr. Dennis Clancy, chart #2.

8. Recognizing shifts in residential demographics over the past three decades, the District established and opened a seventh school, a Multiage Magnet School, and implemented intra-district choice for the 1999-2000 school year. This program initiative was designed to create additional space in each of the six neighborhood schools for a growing student population and increase flexibility for the assignment of students to balance enrollment composition.

9. For kindergarten through second grade in the 1999-2000 school year, the District was comprised of 55% white students, 17% African-American students and 28% National Origin students. *See* Exhibit B to Certification of Dr. Dennis Clancy. Unity's enrollment consisted of 79% white students, and 21% minority students, which was in sharp contrast to the District's percentages. *See* Exhibit B to Certification of Dr. Dennis Clancy, chart #4. Of the eight kindergarten students who were enrolled in Unity from the District in the 1999-2000 school year, all eight were white and six came from Hillcrest. Unity enrolled seven first grade MSD students, 86% of whom were white. Unity enrolled four second grade students from the District, three of whom were white. There was one MSD third grader enrolled in Unity who was white. All three fourth grade students that went to Unity were white. Two fifth graders from MSD went to Unity, one was white and one minority. For the sixth grade, nine MSD students were enrolled in Unity and all of them were white. Only one MSD seventh grader enrolled in Unity and was white.

10. In the 2000-2001 school year, the ethnic composition of the students Districtwide in the grades K-2 was 55% white and 45% minority. In addition, the District-wide composition in grades 3-5 the racial composition is 56% white and 44% minority. *See* Exhibit C to Certification of Dr. Dennis Clancy. Overall, the racial composition of the District is approximately 60% white and 40% minority. During the same year, Unity enrolled 90 students, 52 of whom were from the District. Only 12 of the 52 students are minority. Overall, Unity had only 15 minority students, making its population comprised of just over 83% white students. *See* Exhibit E to Certification of Dr. Dennis Clancy. This is under the lower deviation limits, which requires that Unity have a minimum minority population of 30.8%. *See* Exhibit D to Certification of Dr. Dennis Clancy.

11. Under the *New Jersey State Guidelines on the Desegregation and Integration of Public Schools* ("*Guidelines*") the districtwide student percentages for MSD of 56% White, 17% African-American and 27% National Origin. *See* Exhibits D and E to Certification of Dr. Dennis Clancy. Under the *Guidelines* for racial balancing the upper limit of white students is to be 62.6%, which Unity exceeds by over 20%. The lower deviation limit for African-American students is 11.9%, which Unity is under by over seven percent (7%). Likewise, Unity is over six percent (6%) short of the lower deviation percentage for National Origin students. *See* Exhibit D to Certification of Dr. Dennis Clancy.

(Petition of Appeal at 3-5)

As is apparent from the above-quoted excerpt, and as is additionally borne out by the District's initial brief at 7-9, its brief on remand, and both certifications of Dr. Clancy, the District's claim of "adverse impact" is, in actuality, nothing more than a variation of its complaint regarding the disparity between the District's proportional levels of minority enrollment and those of the charter school, in other words, a veiled version of its now-discounted claim that Unity is compelled to achieve racial balance with District schools in accordance with the *Guidelines*. Although the District notes the fact that more white students than minority have left the District to attend Unity and the fact that some schools and grades in District have been affected more than others, it has made no demonstration whatsoever that the loss of these students has affected the District's overall racial balance. On the contrary, the record[10] instead supports Unity's contention that

> [the District] cannot show how a school of 90 children, only 52 of whom are drawn from [the District], can adversely impact a [K-12] school population of more than 4,000. According to Dr. Clancy's own certification, the racial composition of the K-8th grade student body at [the District] is 58.91% white and 41.09% minority. Also, according to the statistics contained in the same certification, if Unity were to cease operations and all its [District] students returned to the various schools within [the District], the K-8th grade racial makeup at [the District] would only go to 59.24% white and 40.76% minority – less than a 0.4% change. Clearly, Unity has virtually no impact on [the District's] racial balance. (Letter of David A. Bolson at 2)

Unity reiterates and updates this point in its brief on remand:

> The fact remains that Unity simply does not adversely impact [the District's] student population. It cannot. Unity presently enrolls 96 students, only 43 of whom come from the District. These 43 students represent **less than 1.5%** of the more than 2,900 children in grades K through 8 attending public schools in the District. To suggest that Unity has any impact on [the District's] racial balancing, let alone an adverse impact, is simply disingenuous. (emphasis in text) (Unity Brief on Remand at 4)

---

[10] It is noted that the parties incorporated into the record by reference the District's fall enrollment reports for grades K-8 and the fall enrollment statistics on the New Jersey Department of Education website for the years 1998-2002. (Stipulation of Facts at 4)

The Commissioner agrees, and, indeed, he finds the State Board's assessment of the District's earlier claim of "adverse impact" to be equally applicable here:

> [T]here is no indication that the option of attending Unity has had any impact on the racial composition of the District's student population. Given the number of students from the Morris School District who are enrolled in the Charter School, and based on the District's statistics, we cannot discern even a minimal impact on the racial composition of the District.
>
> (*In the Matter of the Final Grant of a Charter for the Unity Charter School, Morris County, supra,* Slip Opinion at 15)

The District, therefore, has failed to show that Unity has had a *de facto* effect on the racial balance of its district of residence, just as it failed to show that the school was itself segregated. *Englewood, supra,* at 328.[11]

In conclusion, then, even assuming, *arguendo*, that the arrangement sought by the Morris School District and the Unity Charter School might be found lawful under circumstances sufficiently narrow and compelling, the Commissioner cannot find any such circumstance on the present record. To the contrary, the record submitted by the parties shows that Unity is in full compliance with applicable provisions of the CSPA as to recruitment and selection of students, that the school is not segregated, and that the school's existence has not negatively affected the racial balance of its district of residence. Thus, despite Unity's sincere desire to increase the level of student diversity produced by operation of the CSPA, and its acquiescence on that basis to the Morris School District's requested relief, the Commissioner cannot sanction, or, indeed,

[11] In its Petition, the District additionally alleged that Unity's sibling preference policy exacerbated the situation with respect to the school's racial balance. However, no evidence whatsoever was brought to the record as to effect of this policy; rather, the District relies solely on the general assertion that "the impact of the current enrollment on future registrants will further compound the adverse effect on racial balancing in the district." (Petition of Appeal at 7) This bare assertion alone cannot suffice as a basis for the Commissioner to direct that Unity's policy, which is expressly permitted by the CSPA at *N.J.S.A.* 18A:36A-8c, must be revised or repealed.

even permit, establishment of an admissions mechanism that relies upon race as the sole determinant of a student's opportunity to attend the school.

Accordingly, for the reasons set forth above, the Initial Decision recommending approval of the proposed Consent Order of the parties is rejected, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[12]

COMMISSIONER OF EDUCATION

Date of Decision: 5|22|03

Date of Mailing: 5|22|03

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

257-03

257-03

M.B. and C.B., on behalf of minor children, A.B. and A.B.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

May 22, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3568-02
AGENCY DKT. NO. 38-2/02

M.B. and C.B. ON BEHALF OF MINOR CHILDREN, A.B. and A.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,

Respondent.

Gary A. Bundy, Esq., for petitioners (LaCorte, Bundy, Varady & Kinsella, attorneys)

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: April 29, 2003 Decided: April 30, 2003

BEFORE **MARGARET M. MONACO,** ALJ:

This matter involves an appeal by petitioners M.B. and C.B. on behalf of A.B. and A.B. from a residency determination by respondent Board of Education of the Township of Union (the Board). The Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) where, on April 23, 2002, it was filed for a hearing and determination as a contested case. Following a prior adjournment of the hearing scheduled for July 5, 2002 at the Board's request, the hearing was scheduled for September 23, 2002, which was adjourned at the joint request of the parties. By letter dated October 21, 2002, counsel for petitioners advised the undersigned that a settlement had been reached. Counsel for the Board subsequently submitted the attached Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim setting forth the terms of agreement, along with a Resolution adopted by

the Board approving the aforesaid Stipulation of Settlement, which the undersigned received on April 29, 2003.

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

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

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

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

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

April 30, 2003
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

5-2-03
DATE

M. Kathleen Duncan/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 5 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

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Attorneys for Union Board of Education

M.B. and C.B. o/b/o A.B. & A.B.,

Petitioner,

v.

UNION BOARD OF EDUCATION,

Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT NO. EDUOS 03568-02N

Agency Ref. No. 38-2/02

STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL OF PETITION AND COUNTERCLAIM

Petitioners Maria and Carlos Beirao and Respondent/Counterclaimant Board of Education of the School District of Union, herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties agree that, Petitioners payment to the Respondent/Counterclaimant of the sum of $3,000 represents full and final settlement of this matter.

3. The pupils A.B. and A.B. will continue in District schools so long as they are domiciled in the district. In the event that the Board of Education has reason to believe that either the domicile or affidavit pupils requirements are no longer satisfied, Petitioners will be notified, and the hearing procedures of N.J.S.A. 18A:38-1 will be invoked.

4. The parties waive any and all claims which were or could have been asserted in the within action, and any and all claims arising out of or related to these claims, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other parties from any and all claims which were or could have been asserted in the within action and any claims arising out of or related to these claims.

5. James D'Amato, Board Secretary and General Counsel, is authorized to enter into this Stipulation of Settlement and Mutual Dismissal on behalf of the Respondent Union Board of Education, and the Board accepts and acknowledges the terms of settlement set forth herein.

6. As a result of the foregoing, Petitioners hereby withdraw the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice,

Maria Beirao (POA) — 03-27-03
Carlos Beirao, Petitioner — Date

Witness — 3/27/03
Witness — Date

Maria Beirao — 03-27-03
Maria Beirao, Petitioner — Date

Witness — 3/27/03
Witness — Date

UNION TOWNSHIP BOARD OF EDUCATION

James D'Amato, Esq. — 3/27/03
James D'Amato, Esq. — Date
Board Secretary/General Counsel

I move that the Board approve Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim in the matter of M.B. and C.B. o/b/o A.B and A.B. vs. Union Board of Education in accordance with the information in the hands of each board member and appended to the non-public portion of the minutes of this meeting.

I CERTIFY THAT THE ABOVE RESOLUTION WAS ADOPTED BY THE TOWNSHIP OF UNION BOARD OF EDUCATION AT ITS ORGANIZATION MEETING ON APRIL 22, 2003.

JAMES J. DAMATO
BOARD SECRETARY

OAL DKT. NO. EDU 3568-02
AGENCY DKT. NO. 38-2/02

M.B. and C.B., on behalf of minor children, A.B. and A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5|22|03

Date of Mailing: 5|22|03

260-03

260-03SEC

IN THE MATTER OF MARY ADAMS,	:	
FAIRFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY.	:	DECISION
	:	

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act for voting on three separate occasions on bill lists containing bills that were submitted by Adams Printing, which was owned by her husband and where she was an employee. After considering the nature of the charge and respondent's submission, the Commission recommended a penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

May 30, 2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C44-02**
MARY ADAMS	:	
FAIRFIELD BOARD OF EDUCATION	:	**DECISION**
CUMBERLAND COUNTY	:	
	:	

PROCEDURAL HISTORY

The above matter arises from a complaint filed by Fairfield Board of Education (Board) member, Benjamin Dagostino, on October 25, 2002 alleging that fellow Board member, Mary Adams, violated N.J.S.A. 18A:12-24(c) of the School Ethics Act when she voted on bill lists containing bills submitted by Adams Printing, which is owned by her husband. Mr. Dagostino specifically alleged that the above conduct constitutes a violation of N.J.S.A. 18A:12-24(c) of the Act.

Ms. Adams did not file an answer to the complaint until December 30, 2002, after having been sent two notices by the Commission on November 25, 2002 and December 18, 2002 that the time that she had to answer the complaint had expired. In her answer, she denied voting on the bills and asserted that she abstained, but her abstentions were not recorded.

The Commission invited the parties to its January 28, 2003 meeting to present witnesses and testimony to aid in the Commission's investigation, but did not require that they be present. Neither party appeared. Ms. Adams requested that the matter be rescheduled on the morning of January 28, 2003, but the Commission denied her request in light of its prior correspondence to Ms. Adams informing her that she should advise the Commission of her intent to appear by January 21, 2003. The Commission voted at its public meeting to find probable cause to credit the allegation that Ms. Adams' conduct was in violation of N.J.S.A. 18A:12-24(c). The Commission determined that there were no material facts in dispute and invited Ms. Adams to submit a written statement, setting forth why the Commission should not find her in violation of N.J.S.A. 18A:12-24(c).

Ms. Adams submitted a timely response by way of counsel, Vincent J. Pancari, Esq., which was considered by the Commission at its meeting of March 25, 2003. At its public meeting on March 25, 2003 the Commission concluded that Ms. Adams violated N.J.S.A. 18A:12-24(c) of the School Ethics Act for acting in a matter in which she and her husband had a direct or indirect financial involvement that might reasonably be expected to impair her objectivity or independence of judgment, when she voted on bill lists containing bills from her husband's company. The Commission adopted this decision at its meeting of May 1, 2003.

FACTS

Mary Adams was elected to the Fairfield Board of Education in April 2000. Her husband is the owner of Adams Printing. She works part-time for the business and receives a salary. The minutes for the Board's November 15, 2001 meeting reflect that she voted in favor of a bill list on that date that contained a bill submitted by Adams Printing in the amount of $103.00. The minutes from the Board meeting of January 24, 2002 reflect that on that date she voted in favor of a bill list that contained a bill submitted by Adams Printing in the amount of $611.00. The minutes from the July 25, 2002 Board meeting reflect that on that date she voted in favor of a bill list that contained a bill submitted by Adams Printing in the amount of $686.00.

Board member Kevin Fox, the previous president of the Board, advised Ms. Adams of the need to abstain on matters concerning Adams Printing. The minutes of the meetings of November 2001 and January 2002 note that Board member Fox abstained from an item on each of the bill lists.

ANALYSIS

Complainant alleged that Ms. Adams' conduct on November 15, 2001, January 24, 2002 and July 25, 2002 violated N.J.S.A. 18A:12-24(c), which provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

In her answer, Ms. Adams set forth, despite the Board minutes to the contrary, that at three separate meetings, the Board Secretary not only did not hear her abstain from voting on bills submitted by Adams Printing, but erroneously heard Ms. Adams vote "yes." Ms. Adams further set forth that on three separate occasions, she reviewed the minutes, but did not see that she had been recorded as voting "yes" when she had actually abstained because she did not have enough time to review the minutes and assumed them to be accurate. Ms. Adams admitted that she was aware that it is a violation of the School Ethics Act to vote on a bill payment to her husband's company.

In its decision finding probable cause, the Commission referred to the Open Public Meetings Act (OPMA) which provides:

> Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the action taken, the vote of each member, and any other

information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12]. [N.J.S.A. 10:4-14].

The Commission pointed to the plain language of the statute which clearly shows that the minutes of public bodies are to demonstrate the action taken and the vote of each member. The Commission noted that if a board member argues that she did not vote in the way that the minutes indicate after the minutes are approved and made available to the public, the OPMA would be undermined.

In her response to the Commission's finding of probable cause, Ms. Adams set forth that she accepts responsibility for the violation alleged due to her failure to correct the minutes of the above-referenced Board meetings.

The Commission now finds that since Ms. Adams' husband is a member of her immediate family pursuant to N.J.S.A. 18A:12-23, and owns of Adams Printing, he has a direct financial involvement in matters concerning Adams Printing that might reasonably be expected to impair her objectivity or independence of judgment. The Commission further finds that since Ms. Adams is an employee of Adams Printing, she has an indirect financial involvement in matters concerning the company that might reasonably be expected to impair her objectivity. The Commission therefore finds that Ms. Adams' votes to approve a payment to her husband's company constitutes acting in her official capacity in a matter in which she or a member of her immediate family has a direct or indirect financial involvement in violation of N.J.S.A. 18A:12-24(c).

DECISION

For the foregoing reasons, the Commission finds Mary Adams in violation of N.J.S.A. 18A:12-24(c) of the School Ethics Act for voting on bill lists on November 15, 2001, January 24, 2002 and July 25, 2002 containing payments to Adams Printing.

PENALTY

The Commission has considered the nature of the offense and notes that in her response, Ms. Adams acknowledges that she acted in violation of the Act and has taken action to ensure that she reviews in detail the minutes of each meeting in advance of any vote for approval of the minutes submitted. The Commission finds that the appropriate penalty for Ms. Adams' violation in this case is a reprimand.

This decision, having been adopted by the School Ethics Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments

on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C44-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, the Commission found probable cause to credit the allegations that Ms. Adams violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission reviewed the written submissions of Ms. Adams in response to the finding of probable cause; and

Whereas, the Commission now finds that respondent violated the School Ethics Act and believes that a reprimand would be the appropriate penalty;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Mary Adams in violation of the Act and recommends that the Commissioner of Education impose a penalty of reprimand.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on May 1, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 145-5/03

IN THE MATTER OF MARY ADAMS,	:	
FAIRFIELD BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CUMBERLAND COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Mary Adams, member of the Fairfield Board of Education, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act by voting on three separate occasions on bill lists containing bills that were submitted by Adams Printing, which is owned by her husband and where she is an employee.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of the decision to file written comments on the recommended penalty for the Commissioner's consideration. However, no comments were submitted by respondent, or on her behalf.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner herein**. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission.

Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision.

Accordingly, IT IS hereby ORDERED that Mary Adams shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5|30|03

Date of Mailing: 5|30|03

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

261-03

261-03

IN THE MATTER OF THE APPLICATION	:	
OF THE BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
FOR AN ORDER DIRECTING ISSUANCE OF	:	
BONDS PURSUANT TO *N.J.S.A.* 18A:7G-12.	:	
	:	

SYNOPSIS

Having unsuccessfully sought voter approval for construction of school facilities twice within a three-year period, petitioning Board of Education sought an order, pursuant to *N.J.S.A.* 18A:7G-12, directing issuance of bonds for proposed projects in the total amount of $31.4 million on grounds that these were necessary for provision of a thorough and efficient system of education (T&E) in the District.

Following a hearing at the Office of Administrative Law pursuant to *N.J.S.A.* 52:14F-5(o), the ALJ issued a report recommending that the Commissioner order issuance of bonds totaling $19.2 million to fund renovations and repairs to the Board's high school. The ALJ found the Board's proofs insufficient to warrant a recommendation ordering issuance of bonds for the remaining $12.2 million to construct additions to the Board's two elementary schools.

The Commissioner determined that renovations and repairs to the high school were necessary for T&E and directed the Board to prepare for issuance of bonds covering the local share of the project cost and to submit detailed plans and specifications to the Office of School Facilities, where the project will proceed as an Authority project pursuant to *N.J.S.A.* 18A:7G-12 and applicable provisions of *N.J.A.C.* 6A:26-3. The Commissioner concurred with the ALJ, even after clarification of the ALJ's Report with respect to the present state of the District's "unhoused student" situation, that the Board had not demonstrated the necessity of its requested elementary school additions in order to provide T&E.

June 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

REPORT AND RECOMMENDATION
OAL DKT. NO. EDU 9431-02
AGENCY DKT. NO. 223-7/02

IN THE MATTER OF THE APPLICATION OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY, FOR AN ORDER DIRECTING ISSUANCE OF BONDS PURSUANT TO *N.J.S.A.* 18A:7G-12

Francis J. Campell and **Michael J. Gross**, Esq., for petitioner
(Kenney, Gross, Kovats, Campbell & Pruchnik, attorneys)

Record Closed: February 24, 2003 Decided: April 10, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an application by the Clark Township Board of Education ("Board") seeking an order by the Commissioner of Education ("Commissioner") directing issuance of school bonds for certain capital projects said to be necessary to fulfill the constitutional mandate of providing a thorough and efficient education. Pursuant to the Educational Facilities Construction and Financing Act ("EFCFA" or "Act"), *N.J.S.A.* 18A:7G-1 to 44, effective as of July 18, 2000, a school district that has unsuccessfully sought to obtain voter approval for school facilities construction twice within a three year

period may apply to the Commissioner for approval to issue school bonds for the local share of the project. Specifically, *N.J.S.A.* 18A:7G-12 authorizes the Commissioner to order issuance of such bonds if "the project is necessary for the provision of a thorough and efficient system of education in the district." The sole issue is whether the Board has satisfied this heavy burden.

Procedural History

By notice dated November 9, 2000, the New Jersey Department of Education ("Department") granted a waiver approving an application for a school facilities project prior to filing of a long-range facilities plan.[1] Originally, the Board held a public referendum on December 12, 2000 to authorize the issuance of bonds totaling approximately $31.4 million to pay for essential repairs to its high school and various renovations and improvements to three other school buildings in the district.[2] Voters of Clark Township defeated this proposal by a narrow margin of only 22 votes. Two months later, on February 27, 2001, an identical public question again was presented to the voters. At the second public referendum, the proposal was rejected by around 1,000 votes.

Thereafter, a newly constituted Board reduced the requested bond amount to approximately $19.2 million, representing repairs deemed necessary to alleviate numerous health and safety issues existing in the several schools, but omitting the cost of adding new classrooms anticipated to be needed for increased enrollment.[3] Clark

[1] In granting the waiver, the Department determined that portions of the project were "necessary to meet the health or safety of occupants" or were "related to a school facility in which the functional capacity is less than 90% of the facilities efficiency standards (FES) based on current school enrollment[.]" *N.J.S.A.* 18A:7G-4(b).
[2] Of the $31.4 million, roughly $21.6 million would have been raised out of local taxes and the remaining $9.8 million would come from state grants.
[3] Of the $19.2 million, the local share would be some $11.4 million and state grants would make up the difference of $7.8 million.

voters defeated the bond question at a third school election held on September 25, 2001.[4]

On July 17, 2002, the Board petitioned the Commissioner for appropriate relief under the statute. At the outset, the Commissioner solicited written comments from any interested person to be filed by October 14, 2002.[5] Approximately 650 residents of Clark and Garwood wrote letters or signed petitions to the Commissioner, the vast majority of which expressed support for the Board's position.[6] Subsequently, on November 8, 2002, the Commissioner forwarded the matter to the Office of Administrative Law ("OAL") for hearing as an "uncontested case."[7] The OAL held a public hearing in the Municipal Building in Clark New Jersey on February 24, 2003.[8] Commencing at 9:00 a.m., the Board offered sworn testimony on the constitutional need for the bond issue. Once the Board's proofs were completed, the hearing was opened to comments from the general public. Later that evening, at 7:30 p.m., the hearing was reconvened for comments by members of the general public unable to attend during the day.

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[4] The record does not reflect the vote tally.

[5] In accordance with the Commissioner's instructions, the Board caused notice soliciting written comments to be published in a newspaper of statewide circulation, *The Star-Ledger*, on September 20, 2002 and in a newspaper of local circulation, *The Home News Tribune*, on September 23, 2002, and to be announced at its public meeting on September 24, 2002.

[6] A breakdown prepared by the Board reflects that roughly 640 correspondents were in favor of the bond issue and ten were opposed.

[7] An "uncontested case" is a proceeding designed to afford interested parties the opportunity to present their views and includes rule-making and investigative hearings. *N.J.S.A.* 52:14F-5(o). *N.J.A.C.* 1:1-21.1 to 21.5. STEVEN L. LEFELT, *Administrative Law & Practice*, N.J. PRACTICE SERIES, §5.15 (2d. ed. 2003).

[8] Again, the Board arranged for notice of the hearing to be published in *The Star-Ledger* on February 3, 2003, in *The Eagle* on January 23, 2003 and in *The Home News Tribune* on January 17, 2003, and to be announced at its public meeting on January 23, 2003.

Findings of Fact

1. General Background Information

Until 1997, the Clark public school system had existed as a K-8 school district serving elementary and middle school students. Clark students enrolled in ninth through twelfth grades attended the Union County Regional High School District No.1 ("Union Regional"), a limited-purpose regional district serving secondary students from six separate municipalities, namely Berkeley Heights, Clark, Garwood, Kenilworth, Mountainside, and Springfield. Students living in Clark were assigned to the Arthur L. Johnson High School ("Johnson High School"), one of four high school buildings then owned and operated by the regional district. Johnson High School is situated on Westfield Avenue within Clark Township, adjacent to the Municipal Building where this hearing was held.

On May 14, 1996, the six constituent communities held a public referendum on whether to dissolve the regional school district.[9] Clark residents were overwhelmingly opposed to deregionalization and voted eight-to-one against dissolution. Nonetheless, four of the six municipalities and a majority of overall votes cast in the entire regional district were in favor of dissolving Union Regional.[10] As a result, Union Regional was dissolved as of June 30, 1997 and the Board assumed control of Johnson High School,

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[9] Events leading to the vote for deregionalization were characterized by a certain degree of rivalry among the constituent school districts. For a flavor of the contentiousness of this preceding period, see the litigation involving a plan to close of one of Union Regional's four high schools. *Glynos v. Union Cty. Reg. High Sch. Dist. No. 1*, 93 *N.J.A.R.*2d (EDU) 673 (Comm'r Aug. 31, 1993), 1993 *W.L.* 470278 (N.J. Adm.)

[10] Statutory procedures for dissolving a limited-purpose regional school district require "an affirmative vote in a majority of the individual constituent districts and . . . an affirmative vote of a majority of the overall votes cast in the entire regional district." *N.J.S.A.* 18A:13-59. For a thorough discussion of these procedures, see *In re Distribution of Liquid Assets Upon Dissolution of the Union Cty. Reg'l. High School Dist. No. 1*, 168 *N.J.* 1 (2001)("*Distribution of Liquid Assets*").

its staff, buildings and grounds.[11] Garwood School District, which does not have a high school building of its own, entered into a ten-year sending-receiving relationship with the Clark authorizing Garwood to send its secondary students to Johnson High School.

(2) Renovations to Johnson High School and Other School Buildings

When the Board took possession of Johnson High School on July 1, 1997, it received the building in an advanced state of disrepair. Superintendent Paul J. Ortenzio of the Clark public schools, a professional educator with thirty-seven years of experience, testified that he was "appalled" by the physical condition when he first toured the facility. Although the outside "façade" of the high school appeared to be well maintained, the interior was in disarray. Describing the "health hazard" existing in the cafeteria, Dr. Ortenzio explained that machinery was hooked up with makeshift extension cords, electric panels lacked circuit breakers, and vermin infested the food-serving area. During the first month of occupancy, a gas pipe sprung a leak and the district had to expend more than $100,000 to enclose and shield the pipe. Reportedly, the existence of a gas smell had been known "for several years," but Union Regional never appropriated the money required to correct the problem.[12]

Built in the 1950s, the high school was set below grade in order to preserve an adjacent level field for athletic activities. Raw sewage from the school does not flow by gravity, but rather is conveyed by a series of injection pumps to a sewer line on Westfield Avenue. According to Dr. Ortenzio, the stench emanating from the pump room is "not for the faint hearted." Ceilings in many high classrooms leak as a result of a decaying roof. Water leakage contributes to an unpleasant smell. Staff members place buckets around the school to collect water when it rains or when snow melts.

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[11] Each host community was deeded the school buildings physically located within its boundaries. Total value placed on the real property deeded to Clark was appraised at $30,119,535. *Distribution of Liquid Assets*, 108 *N.J.* at 5, Table B.

[12] When the regional district owned the building, municipal construction and health officials considered Johnson High School as falling outside their jurisdiction and did not inspect the facilities for compliance with health and safety codes.

Another major repair item at the high school concerns the obsolete heating system. Dr. Ortenzio compared the boiler room to "a Hollywood set for a disaster movie." Mud walls holding the bottom of the boilers had "collapsed" and the entire system had "disintegrated." Underground tunnels used for the passage of hot air were obstructed "by stalactites and stalagmites" and "impassable." Maintenance workers managed to restore the heat by installing two portable boilers outside the building. Dr. Ortenzio complained that these temporary tanks "sit on a tarmac and look like Cape Canaveral at night."

An electrical-panel room sitting below the level of the mud walls brings electrical power into the school. Sump pumps mounted on wooden pallets have been positioned on the floor of this room to prevent flooding. Wooden pallets have "rotted" and electric equipment has "rusted" to the point where the main switch has "frozen in place" and "no one dares touch [it]." It does not take an electrical engineer to realize that the dangerous combination of water and electricity poses a serious safety risk to those occupying the premises.

School officials discussed various efforts made to reduce costs and the draining effect of piecemeal repairs on money available for other priorities. In order to cut costs, the Board has eliminated offerings in several curricular areas, including home economics, industrial arts, auto body shop and photography. Early retirement of older, more senior, teachers enabled the Board to hire newer, less expensive, teachers at considerable savings.[13] In addition, the Board is in the process of selling the District's administration building and intends to utilize the proceeds to reduce the financial burden on taxpayers. Meanwhile, the District's "rainy-day fund" or surplus has been depleted to pay for day-to-day repairs. William Takacs, the school business manager, advised that the District had to devote more than $4.5 million dollars out of current operating expenses to pay for emergency repairs. Superintendent Ortenzio noted that it is "unwise and unsound" to pay for large repairs out of current funds because the tax burden "is too cyclic for project planning." Due to the disastrous condition of the high

[13] Between 2001-2002 and 2002-2003, average teacher's salaries in Clark fell from $70,000 to $50,000.

school, more routine but equally necessary repairs required in the middle school and the elementary schools have had to be deferred.

Nearly everyone who spoke at the public hearing corroborated the accuracy of Dr. Ortenzio's portrayal of dire conditions at the high school. Joseph Papetti, current Board president, is a retired assistant superintendent of schools who served twenty-six years in the City of Elizabeth school system. In his long educational career, Mr. Papetti has never seen "a school in such desperate need of rehabilitation as our high school." Although Elizabeth is one of the Abbott "special needs" districts, Mr. Papetti ventured that all of the public school buildings in Elizabeth are in "better physical condition" than Clark's high school. Board member Michael Timoni, an expert in commercial real estate appraisal, agreed that the high school is in "an advanced state of wear and tear" and threatens the district's "ability to deliver education to students." Speaking in favor of repairing the high school, Clark Mayor Salvatore Bonaccorso presented a resolution of the Township's Governing Body urging approval of a bond issue in the amount of $19.2 million for rehabilitation purposes.

Many of the speakers had personal horror stories of their own or their children's exposure to physical hazards at the high school. Sheila Whiting, a Board member, told of the time that the boiler blew a gasket, resulting in the loss of "hours of classes and academic instruction." Karen Alalfe, another Board member, recalled the time that a high school drama student brought her backstage to show her the "jerry-rigged" electrical wiring. Maria Cutinello, parent of two daughters, complained that the stench in the high school was so sickening that she "had to hold her breath." She noted that morale at the high school was low among "students, teachers and parents alike." Colleen Nemeth, a school employee whose office is located near the boiler, warned that fumes "overcome the children." Barbara White added that wind blows so forcefully through the windows that "students and teachers wear coats." Similarly, Angela Kurek stated that her daughter must frequently change clothes because one room is too cold and another too hot. Robert Kircher, a mechanical engineer, cautioned that placement of electric wires under the boiler is like "putting a match to a flame." A common thread running throughout these comments was that the safety of the children should come

first and that mechanical problems in the high school interfere with students' ability to concentrate on their studies.

Even some Township residents opposed to the bond issue recognize that major repairs to the high school are absolutely essential. William Caruso, a building inspector, favored repairing immediate safety hazards in the high school, although he felt that the amount requested is excessive and believed that less urgent repairs "should be done moderately over the next couple years." Marge Berson, a property manager, acknowledged that repair work needs to be done, but protested the bond issue because "it's too much money." She suggested that the Board "should do a better job" of handling public funds. Bill Gruss, a licensed master plumber, also felt that the Board had misspent money on unnecessary items. Nevertheless, he endorsed expenditures for repair of the high-school facility. Bill Kuchar, a former member of the Township Council, agreed that repairs were necessary, but expressed alarm at the escalating amounts the Board is seeking for this purpose.

One year after taking over the high school, the Board commissioned The Thomas Group, architectural and engineering consultants, to conduct a facilities survey of Johnson High School and all other district buildings. In August 2000, The Thomas Group presented a facilities evaluation report, designed as a planning tool and framework "for maintaining and upgrading the facilities."[14] The report was divided into six categories: (1) general construction; (2) site work; (3) plumbing systems; (4) mechanical systems; (5) electrical systems; and (6) technology systems. Robert J. Kady, a licensed architect knowledgeable about school construction, who served as senior manager for the project, personally attested to the accuracy of the contents of the report. Among other considerations, The Thomas Group conducted a

[14] Beginning in the 1999-2000 school year, EFCFA required school districts "to prepare and submit to the [C]ommissioner a long-range facilities plan that details the district's school facilities needs and the district's plans to address those needs for the ensuing five years." *N.J.S.A.* 18A:7G-4(b). On November 9, 2000, the Department's Office of School Facilities Financing approved the District's application for a school facilities project prior to submission of a long-range facilities plan because "this school facility project is necessary to meet the health or safety of occupants." Thereafter, the District filed its long-range facilities plan on April 5, 2001.

comprehensive survey to ensure compliance with applicable construction codes, fire and safety regulations, sanitary standards, and other legal requirements.

The Thomas Group made detailed recommendations regarding the necessity and cost of correcting numerous health and safety violations, including rehabilitation of dead-end corridors, creation of fire barriers, replacement of unrepaired roofing, provision of handicapped access, elimination of a tripping hazard, installation of a new heating system, addition of fire sprinklers and hydrants, upgrading of emergency lighting, revamping of the electrical wiring and preparation of a study for the presence of asbestos. Similar proposals were made for each school building in the district, namely C.J. Kumpf Middle School, Frank K. Hehnly Elementary School and Valley Road Elementary School, which are in relatively better physical shape than the high school. As part of its presentation, the Board produced a fifteen-minute videotape vividly depicting serious deficiencies at the high school, such as unshielded electrical junction boxes, exposed wiring, rusted or rotted electrical panels, broken ceilings, cracked walls and tiles, water-soaked tiles, structural fissures and suspected asbestos in the boiler room.

Significantly, the Board did not accept every suggested repair or improvement recommended by The Thomas Group. Instead, the Board made "hard choices" and prioritized items totaling $19.2 million for rehabilitation of existing facilities and an additional $12.2 million to accommodate expected growth. On October 11, 2000, the Board made a schematic submission to the Commissioner requesting authorization to conduct an election for voter approval of the original bond issue in the amount of $31.4 million. In its approval letter dated November 9, 2000, the Office of School Facilities Financing expressly determined that the construction project fully "complies with the facilities efficiency standards" promulgated by the Department.[15]

[15] EFCFA directs the Commissioner to develop facilities efficiency standards that are "educationally adequate to support the achievement of the core curriculum content standards." *N.J.S.A.* 18A:7G-4(h).

I **FIND** that issuance of bonds for construction work costing $19.2 million is necessary to protect the health and safety of school children implicit in the concept of a thorough and efficient education. Furthermore, that amount is necessary to provide a suitable environment conducive to learning so that students in the Clark school system will receive the thorough and efficient education to which they are entitled. Compelling evidence establishes that Johnson High School has numerous deficiencies that constitute an unacceptable risk of injury or illness, including unsafe electrical wiring, faulty plumbing, an obsolete heating system and widespread water damage. Such deficiencies not only threaten the physical well being of students attending school in the district, but also seriously impede their ability to benefit from their education and to achieve core curriculum objectives. Despite lingering resentment over being saddled with expenses not shared by the defunct regional district, the Clark community appears to have reached a broad consensus that extensive renovation of the deteriorating high-school facility has become unavoidable. Stopgap measures to fix emergent conditions in the high school have drained financial resources available for other school buildings in the district, so that they too are fast becoming substandard and poorly maintained.

(3) Expansion of the Capacity of the Elementary Schools

A more difficult question is whether the Commissioner should also order issuance of bonds for proposed new construction twice rejected by the voters. Again, the superintendent of schools, Dr. Ortenzio, expressed concern that severe overcrowding at both elementary schools is preventing the district from delivering a thorough and efficient education. In particular, Dr. Ortenzio mentioned that area used to house special education is already "subdivided into six classrooms." Without adequate space in its own schools, the Board has had to send special education students outside of district, at an annual cost of $30,000 to $40,000 per student. Libraries in the two elementary schools are only 1,600 square feet and 1,700 square feet respectively, compared to the Department's facilities efficiency standard of 4,000 square feet. If enrollment increases as predicted and the district fails to build additional classrooms, the only recourse, in Dr. Ortenzio's opinion, would be "to dismantle the

computer laboratories in the two elementary schools." Summarizing his view of the practicalities of the situation, Dr. Ortenzio explained that, "Without having the plant, however, the programs cannot exist."

Several speakers echoed Dr. Ortenzio's emphasis on overcrowding at the elementary schools. Diane Lanigan, a member of the Board who no longer has young children in the lower grades, described the elementary schools as "bursting at the seams." Angela Kurek, a resident of Clark for ten years, reported that her son's classes at Valley Road School are "jammed." Another long-time resident, Martin Mogensen, had initially been against expansion of the facilities, but after viewing the school buildings he changed his mind. Mr. Mogensen deplored the absence of suitable space for art classes, saying that School had replaced dedicated classrooms with "art in a cart." Wendy Griffin was equally distressed "at the loss of art and music rooms in the elementary schools" and feared that loss of computer rooms would be "soon to follow."

Fewer people seemed to care deeply about overcrowding, however, when contrasted to the strong public sentiment for repairing immediate health and safety hazards. Bill Kuchar, for example, sought to hold the line at "what the Board really needs and what the taxpayers can afford." Notwithstanding its vote in favor of necessary repairs amounting to $19.2 million of debt, the Clark Township Council asked the Commissioner "to postpone any new construction to the school buildings which can be presented to the public at some future time."

Before seeking voter approval of new construction, the Board arranged for an independent consultant, Applied Data Services, Inc, to conduct a demographic study of likely future enrollment.[16] Utilizing birth records and three years of enrollment data,

[16] Statistical projections of future enrollment have been generally accepted as scientifically reliable. For a description of the "cohort survival ratio" method, one of the common tools used to plan future educational needs, see *Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ.*, 12 *N.J.A.R.* 566, 592 (Comm'r July 11,1988), *modified on other grounds,* 12 *N.J.A.R.* 663 (St. Bd. April 4, 1990), *aff'd* 257 *N.J. Super.* 413 (App. Div. 1992), *aff'd* 132 *N.J.* 327 (1993), *cert. den.* 510 *U.S.* 991 (1993).

Applied Data made a five-year projection of anticipated enrollment. Board witnesses predicted that, by the year 2005-2006, Clark elementary schools would have 877 "unhoused students" in Kindergarten through grade 5. The Board's demographic study, however, contradicts this supposition. On the contrary, the report suggests that "[t]he and Valley elementary schools clearly indicate a 'flat' growth – from 504 students to 529 in 2005/06 for Hehnly and from 424 to 399 students for Valley. * * * This represents no increase in the elementary schools." Indeed, the study predicts that "[m]ost of the growth during the next five years occurs in the high school," for which no additional classrooms are being sought. Unfortunately, the record also lacks reliable information on average class size in the Clark elementary schools, presently or in the foreseeable future, or any empirical research on the maximum class size at which meaningful learning can be achieved. Thus, it is difficult to quantify the effect that potential overcrowding might have on student performance.

I **FIND** that the proofs are insufficient to show that students in Clark will be deprived of a thorough and efficient education unless new elementary classrooms are built. Such objective evidence as does exist indicates that enrollment at the elementary level is likely to remain stable over the next five years. While it may well be shortsighted and more costly in the long run for Clark to put off expanding its facilities, failure to expand cannot be said to pose an immediate threat to the overall quality of education in the district. Absent an adequate showing that students in the district will be unable to attain satisfactory mastery of core curriculum content, that their learning will be seriously compromised or that their health and safety will be jeopardized, the need for improved facilities cannot justify overturning the will of the electorate as expressed at the polls.

Conclusions of Law

Long before adoption of EFCFA, New Jersey courts declared the State's responsibility to ensure that children receive the "thorough and efficient system of free public schools" guaranteed under the state constitution. *N.J. Const.*, Art VIII, §IV, para. 1. As early as 1966, our highest court recognized the Commissioner's broad authority

to review local budgetary decisions and ascertain whether the amount fixed is sufficient to satisfy minimum educational standards for the mandated thorough and efficient education. *Board of Educ., East Brunswick Twp. v. Township Council*, 48 *N.J.* 94 (1966) (Commissioner has power to reject annual school budget and direct an increase over the amount fixed by the governing body). *See also, Board of Educ. of Elizabeth v. City Council of Elizabeth*, 55 *N.J.* 501 (1970) (Commissioner has power to reject operating budget and restore cuts where the budget proposed by the school board was rejected by voters).[17]

In the leading case of *In re Upper Freehold Reg. Sch. Dist.*, 86 *N.J.* 265 (1981), the New Jersey Supreme Court dealt with the specific issue of the Commissioner's affirmative duty to order issuance of school bonds to alleviate unsafe or unhealthy building conditions. Deteriorating conditions found to exist at the high school in *Upper Freehold*, among which were sagging roof planks, water leakage onto ceiling tiles, short-circuited electrical systems, slippery floors and danger from shattering glass, are strikingly reminiscent of similar conditions present in Clark. Citing *Robinson v. Cahill*, 62 *N.J.* 473 (1973), the Court reiterated that the obligation of the State to fulfill its constitutional duty extends to capital expenditures as well as current operating expenses. *Upper Freehold*, at 275. Since deteriorating building conditions made delivery of minimally acceptable education "inadequate and inefficient, if not impossible," the Court held that "[t]hose conditions contravene the constitutional right of the students to a thorough and efficient education and justify invocation of the power of the Commissioner to vindicate that right." *Upper Freehold*, at 278. Consequently, the Court concluded that, "after voter rejection, the Commissioner may authorize the issuance of bonds for a capital project for a public school." Abundant precedent, therefore, allows the Commissioner to intervene in local budgetary affairs when necessary to protect school children from unsafe or dangerous building conditions.

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[17] Pointing to low voter turnout at school budget elections, the fact that voters do not have a direct say in any other use of public funds for current operating expenses, and the advent of budget caps, one perceptive commentator has called for eliminating voter participation in the school budget process. Robert P. Glickman, *Eliminate Public Voting on New Jersey School Budgets*, 115 *N.J.L.J.* 720 (June 20, 1985).

Recently, the Court had opportunity to reassert these fundamental principles. Confronted with crumbling and obsolete school buildings in such grave state of disrepair as not only to prevent children from receiving a thorough and efficient education but also to threaten their health and safety, the Supreme Court upheld an ambitious state plan to finance the construction and repair of school facilities.[18] *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*"Abbott V"*). While *Abbott V* arose in the context of disadvantaged school districts with special needs, the basic right to a thorough and efficient education belongs to every child attending public school in this state.

Against this backdrop, the Legislature enacted EFCFA to help school districts finance construction costs of providing a through and efficient education, including "ensuring that children are educated in physical facilities that are safe, healthy, and conducive to learning." *N.J.S.A.* 18A:7G-2a. EFCFA represents "the largest, most comprehensive school construction program in the nation." *Lonegan v. State*, 174 *N.J.* 435, 458 (2002), *aff'd in part*, *Lonegan v. State*, 2003 *WL* 1824837 (N.J. April 9, 2003). Realizing that "[e]ducational infrastructure inadequacies are greatest in the Abbott districts," the Legislature nevertheless acknowledged that,

> In other districts, the State must also identify need in view of anticipated growth in school population, and must contribute to the cost of renovation and construction of new facilities to ensure the provision of a through and efficient education in those districts. *N.J.S.A.* 18A:7G-2c.

To effectuate its goals, the Act designated the New Jersey Economic Development Authority ("EDA") as the state agency responsible "for the financing, planning, design, construction management, acquisition, construction, and completion of school facilities projects." *N.J.S.A.* 18A:7G-13a. *Lonegan*, at 459. Moreover, the

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[18] School buildings in the Abbott districts exhibited the following deficiencies:

> Windows, cracked and off their runners, do not open; broken lighting fixtures dangle precipitously from the ceilings; fire alarms and fire detection systems fail to meet even minimum safety code standards; rooms are heated by boilers that have exceeded their critical life expectancies and are fueled by leaking pumps; electrical connections are frayed; floors are buckled and dotted with falling plaster; sinks are inoperable; toilet partitions are broken and teetering; and water leaks through patchwork roofs into rooms with deteriorating electrical insulation
> *Abbott V*, at 519

Act established a formal mechanism for the Commissioner to review school facilities projects rejected by voters at two elections. *N.J.S.A.* 18A:7G-12 provides, in pertinent part, that:

> A district . . . that sought approval . . . of a school facilities project without excess costs but failed to receive that approval, and within the three years prior to that, sought and failed to receive approval of that school facilities project with or without excess costs, may submit the project to the commissioner and request that the commissioner approve the project and authorize the issuance of school bonds for the local share of the project. Upon receipt of the request, the commissioner shall review the school facilities project and determine whether the project is necessary for the provision of a thorough and efficient system of education in the district. If the commissioner concludes that the project is necessary, the commissioner may approve the project without excess costs and authorize the issuance of school bonds to fund the local share.

As expressly stated, the Commissioner can only approve a construction project "without excess costs." The Act defines "excess costs" to mean "the additional costs, if any, which shall be borne by the district, of a school facilities project which result from design factors that are not required to meet the facilities efficiency standards[.]" *N.J.S.A.* 18A:7G-3. Effective November 21, 2000, the Commissioner adopted facilities efficiency standards constituting the characteristics of instructional spaces, specialized instructional areas, and administrative spaces that are educationally adequate to support the achievement of the core curriculum content standards. 32 *N.J.R.* 4473(a) (Dec. 18, 2000). Since all of the renovations proposed by The Thomas Group comply with, but do not exceed, the parameters set by the facilities efficiency standards, the project does not involve any "excess costs." Insofar as the Commissioner accepts the recommended findings that repairs and renovations to existing school facilities are necessary for Clark students to receive a thorough and efficient education, the district should be ordered to issue bonds in the amount of $19.2 million.

It is more difficult to estimate *future* construction needs than to demonstrate deficiencies in *existing* plant and equipment. Certainly, the New Jersey Supreme Court

is equally concerned with potential overcrowding in the Abbott districts as with the condition of substandard buildings. Illustrative of such concern, the Court commented:

> Besides facing these decrepit and dangerous conditions, children in Abbott districts must also contend with gross overcrowding. Some class sizes hover around forty. Due to insufficient space, up to three different classes may be conducted simultaneously within the confines of one room. Libraries and hallways have been pressed into service as general classrooms. Some "classrooms" are no more than windowless closets converted by necessity into instructional areas. For children in these huddled spaces, "art" consists of coloring and "music" consists of singing. *Abbott V*, at 519.

Responsive to this analysis, the Legislature directed every school district to calculate the number of "unhoused students" for the ensuing five-year period, *N.J.S.A.* 18A:7G-4(f), -8, and established a functional capacity of less than 90% of existing enrollment as the benchmark for approving a construction project prior to development of a long-range facilities plan.[19] *N.J.S.A.* 18A:7G-4-(b). Applying this methodology, the Department determined that the functional capacity was 68% of the facilities efficiency standard at Hehnly School and 64% at Valley Road School.

Distinguishing the present situation from earlier cases where courts "went to great lengths to describe dangerous conditions at school facilities," the Board argues that the criteria embodied in the "facilities efficiency standards" represents "the *minimum* standards required for public school facilities in order to support core curriculum content standards." Given the shortage in functional capacity, the Board urges that these standards must be used to measure the adequacy of instructional space and supersede the Commissioner's discretion to determine what facilities are necessary for a thorough and efficient education.

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[19] "Functional capacity" is "the number of students that can be housed in a building in order to have sufficient space for it to be educationally adequate for the delivery of programs and services necessary for student achievement of the core curriculum." The difference between the projected enrollment and the functional capacity is "the unhoused students that are the basis upon which the additional costs of space to provide educationally adequate facilities for the entire projected enrollment are determined." *N.J.S.A.* 18A:7G-3.

While it is understandable to want to reduce a flexible term like "thorough and efficient education" to certain hard and fast rules, rigid application of an absolute formula to a non-Abbott school district goes beyond the intended usefulness of such device. Facilities efficiency standards "shall not be construction design standards;" rather, "[t]he design of the project may eliminate spaces in the facilities efficiency standards, include spaces not in the facilities efficiency standards, or size spaces differently than in the facilities efficiency standards upon a demonstration of the adequacy of the school facilities project to deliver the core curriculum content standards[.]" *N.J.S.A.* 18A:7G-4h As the statute provides, the facilities efficiency standards must be "educationally *adequate* to support the achievement of core curriculum standards," *N.J.S.A.* 18A:7G-4, but not necessarily the only means to achieve that result. (Emphasis added.) Consistent with this approach, the New Jersey Supreme Court has acknowledged that square footage guidelines adopted by the Commissioner are sufficient, but not necessary, for a thorough and efficient education and that local districts "should have the discretion to decide initially whether specialized rooms for art, music, and science instruction are required at the elementary level." *Abbott V*, at 522.

Nothing in EFCFA, which sets higher standards for *new* construction, evidences a legislative intent to retrofit all existing school facilities in this state to conform to newer, more stringent, building requirements. *Cf. Dresner v. Carrara*, 69 *N.J.* 237 (1976) (zoning ordinance imposing new off-street parking requirement inapplicable to building constructed long before the ordinance was passed.) Many New Jersey school districts may have antiquated school buildings, but it does not automatically follow that such districts are incapable of providing a quality education to students. Instead, the relevant inquiry is whether the existing configuration of school facilities is inadequate to afford students a through and efficient education.

An additional drawback of the Board's statutory interpretation is its contention that the Commissioner lacks discretion to deny issuance of school bonds whenever the project does not have excess costs. But this argument, if accepted, would render

nugatory the provisions of *N.J.S.A.* 18A:7G-12, since the discretion vested in the Commissioner to rule on such applications would thereby be effectively eliminated. *Board of Educ. of East Windsor Reg. Sch. Dist. v. State Bd. of Educ.*, 172 *N.J. Super.* 547, 554 (App. Div. 1980). *N.J.S.A.* 18A:7G-12 provides that the Commissioner "may approve the project without excess costs" if he or she concludes that the project is necessary for provision of a thorough and efficient system of education in the district. If the Legislature had intended to require approval of all projects that do not have excess costs, it could easily have said so without adding extra language mandating that the Commissioner determine whether such project was "necessary."

In sum, potential overcrowding of existing school facilities is a legitimate factor for the Commissioner to consider in determining whether to order issuance of school bonds. Mere failure to adhere to the newly enacted facilities efficiency standards, however, is not dispositive of that issue. Evidence of future overcrowding in the Clark school district is ambiguous at best, with the Board's own demographic study suggesting enrollment trends at the elementary level will be stable for the foreseeable future. Failure to include dedicated classrooms for art and music in an elementary school is less than ideal, but not indicative of a genuine inability to satisfy core curriculum content standards. In the event that enrollment rises dramatically, there should be sufficient lead-time to return to the voters for authorization to construct new facilities. Under the present circumstances, however, there is insufficient evidence of overcrowding for the Commissioner to substitute his judgment for that of the voters.

Finally, the Board seeks instructions on the local share of the bonded debt. In particular, the Board contends that the tax burden borne by local taxpayers cannot exceed the amount previously placed before them at the two elections and that state aid must make up any inflationary increases during the interim. In due course, appropriate Department officials will decide how much state aid to grant the Clark School District. That issue lies outside the limited scope of this proceeding. Hence, this report does not express any view on the amount of state aid to which the Board may be entitled.

Recommendation

It is recommended that the Commissioner order issuance of bonds totaling $19,204,980 to fund renovations and repairs necessary to provide a through and efficient education to the students of the Clark School District.

I hereby **FILE** my report and recommendation with **COMMISSIONER, DEPARTMENT OF EDUCATION** for consideration.

April 10, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

April 16, 2003
DATE

M. Kathleen Dunncault
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 17 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

List of Witnesses

Testimonial Witnesses:

1. Dr. Paul J. Ortenzio, Superintendent of Schools
2. Robert J. Kady, Architect, Senior Project Manager of The Thomas Group
3. William Takacs, School Business Administrator for Clark Public Schools
4. James P. Nichols, Architect, The Thomas Group
5. Kathleen Borden, Former President of the Clark School Board
6. Joseph Papetti, President, Clark School Board
7. Michael J. Timoni, Former President of the Clark School Board

Opportunity for Public Comment

1. Mayor Sal Bonaccorso
2. Sheila Whiting, Vice President, Board of Education
3. Karen Amalfe, Board of Education
4. Maria Cutinello
5. Martin Mogensen
6. Marge Berson
7. Bruce Best
8. Fred Hagen
9. William Caruso
10. Bill Gruss
11. Jill Curran
12. Barbara White
13. Natalie Belverio
14. Bill Kuchar
15. Robert Kircher
16. Dr. Murphy, Superintendent of Schools of Garwood
17. Tom Belverio

18. Wendy Griffin
19. Laura Caliguire
20. Diane Lanigan
21. Carmen Brocato
22. Colleen Nemeth
23. David Wechsler
24. Angela Kurek

List of Exhibits

No.	Description
OAL-1	Affidavit of Publication, dated February 24, 2003
OAL-2	Affidavit of Publication, dated September 24, 2002
P-1	Written statement of Paul J. Ortegio, Superintendent
P-1 (a)	Videotape depicting conditions of the high school
P-1 (b)	Explanation of the videotape
P-2	Curriculum vitae of Robert J. Kady, Architect, The Thomas Group
P-3	Outline prepared by Robert J. Katy, Architect
P-3(a) to (j)	Photographs depicting conditions of the two elementary schools
P-4	Clark School Board's Schematic Submission to NJDOE for Frank K. Hehnly School
P-5	Clark School Board's Schematic Submission to NJDOE for Valley Road School
P-6	Clark School Board's Schematic Submission to NJDOE for Kumpf Middle School
P-7	Clark School Board's Schematic Submission to NJDOE for A.L. Johnson High School
P-8 Id.	Excerpt from Clark School Board's long-range facilities plan
P-9	Facilities Evaluation of Clark Public Schools by The Thomas Group

P-9	(a)	Facilities efficiency standards
P-10		Outline prepared by William Takacs, School Business Administrator
P-11		Curriculum vitae of James P. Nichols, Architect, The Thomas Group
P-12		Outline prepared by James P. Nichols, Architect
P-13		Outline prepared by Kathleen Borden, former president Clark Board of Education
P-14		Outline prepared by Joseph Papetti, President, Clark Board of Education
P-15	(a)	Curriculum vitae of Nichol J. Timoni
P-15	(b)	Letter to Michael Timoni from Mitchell S. Elias, dated January 22, 1996
C-1		Referendum of the Township of Clark, dated February 18, 2003
C-2		Typewritten notes of Sheila Whiting
C-3		Typewritten notes of Maria Cutinello
C-4		Typewritten notes of Bruce Best
C-5		Letter from the Clark Civic & Taxpayers Committee, Inc., dated February 7, 2003
C-6		Videotape of public meeting of the Clark Board of Education
C-7		Typewritten notes of Bill Gruss
C-8		Typewritten notes of Jill Curran
C-9		Typewritten notes of Barbara White
C-10		Typewritten notes of Natalie Belverio
C-11		Handwritten notes of Bill Kuchar
C-12		Typewritten notes of Dr. Bill Murphy
C-13		Typewritten notes of Tom Belverio
C-14		Handwritten notes of Wendy Griffin
C-15		Photographs depicting water damage at the high school
C-16		Handwritten notes of Diane Lanigan

OAL DKT. NO. EDU 9431-02
AGENCY DKT. NO. 223-7/02

IN THE MATTER OF THE APPLICATION	:	
OF THE BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
FOR AN ORDER DIRECTING ISSUANCE OF	:	
BONDS PURSUANT TO *N.J.S.A.* 18A:7G-12.	:	
	:	

The record of this matter, and the Report and Recommendation (Report) of the Administrative Law Judge (ALJ) issued by the Office of Administrative Law following hearing pursuant to *N.J.S.A.* 52:14F-5(o), have been reviewed. Comments on the Report were filed by the petitioning Board of Education (Board) in accordance with procedures established by the Department of Education (Department) on behalf of the Commissioner.

In its comments, the Board examines the ALJ's Report in detail and raises objections to a number of the statements and analyses therein. The great majority of these objections are, in essence, specific applications of the Board's overarching position, reflected in the Initial Decision, that the facilities efficiency standards (FES) adopted in conjunction with the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-4(h), are the *minimum* State standards that public school buildings must meet in order to support the provision of a thorough and efficient system of public education (T&E), and that the Commissioner *must* order issuance of bonds where a district appearing before him pursuant to *N.J.S.A.* 18A:7G-12 has established that those standards will not be met absent completion of its proposed capital project(s). In this regard, the Board views the ALJ's

Report as "tantamount to a repudiation" of the FES, and it decries the Report's "refusal to recognize and apply the criteria defining the minimum standards of public school buildings adequately designed and spatially sufficient" to support T&E in the District. (Board's Comments at 2, 9, 10, 11) The Board contends that the ALJ inappropriately held it to a burden of proof that may have applied previously, but has now been superseded by enactment of EFCFA and establishment of the FES. (*Id.* at 2-4) It further contends that the ALJ failed to acknowledge and credit the Department's recognition, in granting a waiver from the requirement for submission of the long-range facilities plan otherwise required by EFCFA prior to permitting a local district to conduct facilities referenda, of "functional capacity [of] less than 90% of the [FES]" in the Board's two elementary schools, a recognition that was determinative of the Department's allowing those projects to be included in the Board's application under *N.J.S.A.* 18A:7G-12. (*Id.* at 4-6) The Board alleges that the ALJ failed to consider sufficiently the Superintendent's testimony about inadequate space for special education and the absence of library/media centers that are "anywhere near the minimum size set forth in the FES" (*Id.* at 6-7), instead giving undue credence to the few witnesses who spoke against issuance of bonds for the elementary school additions and inappropriately weighing "the existence of unsafe and hazardous conditions found in the Clark Township Schools, which require immediate repairs and renovations as a first priority, with the issues of inadequate space and non-existent facilities to which the students of Clark Township are entitled" under the FES. (*Id.* at 7)

The Board also contends that the ALJ misconstrued the District's situation with respect to "unhoused" students. Specifically, the Board argues that the ALJ did not recommend issuance of bonds for its two proposed elementary school additions because he

erroneously believed that the Board was claiming need based on *projected* enrollment increases rather than *current* conditions of overcrowding, and because he did not appear to understand that a district's number of "unhoused students" does not refer to students without a place in a school building, but rather serves as an "inadequacy index" in relation to the FES. Thus, the Board claims, because its elementary schools evince 64% and 68% functional capacities as determined under the FES and recognized by the Department in granting a five-year-plan waiver as noted above, and because FES formulas identify over 300 "unhoused students" in the District right now, the Board has demonstrated that its proposed additions are necessary under FES criteria. (Board's Comments at 6, 7-9, 10-11)

Upon careful review of the ALJ's Report, the underlying record including Exhibits and the Board's Post-Hearing Brief, and the Board's comments on the ALJ's Report, the Commissioner fully concurs with the ALJ's assessment of the Board's application. On the necessity for repairs and renovations to the District high school, as demonstrated on this record, there can be no two opinions; clearly, in the absence of the proposed project, the District will be unable to provide T&E due to significant health and safety issues. On the question of expanding elementary school facilities, however, as found by the ALJ, the Board has developed a record demonstrating little more than that its current functional capacity is less than the 90% established as a threshold by the FES, and that it lacks certain specialized rooms conforming to FES standards; even granting that the ALJ's Report may at times suggest that the schools' alleged overcrowding is prospective rather than current (the record supports the Board's request for clarification in this regard), the Board has made no demonstration as to how these alleged shortcomings have affected student performance or compromised the Board's ability to provide T&E. As stated by the ALJ:

> Unfortunately, the record***lacks reliable information on average class size in the Clark elementary schools, presently or in the foreseeable future, or any empirical research on the maximum class size at which meaningful learning can be achieved. Thus, it is difficult to quantify the effect that potential overcrowding might have on student performance.
>
> I **FIND** that the proofs are insufficient to show that students in Clark will be deprived of a thorough and efficient education unless new elementary classrooms are built.***Absent an adequate showing that students in the district will be unable to attain satisfactory mastery of core curriculum content, that their learning will be seriously compromised or that their health and safety will be jeopardized, the need for improved facilities cannot justify overturning the will of the electorate as expressed at the polls. (ALJ's Report at 12)

This finding reaches to the heart of the Board's position, which is its contention, noted above, that, as a matter of law, the FES are the *minimum* State standards that public school buildings must meet in order to support T&E, and that the Commissioner *must* order issuance of bonds where a district appearing before him pursuant to *N.J.S.A.* 18A:7G-12 has established that those standards will not be met absent completion of its proposed capital project(s). In the Board's view, then, if it has demonstrated that its schools are below the FES threshold for functional capacity and that they lack specialized instructional spaces as set forth in the FES, that demonstration is, *per se*, equivalent to a finding that the Board cannot provide T&E without construction of its proposed projects.

For the reasons well and thoroughly set forth by the ALJ in his discussion of the law underlying the Board's application (ALJ's Report at 12-18), the Commissioner rejects this view. As stated by the ALJ:

> While it is understandable to want to reduce a flexible term like "thorough and efficient education" to certain hard and fast rules, rigid application of an absolute formula to a non-Abbott school district goes beyond the intended usefulness of such device. Facilities efficiency standards "shall not be construction design standards;" rather, "[t]he design of the project may eliminate spaces in the facilities efficiency standards, include spaces not in the facilities efficiency standards, or size spaces differently than in the facilities efficiency standards upon a demonstration of the adequacy of the school

facilities project to deliver the core curriculum content standards[.]" *N.J.S.A.* 18A:7G-4h As the statute provides, the facilities efficiency standards must be "educationally *adequate* to support the achievement of core curriculum standards," *N.J.S.A.* 18A:7G-4, but not necessarily the only means to achieve that result. (Emphasis added.) Consistent with this approach, the New Jersey Supreme Court has acknowledged that square footage guidelines adopted by the Commissioner are sufficient, but not necessary, for a thorough and efficient education and that local districts "should have the discretion to decide initially whether specialized rooms for art, music, and science instruction are required at the elementary level." *Abbott V*, at 522.

Nothing in EFCFA, which sets higher standards for *new* construction, evidences a legislative intent to retrofit all existing school facilities in this state to conform to newer, more stringent, building requirements. (citation omitted) Many New Jersey school districts may have antiquated school buildings, but it does not automatically follow that such districts are incapable of providing a quality education to students. Instead, the relevant inquiry is whether the existing configuration of school facilities is inadequate to afford students a through and efficient education.

An additional drawback of the Board's statutory interpretation is its contention that the Commissioner lacks discretion to deny issuance of school bonds whenever the project does not have excess costs. But this argument, if accepted, would render nugatory the provisions of *N.J.S.A.* 18A:7G-12, since the discretion vested in the Commissioner to rule on such applications would thereby be effectively eliminated. (citation omitted) *N.J.S.A.* 18A:7G-12 provides that the Commissioner "may approve the project without excess costs" if he or she concludes that the project is necessary for provision of a thorough and efficient system of education in the district. If the Legislature had intended to require approval of all projects that do not have excess costs, it could easily have said so without adding extra language mandating that the Commissioner determine whether such project was "necessary." (ALJ's Report at 17-18, emphasis in text)

Contrary to the Board's assertions, then, the ALJ's Report is not a "repudiation" of the FES, but rather a recognition of their appropriate role in a proceeding to determine whether proposed facilities projects *must* be ordered despite voter disapproval because they are necessary to meet the constitutional mandate for T&E. Moreover, as recognized by the ALJ, previously applicable standards for the issuance of such an order have *not* been superseded by enactment of EFCFA and establishment of the FES; rather, these have

served to set legislative and administrative parameters to guide the Commissioner's case-by-case determinations in assessing a proposed project's constitutional necessity.[1]

Accordingly, the Commissioner concurs with the Report and Recommendation of the ALJ as clarified with respect to the current applicability of the Board's "unhoused student" argument. The Commissioner finds that insufficient evidence exists to warrant a directive for issuance of bonds to fund the Board's proposed elementary school projects, but that its proposed renovations and repairs to the high school are necessary for provision of a thorough and efficient system of education in the District. The Commissioner, therefore, authorizes the Board to prepare for issuance of bonds in the amount necessary to fund the local share of the high school project[2] and directs it to submit detailed plans and specifications for that project to the Office of School Facilities, where the project shall proceed forthwith as an Authority project pursuant to *N.J.S.A.* 18A:7G-12 and applicable provisions of *N.J.A.C.* 6A:26-3.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6|02|03

Date of Mailing: 6|02|03

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[1] Arguably, they have actually *narrowed* boards' ability to apply to the Commissioner for issuance of bonds, since, prior to enactment of EFCFA, there were no preconditions on such applications as are now set forth in *N.J.S.A.* 18A:7G-12.

[2] The ALJ's final recommended order directs issuance of $19.2 million in bonds, reflecting the entire cost of the project; however, as noted on page 2 of the Initial Decision (Note 3), the local share is actually less and will be finally determined pursuant to applicable rules governing Authority projects.

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

262-03

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,

PETITIONER,

V.

MARY LOU MARGADONNA,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

June 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2409-03

AGENCY DKT. NO. 123-4/03

BOARD OF EDUCATION
OF THE TOWNSHIP OF WALL,

Petitioner,

v.

MARY LOU MARGADONNA,

Respondent.

Douglas J. Kovats, Esq., for petitioner (Kenny, Gross & Kovats, attorneys)

Richard B. Stone, Esq., for respondent (Stone Mandia, attorneys)

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

Record closed: April 24, 2003 Decided: April 25, 2003

STATEMENT OF THE CASE

The basic issue here is whether respondent Mary Lou Margadonna may hold office as a member of the petitioner Board of Education of the Township of Wall (BOE).

The case is complicated, but can be summarized. N.J.S.A. 18A:12-2 states, "No member of any board of education shall be interested directly or indirectly in any contract with or claim

against the board." N.J.S.A. 19:60-5 states that each nominating petition for election to a school board shall state "That the person so endorsed is legally qualified to be elected to the office." For several school years, the BOE employed respondent as a non-tenured teacher, but, in 2002, it declined to offer her another contract to continue that employment. Thereafter, in 2002, respondent served the BOE with a New Jersey Tort Claims Act notice of claim, alleging wrongful loss of employment, damage to her good name, etc. N.J.S.A. 59:8-4. Thereafter, in 2002 also, she petitioned the Commissioner of Education, naming the BOE and its employees and agents as respondents; claiming that the BOE should afford her a public hearing relative to whether it should have offered her another contract of employment; and claiming that the BOE should offer her a contract as a teacher, which by statute would result in tenure. N.J.S.A. 18A:6-9; N.J.S.A. 18A:28-5. In 2002 the Commissioner dismissed her petition, the State Board of Education affirmed, and she has appealed to the Superior Court, Appellate Division. R. 2:2-3(a)(2). In 2003 she submitted to the BOE her nominating petition for the BOE's April 15, 2003, election, wherein, despite her claim that the BOE should employ her and despite N.J.S.A. 18A:12-2, she certified that she was "legally qualified" to be a member of the BOE. P-1(5). She appeared on the April 15, 2003, election ballot and received the second highest number of votes. Consequently, absent disqualification, she could begin as a BOE member at the BOE's April 29, 2003, reorganization meeting required by N.J.S.A. 18A:10-3(b). The BOE requested that respondent notify it as to (1) whether she agreed to withdrawal and/or dismissal with prejudice of her claims against the BOE or (2) whether she would decline a seat on the BOE. She refused withdrawal and/or dismissal of her claims, so the BOE filed the petition resulting in this case. The BOE requested that respondent be ordered to choose between the dismissal of her claims or declining office and the BOE requested that, if she declined office, the matter be referred to the county superintendent of schools for filling the membership of the BOE. N.J.S.A. 18A:12-15. On the record made April 24, 2003, respondent agreed to dismissal of her claims with prejudice, except for a claim still pending before the Appellate Division, i.e., that the BOE must afford her the public hearing relative to whether it should have offered her another contract of employment. Respondent's attorney argues that this would not constitute a disqualifying claim within the intent of N.J.S.A. 18A:12-2. However, the BOE submits that respondent is continuing a claim and that, consequently N.J.S.A. 18A:12-2 prohibits her service as a BOE member. I agree with the BOE and enter orders accordingly.

PROCEDURAL HISTORY

On April 22, 2003, the BOE filed its verified emergent petition with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on April 23, 2003. N.J.S.A. 52:14B-2(b). On April 24, 2003, in the OAL, Trenton, the respondent's opposition papers were filed and the case was argued.

FINDINGS OF FACT

During the 1999-2000, 2000-01, and 2001-02 school years, the BOE employed respondent as a non-tenured teacher. Consequently, if the BOE had employed her for the 2002-03 school year, pursuant to N.J.S.A. 18A:28-5, she would have obtained tenure.

Late in the 2001-02 school year, respondent began to receive reviews that she alleges were inconsistent with her excellent performance and, in April 2002 the BOE notified her that it would not offer her a contract for the 2002-03 school year. The respondent requested a statement of the BOE's reasons for not offering a contract and the BOE provided such a statement and notified her that in that regard she had an opportunity for an informal appearance before the BOE. P-1; see N.J.S.A. 18A:27-3.2, -4.1.

On June 11, 2002, respondent had her informal appearance before the BOE and, thereafter, the BOE notified her that it had not taken action to offer her a contract. Thereafter, members of the public appeared before the BOE to urge it to offer respondent another contract; but the BOE declined to do so.

On June 18, 2002, respondent requested a public hearing before the BOE and the BOE denied her request. P-1(3).

On July 17, 2002, respondent served the BOE with a New Jersey Tort Claims Act notice of claim, wherein she claimed that the BOE had wrongfully denied her rights of due process and wrongfully denied her a public hearing, causing "loss of employment [and] damage to [her] good

name and reputation," etc., and wherein she demanded damages for "loss of salary and benefits," etc. P-1(2); N.J.S.A. 59:8-4.

On or about July 18, 2002, respondent filed a petition with the Commissioner of Education, captioned as Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, wherein she alleged that the BOE had denied her the "right to a public hearing" on the matter of whether it should employ her as a teacher for the 2002-03 school year and wherein she demanded relief, including continued employment as a BOE teacher with tenure. P-1(1); N.J.S.A. 18A:6-9.

On October 29, 2002, in Margadonna v. Wall BOE et al., Agcy Dkt. No. 225-7/02, the Commissioner concluded that respondent's (petitioner in that case) petition failed to state a claim on which relief could be granted and he dismissed it. P-1(3). The Commissioner cited Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), as holding that a non-tenured teacher does not have a protected interest in continued employment and, if the school declines to continue his or her employment the United States Constitution's Fourteenth Amendment does not guarantee due process in that regard. The Commissioner cited Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974), holding that a board of education need not base its declining to continue employment of a teacher on unsatisfactory performance and the board's action or inaction may be based on another valid reason; although a board may not decline to continue employment because of a teacher's membership in a union or exercise of a constitutional right and the teacher has a right to a statement of reasons from the board for declining to continue the employment. The Commissioner cited Lydia Anderson v. State-operated School District of the City of Newark, State Board (February 7, 2001), as holding that, under the New Jersey Constitution, a non-tenured teacher has limited rights to due process in that regard. The Commissioner cited Angelo Velasquez v. Board of Education of the Borough of Brielle, State Board (August 6, 1997), as holding that, when a board of education declines to continue a non-tenured teacher's employment, the teacher may appear for an informal meeting with the board; but he or she does not have a right to a vote by the board on whether another contract should be offered. The Commissioner cited Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447, at 453 (App. Div. 1982), holding that a district board of education's decision not to continue employment of a non-tenured teacher may be based on a broad range of factors, including factors other than the teachers' evaluations and boards have

"virtually unlimited discretion in hiring or renewing non-tenured teachers." The Commissioner also cited Guerriero v. Board of Education of the Borough of Glen Rock, State Board (February 6, 1986), aff'd, No. A-3316-85T6 (App. Div. 1986), as holding that, where a non-tenured teacher challenges a board's declining to offer another contract on the grounds that facts do not support the board's reasons, the non-tenured teacher is entitled to litigate the matter only if the facts he or she alleges are true would constitute a violation of a constitutionally or statutorily conferred right. Given the above, the Commissioner agreed with the BOE that Rice v. Union County Regional High School District, 155 N.J. Super. 64 (App. Div. 1977), cited by respondent as requiring the public hearing relative to the BOE's declining to offer her another contract, did not require such a hearing.

The respondent appealed the Commissioner's decision in Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, to the State Board of Education, which, on February 5, 2003, affirmed the Commissioner. P-1(4); N.J.S.A. 18A:6-27, -28

On February 24, 2003, respondent submitted to the BOE her nominating petition relative to the April 15, 2003, election for membership on the BOE. Her petition certified that she was "legally qualified under the laws of the State to be elected a member of the [BOE]" and included sufficient signatures for placement of her name on the ballot. P-1(5); N.J.S.A. 19:60-5d.

On March 7, 2003, respondent filed an appeal from the State Board's decision in Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, with the Superior Court, Appellate Division, A-3338-02T2. P-1(6); R-2; R. 2:2-3(a)(2).

In the April 15, 2003, BOE election, the respondent's vote total was the second highest, i.e., sufficient for election to the BOE, absent disqualification. P-1.

By letter dated April 15, 2003, the BOE notified respondent that she had obtained sufficient votes to take a seat on the BOE; that, given her claims against the BOE, N.J.S.A. 18A:12-2 prohibited her from holding office as a member of the BOE; that, by April 21, 2003, she should notify the BOE of whether she would withdraw or dismiss the claims with prejudice; and that, if she failed to do so, the BOE would petition for relief. P-1(7).

By letter dated April 16, 2003, respondent's attorney responded that, due to the "complexity of this matter and a pre-planned vacation, a proper response [could not] be provided by . . . April 21, 2003" and he requested a two-week extension to respond. P-1(8).

By letter dated April 16, 2003, the BOE notified respondent that (as required by N.J.S.A. 18A:10-3(b)), on April 29, 2003, it would hold its reorganization meeting and it could not consent to the two-week delay in her response. P-1(9).

By way of respondent's attorney's April 23, 2003 letter brief, respondent represented that she "will withdraw her Notice of Tort Claim under [N.J.S.A. 59:1-1 et seq.]." R-1; emphasis added. On the record made April 24, 2003, respondent agreed to dismissal with prejudice of her claims against the BOE, except for her demand in Margadonna v. Wall BOE et al., No. A-3338-02T2, before the Appellate Division, that the BOE afford her a public hearing relative to whether it should have offered her another contract of employment. Her attorney argued that this does not constitute a claim within the intent of the laws cited above and that, if the BOE decides to offer her employment, she may then decide whether to accept the employment or reject it and continue as a member of the BOE.

CONCLUSIONS OF LAW

"No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." N.J.S.A. 18A:12-2. Consistent with N.J.S.A. 18A:12-2, the petition of a candidate for nomination for election to a board of education must state that he or she "is legally qualified to be elected to the office." N.J.S.A. 19:60-5.

From July 17, 2002, when respondent served the BOE with her New Jersey Tort Claims Act notice of claim, until April 24, 2003 (during the argument of this case), the respondent asserted a claim that the BOE had wrongfully denied her rights of due process and wrongfully denied her a public hearing, causing "loss of employment [and] damage to [her] good name and reputation," etc., and she demanded damages for "loss of salary and benefits," etc. P-1(2); N.J.S.A. 59:8-4.

On or about July 18, 2002, respondent filed the petition with the Commissioner of Education, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, wherein she alleged that the BOE had denied her the "right to a public hearing" on the matter of whether it should employ her as a teacher for the 2002-03 school year and wherein she claimed relief, including continued employment as a BOE teacher with tenure. P-1(1). She continued her claim until April 24, 2003 (during the argument of this case), when she agreed to dismissal with prejudice of her petition's claims (now in the Appellate Division), except that she continues her claim that the BOE must afford her a public hearing relative to whether it should have offered her another contract of employment.

Given the above, on February 24, 2003, when the respondent submitted her petition, and on April 15, 2003, at the time of the election, she was directly interested in claims against the BOE that related to a contract and employment.

Howell Township Board of Education v. Suchcicki, 93 N.J.A.R.2d (EDU) 157, where an employee of the board of education submitted a petition for nomination for election to the board, applied N.J.S.A. 18A:12-2 and N.J.S.A. 18A:14-10 (repealed). N.J.S.A. 18A:14-10, like N.J.S.A. 19:60-5 which replaces it, required that petitions for nomination for election to a board of education state that the proposed candidate "is legally qualify to be elected" and the decision states:

> Public policy demands that one who holds public office discharge his duties with undivided loyalty and from this policy the concept of "incompatibility" has evolved. Consistent with this concept, one may not hold two public offices, each of which has an interest which competes with the other, and one cannot hold two public offices where his performance in one office would be subordinate to the other, or subject to its control, or requires him to choose the obligation of one office over another. In such circumstances, it is not enough for the office holder to abstain from participation when an area of conflict arises; holding both the public offices is prohibited. See Jones v. MacDonald, 33 N.J. 132 (1960); Dunn v. Froehlich, 155 N.J. Super. 249 (App. Div. 1978); Kaufman v. Pannuccio, 121 N.J. Super. 27 (App Div. 1972);

Visotcky v. City Council of City of Garfield, 113 N.J. Super. 263 (App. Div. 1971).

Consistent with the concept of "incompatibility," N.J.S.A. 18A:12-2 provides that "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." Also, a nominating petition, such as that filed by the respondent, must state that the proposed candidate "is legally qualified to be elected" to the board . . . ." N.J.S.A. 18A:14-10 (Emphasis added.) [repealed and replaced by N.J.S.A. 19:60-5].

Surely the respondent's employment contract, if not his union responsibilities, give him the kind of "interest" which N.J.S.A. 18A:12-2 speaks of. Compare Visotcky v. City Council of Garfield, supra, wherein it was decided that holding the position of teacher is "incompatible" with membership on the Board of Education in the same school district and where membership on the board would be invalid in such circumstances.

During the hearing, respondent represented that it was and is his intention, conditioned upon his election, to resign as an employee and union representative. However, as quoted above, in N.J.S.A. 18A:14-10, the Legislature speaks in the present tense of legal qualification for election to the Board, i.e., there must be qualification at the time of execution of the petition and its accompanying certificate. (This is a reasonable and practical condition intended to assure that a candidate will not later reconsider and decide not to give up his disqualifying employment, etc.) Therefore, I **FIND** and **CONCLUDE** that, despite the respondent's petition's statement and accompanying certification wherein he is described as "qualified," he was and is not qualified.

During the hearing, the respondent also stated that he was unaware of his lack of qualification. This statement is somewhat inconsistent with the respondent's representation that he intended to resign his position as a Board employee if elected, but, in any event, it is the proposed candidate's responsibility to learn applicable laws before certifying his qualification for election. See Graham v. N.J. Real Estate Comm'n, 217 N.J. Super. 130, 138 (App. Div. 1987), and In re Krah, 130 N.J. Super. 366 (App. Div. 1974), for the proposition that everyone is conclusively presumed to know the law, statutory and otherwise, and, in the absence of statutory or constitutional requirements, an agency is not required to give actual notice of the law.

> Given the above facts and circumstances, I **FIND, CONCLUDE** and **DECLARE** as follows: (1) The respondent is not legally qualify for election to the Board; (2) The respondent's nominating petition is invalid, null and void; and (3) The respondent's name as a candidate for election to the Board must be removed from the ballot relative to the April 7, 1992 election.
>
> [Howell Township v. Suchcicki, supra, 93 N.J.A.R.2d at 157-58.]

Since respondent was continuing all of her claims against the BOE at the time she submitted her petition for nomination for election to the board, pursuant to N.J.S.A. 18A:12-2 she was not qualified to serve on the BOE; her petition and her presence on the ballot violated N.J.S.A. 19:60-5; and her election may be voided.

Respondent's attorney argues that her petition in Margadonna v. Wall BOE et al., No. A-3338-02T2, does not constitute a "claim" within the intent of N.J.S.A. 18A:12-2. However, in that case, as the "petitioner" she is "requesting relief or action." N.J.A.C. 1:1-2.1 "Petitioner"; see also N.J.A.C. 6A:3-1.3. See also N.J.A.C. 1:1-1.3(a) and R. 4:5-2, stating that a claim contains a "statement of the facts . . . [purportedly] showing that [she] is entitled to relief." The respondent's petition alleges facts and sets forth a demand for relief: an order commanding the BOE to afford her the public hearing. (It is similar to a mandamus action. Compare R. 4:69.) Consequently, respondent's petition contains a "claim" and N.J.S.A. 18A:12-2 prohibits her holding office as a member of the BOE.

Further, in respondent's case in the Appellate Division, she continues her claim that an order should be entered requiring the BOE to hold a public hearing relative to whether it should have offered her another contract of employment.

The respondent's attorney also contends that N.J.S.A. 19:60-5 and N.J.S.A. 18A:12-2 violate her constitutional rights. In these statutes, the Legislature has articulated important policies to avoid conflicts of interest for public officials and statutes are presumed to be lawful. In any event, this administrative case has not been transmitted here for a decision on such an issue and, as the BOE's attorney has pointed out, respondent has not notified the Attorney General of this challenge to State statutes. N.J.S.A. 52:14B-2(b).

To summarize, the respondent (represented by counsel) brought and maintained claims against the BOE and, contrary to N.J.S.A. 18A:12-2 and despite the requirements of N.J.S.A. 19:60-5, she certified in her nominating petition that she was qualified to serve as a BOE member. Despite the opportunity to do so, she has again refused to dismiss her claim against the BOE. Her real claim and interest is in a contract of employment with the BOE and N.J.S.A. 18A:12-2 prohibits a BOE member from maintaining such a claim. Consequently, although frustrating the will of her voters, her actions require the results ordered below.

ORDER

Consistent with the above, (1) I **ORDER** the respondent disqualified from holding office as a member of the BOE and (2) I refer to the county superintendent of schools the decision relative to the filling the membership of the BOE. N.J.S.A. 18A:12-15.

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

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

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

April 25, 2003
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

April 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 25 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioner:

P-1 Verified Emergent Petition & Verification, April 22, 2003

P-1(1) Petition, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, July 8, 2002

P-1(2) Letter from Stone Mandia, July 12, 2002, with notice of claim under the New Jersey Tort Claims Act, July 12, 2002

P-1(3) Letter/decision from Commissioner of Education, dismissing petition, Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, October 29, 2002

P-1(4) Decision of State Board of Education, affirming Commissioner's Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, decision, February 5, 2003

P-1(5) Nominating Petition for April 15, 2003, Annual School Election for Margadonna, February 24, 2003

P-1(6) Notice of Appeal to the Superior Court, Appellate Division, from the Decision of State Board of Education, affirming Commissioner's Margadonna v. Wall BOE et al., Agency Dkt. No. 225-7/02, decision, February 5, 2003, March 5, 2003

P-1(7) Letter from BOE's attorney, April 15, 2003

P-1(8) Letter from respondent's attorney, April 16, 2003

P-1(9) Letter from BOE's attorney, April 16, 2003

For Respondent:

R-1 Letter brief, April 23, 2003

R-2 Statement of Issues, Margadonna v. Wall BOE et al., App. Div. No. A-3338-02T2, with exhibits

OAL DKT. NO. EDU 2409-03
AGENCY DKT. NO. 123-4/03

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MARY LOU MARGADONNA,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

By letter dated April 29, 2003, respondent notified petitioner of her intent to dismiss, with prejudice, her remaining claims against the Board of Education and provided petitioner with a signed Stipulation of Dismissal addressed to the Superior Court of New Jersey, Appellate Division, confirming the same.[1] Having done so, the Commissioner finds there is no present issue with respect to respondent maintaining an inconsistent interest, as prohibited by *N.J.S.A.* 18A:12-2 , and no relief to be granted herein.

[1] The Superior Court issued an Order of Dismissal on April 30, 2003 in the matter entitled *Mary Lou Margadonna v. Wall Township Board of Education et al.*, New Jersey Superior Court, Appellate Division, A-3338-02T2.

Accordingly, the Commissioner dismisses the Petition of Appeal, without reaching to the Initial Decision issued by the Administrative Law Judge.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/2/03

Date of Mailing: 6/2/03

[2] The Commissioner clarifies only that *N.J.S.A.* 18A:12-2, "by its express terms, applies only to board members, prohibiting a '*member* of any board' (emphasis added) from having an interest in a contract with [or claim against] the board. A candidate for a seat on a board is not a board 'member' within the express prohibition of the statute. Given the clear and unambiguous language of the statute, it is evident that a victorious school board candidate who cured any conflicts prior to commencement of his or her term of office would *not* be disqualified from board membership by operation of that statute. Thus, *N.J.S.A.* 18A:12-2 cannot be read to disqualify individuals with inconsistent interests from being *candidates* for board membership.***" *Thomas v. Edwards*, 93 *N.J.A.R.*2d EDU 369, *aff'd in part, rev'd in part*, State Board of Education, November 3, 1993, Slip Opinion at 3.

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

264-03

CYNTHIA MC DAY,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

June 2, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 02987-96S

AGENCY DKT. NO. 112-3/96

CYNTHIA McDAY,

Petitioner,

v.

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

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Fagella & Nowak, attorneys)

Elizabeth Farley Murphy, Esq., for the respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: May 12, 2003 Decided: May 14, 2003

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter arises from the filing of a Petition of Appeal with the Commissioner of Education on March 19, 1996, by Cynthia McDay ("petitioner") requesting consideration of allegations against the Woodbridge Township Board of Education ("respondent") relative to a denial of salary and sick leave time for absences arising from a work-related injury. The matter was transmitted to the Office of Administrative Law on April 30, 1996, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle the matter and prepared a Stipulation of Settlement and Dismissal attached hereto.

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

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

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

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

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

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

May 14, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

May 15 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 10 2003

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
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(732) 636-8000
Attorneys for Respondent,
Woodbridge Township Board of Education

CYNTHIA McDAY, Petitioner, v. WOODBRIDGE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO. 112-3/96 OAL DOCKET NO. EDU 02987-96S **STIPULATION OF SETTLEMENT AND DISMISSAL**

The Woodbridge Township Board of Education ("Board"), with principal offices located at School Street, Box 428, Woodbridge, New Jersey 07095, and Cynthia McDay, residing at 76 West Willow Street, Colonia, New Jersey 07067, agree as follows:

W I T N E S S E T H:

WHEREAS, Cynthia McDay was employed by the Board as a school nurse between September 1, 1989 and April 30, 1997, the effective date of her retirement; and

WHEREAS, on February 28, 1995, Ms. McDay was injured in school when she was struck by a door that had been opened by a teacher (hereinafter "the accident"); and

WHEREAS, based upon information received from the Board's insurance carrier concerning Ms. McDay's ability to return to work, the Board charged Ms. McDay's sick leave bank for approximately 44 days of absence during the 1995-1996 school year; and

WHEREAS, on the 11 work days prior to her retirement (that is, between April 15, 1997 and April 30, 1997), Ms. McDay's pay was "docked" due to absence because she had no remaining paid leave in her sick leave bank; and

WHEREAS, a dispute arose concerning whether or not the Board properly charged Ms. McDay's sick leave bank during the 1995-1996 school year pursuant to N.J.S.A. 18A:30-2.1 which provides for payment of full salary and wages for up to one calendar year to employees injured as the result of an accident arising out of and in the course of their employment; and

WHEREAS, if the Board had not charged Ms. McDay's sick leave bank subsequent to the accident, Ms. McDay's pay would not have been docked between April 15, 1997 and April 30, 1997; and

WHEREAS, Ms. McDay filed a Petition of Appeal before the Commissioner of Education, Agency Reference Number 112-3/96; and

WHEREAS, the Commissioner of Education transmitted the matter for a hearing before the Office of Administrative Law, OAL Docket No. EDU 02987-96S; and

WHEREAS, Ms. McDay has advised the Board that she subsequently was awarded an accidental disability pension as a result of the accident; and

WHEREAS, on June 13, 2002, the Honorable Joel Gottlieb, J.C., entered an Order Approving Settlement with Dismissal of Ms. McDay's related claim

before the Division of Workers' Compensation, Claim Petition No. 1996-46663, regarding workers' compensation benefits for Ms. McDay as a result of the accident; and

WHEREAS, prior to a hearing being held before the Office of Administrative Law regarding the issue of reimbursement for statutory sick leave pursuant to N.J.S.A. 18A:30-2.1, the parties reached an amicable resolution to the issues in dispute.

NOW, THEREFORE, for the consideration specified below, the parties set forth the following mutual covenants and agreements:

1. Reimbursement for Sick Days. Within 30 days of the full execution of this Stipulation, the Board shall pay Ms. McDay $2,839.32 as full reimbursement for the eleven (11) work days between April 15, 1997 and April 30, 1997 on which her pay was docked due to absence. The parties agree that this payment represents any and all compensation owed by the Board to Ms. McDay to date. This amount will be reflected on an IRS Form W-2 Wage and Tax Statement. Such settlement amount shall be designated "wages" and shall be subject to all applicable state, federal and local taxes and any other withholdings as are required by law.

2. Dismissal of Petition. Upon full execution of this Stipulation, Ms. McDay will immediately withdraw her pending petition before the Commissioner of Education.

3. Release and Waiver. In consideration of the aforesaid payment and other terms and conditions of this Stipulation, and except as prohibited by law, Ms. McDay, personally and for her estate and/or her heirs, waives, releases

and gives up any and all claims, demands, obligations, damages, liabilities, causes of action, and rights, in law or in equity, known and unknown, that she may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives (hereinafter "releasees"), based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any events related to, arising from, or in connection with, Ms. McDay's employment and/or association with releasees.

4. No Claims Permitted/Covenant Not to Sue. Ms. McDay agrees, to the fullest extent permitted by law, not to commence, encourage, facilitate or participate in any action or proceeding for damages, reinstatement, injunctive or any other type of relief, in any state, federal or local court or before any administrative agency relating to her employment, based upon any act, event or omission occurring before the effective date of this Stipulation. Nothing in this Stipulation is intended to prevent Ms. McDay from an action to enforce the Board's obligations as set forth herein. Nothing in this Stipulation is intended to prevent Ms. McDay from contacting the Equal Employment Opportunity Commission ("EEOC"); however, if Ms. McDay signs this Stipulation, she will not be able to obtain any relief or recovery in connection with any charge filed with the EEOC. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Ms. McDay, it shall be dismissed with prejudice upon presentation of this Stipulation, and Ms. McDay shall

reimburse releasees for the costs, including attorneys' fees, of defending any such action.

5. No Admission of Liability. It is expressly understood that neither the execution of this Stipulation, nor any other action taken by releasees in connection with this settlement, constitutes an admission by releasees of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with Ms. McDay's employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful. The parties agree that releasees have entered into this Stipulation to conclude this litigation and avoid costs and expenses attendant thereto. Releasees specifically reiterate their denial of any legal liability or obligation to Ms. McDay or any other person.

6. Entire Agreement. This Stipulation contains the sole and entire agreement among the parties hereto, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Stipulation.

7. Counterparts and Applicable Law. This Stipulation may be executed in counterparts and shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction of the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of the State of New Jersey,

venued in Middlesex County. The parties further agree that this Stipulation may be specifically enforced in court, may be the subject of an action for breach, and may be used as evidence in a subsequent proceeding in which either of the parties allege a breach of this Stipulation, and that in the event that Ms. McDay breaches this Stipulation and releasees are successful in an action against her, Ms. McDay shall be liable for the attorneys' fees and costs incurred by releasees with respect to any such action.

8. Revocation. As required by the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626, Ms. McDay will have twenty-one (21) days from her receipt of this Stipulation to consider its terms before signing it. Once Ms. McDay signs this Stipulation, she shall have seven (days) to revoke this Stipulation or it shall become binding and in full force and effect seven (7) days after Ms. McDay signs it. Ms. McDay may revoke this Stipulation for a period of seven days following the day she signs it. Any revocation within this period must be submitted, in writing, to Elizabeth Farley Murphy, Esq., Wilentz, Goldman & Spitzer, P.A., 90 Woodbridge Center Drive, P.O. Box 10, Woodbridge, NJ 07095 and must state "I hereby revoke my acceptance of this Stipulation." The revocation must be personally delivered to Elizabeth Farley Murphy, or mailed to Elizabeth Farley Murphy, and postmarked within seven days of execution of the Stipulation. This Stipulation shall not become effective or enforceable until after the revocation period has expired. If the last day of the revocation period is a Saturday, Sunday, or legal holiday in New Jersey, then the revocation period shall not expire until the next following day which is not a Saturday, Sunday, or legal holiday. Ms. McDay acknowledges that she

waives her rights or claims herein in exchange for consideration in addition to anything of value to which she already is entitled. Ms. McDay acknowledges that she has been advised to consult with an attorney prior to executing this Stipulation;

9. This Stipulation must be approved by the Board by resolution prior to being effective or final.

IN WITNESS WHEREOF, THE PARTIES HERETO SET THEIR HANDS TO THIS STIPULATION AS FOLLOWS:

Cynthia McDay
CYNTHIA McDAY

March 21, 2003
Date

STATE OF NEW JERSEY:
: ss:
COUNTY OF MIDDLESEX

I CERTIFY that on March 21st, 2003, CYNTHIA McDAY personally came before me and acknowledged under oath, to my satisfaction, that she: (a) is named in and personally signed this document; and (b) signed, sealed and delivered this document as her own act and deed.
Sworn and subscribed to before me this 21st day of March, 2003.

Kamini Patel
Notary Public, State of New Jersey

KAMINI PATEL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 27, 2004

3/24/03

ATTEST:

Vincent S. Smith
Superintendent of Schools/
Business Administrator/Board
Secretary

4/24/03
Date

WOODBRIDGE TOWNSHIP
BOARD OF EDUCATION

Judy Leidner
Judy Leidner
President

5/1/03
Date

OAL DKT. NO. EDU 02987-96S
AGENCY DKT. NO. 112-3/96

CYNTHIA MC DAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/02/03

Date of Mailing: 6/02/03

* Respondent's counsel confirmed by letter, dated May 5, 2003, that the Board approved the Stipulation of Settlement at its meeting on April 24, 2003.

274-03

274-03

IN THE MATTER OF THE TENURE :
HEARING OF SANDRA KEARNEY, :
STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF NEWARK, ESSEX :
COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

June 3, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1226-03

AGENCY DKT. NO. 407-12/02

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Petitioner,

v.

SANDRA KEARNEY,

Respondent.

Arsen Zartarian, Esq., appearing for petitioner

Eugene G. Liss, Esq., appearing for respondent

Record Closed: April 10, 2003 Decided: May 1, 2003

BEFORE **MARGARET M. HAYDEN**, ALJ:

Petitioner State-Operated School District of the City of Newark (District) certified tenure charges of conduct unbecoming a school employee against tenured teacher Sandra Kearney (Respondent) under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1. The Bureau of Controversies and Disputes of the Department of Education transmitted to the Office of Administrative Law (OAL) on January 17, 2003, for hearing as a contested case.

Prior to the hearing scheduled April 28, 2003, settlement discussions were held and a settlement was reached. In April 2003, the settlement was reduced to writing and signed by the parties. Based on a review of the record and testimony at the hearing, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons.

1. Ms. Kearney has been an employee of the District for 18 years, wherein she required tenure as a teaching staff member.

2. During the past several years, certain allegations of improper conduct was made against Ms. Kearney involving inappropriate behavior and corporal punishment.

3. In November 2002, the Board determined, after a lengthy investigation, to charge Ms. Kearney with multiple counts of conduct unbecoming a school employee and charged that this conduct warranted Ms. Kearney's dismissal (See District's Petition and Statement of Supporting Evidence).

4. Prior to the hearing, the parties became convinced that it was in the public interest to settled the matter.

5. At the hearing the District representative explained the reasons why the District decided to settled the matter rather than try it. These reasons included that the students involved were elementary and middle school children of tender years who might be traumatized by the hearing. The multi-day hearing might have caused grave inconvenience to the children, the parents and the District. The passage of time had resulted in some children giving contradiction statements. On the older claims the District has been unable to locate at least one victim. The settlement would result in a complete and permanent separation as desired by the Board.

6. Ms. Kearney, under oath, testified credibly and appropriately that she understood the settlement, and she thought that the settlement was in her interest as well as the public interest.

7. Ms. Kearny expressly understood that the Commissioner of Education may refer this matter to the State Board of Examiners for possible certificate revocation proceedings. Before entering into this agreement, Ms. Kearney was advised by counsel and fully understood her rights.

I **FIND** that the parties have voluntarily entered into this agreement which fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the terms of the settlement are in the public interest as well as the party's interest and otherwise meet the requirements of *N.J.A.C.* 6A:3-5.6. I hereby **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

May 1, 2003
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

5-6-03
DATE

M. Kathleen Dunbar
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 0 9 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

J-1 Ex

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139

MAR 10 10 23 AM '03

In the Matter of the Tenure Hearing of	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
SANDRA KEARNEY, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	**OFFICE OF ADMINISTRATIVE LAW** **Agency Ref. No. 407-12/02** **Docket No. EDUTH 01226-03N**
	STIPULATION OF SETTLEMENT

WHEREAS, the parties, State-Operated School District of the City of Newark ("District"), and Sandra Kearney ("Ms. Kearney"), a tenured teacher, residing at 27 Highland Terrace, Irvington, New Jersey 07111, hereby stipulate and agree as follows:

1. Ms. Kearney hereby agrees to irrevocably resign her tenured teaching position, effective September 30, 2003, and to relinquish any rights to such position under *N.J.S.A.* 18A:28-5. Attached is a copy of the signed Letter of Resignation (Exhibit A). Upon the final approval of the signed Stipulation, the District shall and hereby does withdraw the Tenure Charges of Conduct Unbecoming certified on or about December 30, 2002.

2. Ms. Kearney will receive her salary and benefits as an employee from January 1, 2003 through September 30, 2003.

3. In accordance with the District's Department of Records/Verification policy, unless otherwise compelled by law and/or Authorization of Release by Ms. Kearney, an authorized District representative will only confirm dates of employment and separation.

4. As of September 30, 2003, all of Ms. Kearney's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end. Ms. Kearney expressly waives and gives up any rights to tenure in the District and agrees not to seek employment with the District in the future.

5. As of September 30, 2003, Ms. Kearney will receive compensation for all sick, personal and/or vacation days accrued as per the terms of the Collective Bargaining Agreement between the State-Operated School District of the City of Newark and the Newark Teachers Union.

6. The District will not pursue tenure charges against Ms. Kearney as long as this Stipulation remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the Stipulation is voided, the District retains the right to file and consider for certification tenure charges against Ms. Kearney, including such charges that have previously been filed by the District against Ms. Kearney and Respondent does not admit to Petitioner's charges.

7. Ms. Kearney specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to N.J.A.C. 6:11-3.6 and In re Cardonick concerning referral to the State Board of Examiners for

possible action regarding her teaching certification. The parties agree that settlement of this matter will be in the public's best interest. In addition, settlement of this matter will avoid the necessity of student testimony

8. The parties respectively acknowledge that counsel has advised them and that each is signing this Stipulation freely and voluntarily, without duress, coercion or pressure from the other party.

9. This Stipulation constitutes the full agreement between the parties.

10. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by the respective parties to sign this Stipulation and bind their principals to its terms.

11. Except as noted above, Ms. Kearney waives all claims of any nature in any forum against the State Operated School District of the City of Newark with regard to this matter, including fees, or other monetary relief. This agreement includes, without limitation, any and all claims directly or indirectly related to or arising out of her employment by the District. This release specifically includes, but is not limited to, discrimination on any basis, including claims Ms. Kearney may have in connection with her employment with Respondent under the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the New Jersey Law Against Discrimination, the Older Workers Benefit Protection Act, the Conscientious Employees Protection Act, and any other federal or state civil rights laws, wrongful discharge claims, grievances under collective bargaining agreement, sick leave,

disability, or payment, with the exception of any claim under the workers compensation laws.

12. This Stipulation is subject to approval by the State District Superintendent and the Commissioner of Education.

Dated: April 2 2003

Sandra Kearney

Dated: April 2 2003

Eugene Liss, Esq.
Attorney for Ms. Holman

Dated: 4/8/03

Marion Bolden
State District Superintendent

Dated: 4/8/03

Arsen Zartarian, Esq.
Associate Counsel
Newark Public Schools

Exhibit A

April 2, 2003

Ms. Marion Bolden
State District Superintendent
Newark Public Schools
2 Cedar Street
Newark, New Jersey 07102

Dear Ms. Bolden:

I hereby resign my tenured teaching position with the State Operated School District of the City of Newark effective September 30, 2003.

Very truly yours,

Sandra Kearney

Sandra D Kearney

CERTIFICATION

I, SANDRA KEARNEY, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

SANDRA KEARNEY

DATE

OAL DKT. NO. EDU 1226-03
AGENCY DKT. 407-12/02

IN THE MATTER OF THE TENURE	:	
HEARING OF SANDRA KEARNEY,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|03|03

Date of Mailing: 6|03|03

284-03

AP-BOYD, INC., A NEW JERSEY CORPORATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND FRANK C. GIBSON, INC., RESPONDENTS.	:	DECISION

SYNOPSIS

Petitioning contractor and unsuccessful bidder alleged the Board did not award contract for plumbing and fire protection to the lowest bidder. The Board contended petitioner did not comply with a statutory disclosure requirement and sought award of counsel fees.

The ALJ found that the Board was correct in rejecting petitioner's bid, accepting the next lowest bid from Respondent Gibson and awarding the contract to Gibson. The ALJ determined that failure to comply with the statutory disclosure requirement was a material defect in the bid requiring its rejection. *N.J.S.A.* 52:25-24.2. Moreover, the ALJ concluded that, pursuant to the provisions of the Instructions to Bidders, petitioner was obligated to reimburse the Board the legal fees and costs it incurred in defending against petitioner's protest. The ALJ ordered the reimbursement.

The Commissioner adopted the findings and determination in the Initial Decision as his own and directed petitioner to reimburse the Board in the amount of $4,453.21 for legal fees and costs. The Petition was dismissed.

June 9, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENTS' MOTIONS FOR SUMMARY DECISION IN PART, AND DENYING PETITIONER'S MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 4723-02
AGENCY DKT. NO. 170-6/02

AP-BOYD, INC., A NEW JERSEY CORPORATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND FRANK C. GIBSON, INC.,
Respondents.

Steven P. Russo, Esq., for petitioner
James H. Landgraf, Esq., for respondent Board of Education (Cureton Caplan, attorneys)
Joseph J. Hocking, Esq., for respondent Frank C. Gibson (Hedinger & Lawless, attorneys)

Record Closed: April 15, 2003 Decided: April 22, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE

In this matter, petitioner asserts that respondent Board of Education improperly did not award a contract to the lowest responsible bidder. In challenging this action, petitioner initially filed a petition on June 6, 2002, protesting rejection of petitioner's bid and accepting a higher bid. Following this, petitioner filed a petition for declaratory ruling on June 15, 2002. On July 19, 2002, the Commissioner declined to consider the matter as one for declaratory judgment. The matter was then transmitted to the Office of Administrative Law (OAL) on July 29, 2002, for hearing as a contested case. The matter was assigned to me on August 28, 2002, and a telephone prehearing conferences were scheduled for October 1, 2002, and December 4, 2002. The matter was scheduled for hearing on April 22 and 23, 2003. During the discovery period, discovery orders were entered on January 28, 2003, dealing with certain discovery motions made by the parties.

On March 5, 2003, respondent Middletown Township Board of Education filed a motion for summary judgment[1] seeking dismissal of the petition (RB-1) together with a supporting brief (RB-2) and certifications (RB-3 and RB-4). On March 18, 2003, respondent Frank C. Gibson, Inc., (Gibson) filed a cross motion for dismissal (RG-1) with supporting certifications (RG-2 and RG-3) and brief (RG-4). On March 24, 2003, petitioner filed a cross motion for summary judgment (P-1) a certification of Andre Poulos (P-2) and a memorandum of law (P-3) in opposition to the motions of respondents. On March 31, 2003, petitioner filed a certification of Andre Poulos (P-4) and a memorandum of law (P-5) opposition to the motions of respondents. On March 28, 2003 (received April 15, 2003), respondent Board of Education submitted a letter in lieu of brief in opposition to petitioner's submission (RB-6). On April 2, 2003, respondent Board of Education submitted a certification supporting respondent Gibson's cross motion to dismiss (RB-5). On April 9, 2003, respondent Gibson filed a letter brief in reply to petitioner's opposition to its motion (RG-5).

[1] The correct designation pursuant to *N.J.A.C.*1-12.5 is a motion for summary decision.

N.J.A.C. 1:1-12.2(e) provides that all motions in writing shall be submitted for disposition on the papers unless oral argument is directed by the judge. Since I have determined that oral argument is not necessary in order to address the issues herein, and since the matter was scheduled for hearing on April 22, 2003, the motions were submitted to me for decision without awaiting the requisite 20 days provided for by *N.J.A.C.* 1:1-12.2(a) and the record was close on April 15, 2003, the date of receipt of the last submission.

FACTUAL DISCUSSION

A careful review of the certifications in this matter reveals that most of the essential facts relating to the issues to be addressed herein are not in dispute. For the purpose of deciding the pending motions, the facts set forth as follows are determined to be the facts in this matter.

On May 16, 2002, petitioner submitted a bid for plumbing and fire protection portion of the project in the amount of $1,313,560. It is undisputed that petitioner's bid was the lowest bid presented to respondent for this portion of the project.

On May 17, 2002, respondent Frank C. Gibson, Inc. (Gibson) protested the low bid submitted by petitioner alleging that petitioner exceeded its pre-qualified classification limit of $4,000,000 by excluding certain contracts awarded for renovations at an elementary school in Freehold and by not being truthful as to the dollar amount of work to be completed on other projects.

On May 21, 2002, respondent Board required petitioner to confirm all information provided in support of its bid and on that same date, petitioner replied by fax forwarding documentation and confirming all information.

On May 22, 2002, respondent Board accepted the bid of respondent Gibson for $1,359,411 and awarded the contract to respondent Gibson for the plumbing and fire protection portion of the project, even though it was $45,851 higher than petitioner's bid. On May 31, 2002,

respondent Board faxed a notice to petitioner that petitioner's bid had been rejected on May 22, 2002, as non-responsive to the bid requirements for the following alleged reasons: (a) petitioner failed to provide a pre-qualification application affidavit with its bid, (b) petitioner failed to submit a stock-partner disclosure statement, (c) petitioner failed to provide a contractor's certification of qualifications, (d) petitioner provided a financial statement dated December 31, 2000, and (e) petitioner would have exceeded its New Jersey Department of Treasury Notice of Classification aggregate amount of work of $4,000,000 by $237,000 if the bid had been awarded to petitioner.

LEGAL DISCUSSION AND ANALYSIS

The issues raised by the motions and cross motions herein are as follows:

1. (a) Whether petitioner's bid complied with *N.J.S.A.* 52:25-24.2 requiring a corporation or partnership to submit a statement setting forth the names and addresses of all stockholders in the corporation or partnership who own 10% of more of its stock, or of all individual partners in the partnership who own a 10% or greater interest therein, as the case may be, prior to the receipt of the bid or accompanying the bid? (b) If petitioner failed to comply, is this an appropriate basis for rejecting petitioner's bid and for dismissal of the petition?

2. Whether the petition should be dismissed as moot based on the amount of work performed to date by respondent Gibson, pursuant to *Richardson Engineering Co. v. Rutgers, et al.*, 52 *N.J.* 207, 219 (1968)?

3. Whether petitioner, as an unsuccessful protester to the award of the bid, is obligated to pay counsel fees to respondent Board of Education pursuant to the Instructions to Bidders?

1. Legal effect of N.J.S.A. 52:25-24.2

N.J.S.A. 52:25-24.2 provides:

> No corporation or partnership shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State, or any county, municipality or school district, or any subsidiary or agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, unless prior to the receipt of the bid or accompanying the bid, of said corporation or said partnership, there is submitted a statement setting forth the names and addresses of all stockholders in the corporation or partnership who own 10% or more of its stock, of any class or of all individual partners in the partnership who own a 10% or greater interest therein, as the case may be. If one or more such stockholder or partner is itself a corporation or partnership, the stockholders holding 10% or more of that corporation's stock, or the individual partners owning 10% or greater interest in that partnership, as the case may be, shall also be listed. The disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, exceeding the 10% ownership criteria established in this act, has been listed.

In reaching a decision as to the legal effect of the foregoing statutory provision, I will accept as true the statements set forth in the Certification of Andrew Poulos. In that Certification, Mr. Poulos states that he is Vice president of AP-Boyd, Inc., and that his Certification is based upon his own personal knowledge of the facts and circumstances surrounding the issues raised by this litigation. He states that respondent Board of Education has filed a motion for summary judgment that specifically seeks a dismissal of AP-Boyd's petition for failure to submit a "stockholder or partnership disclosure statement" which, according to respondent Board, is an "absolute requirement of the bidding documents". William Doering, Business Administration and Board Secretary of respondent Board stated that this stockholder or partnership disclosure statement is "a document establishing compliance with *N.J.S.A.* 52:25-24.2", which statute requires such a disclosure statement on the bidding for school projects.

In his Certification, Mr. Poulos states that AP-Boyd's failure to complete this "stockholder or partnership disclosure statement" is not fatal to its bid as has been urged by

respondent Board. The above statute is not intended to require respondent Board to accept respondent Gibson's higher bid because of a mere technical violation by the lowest bidder. In paragraphs 4 through 6 of his Certification, Mr. Poulos goes on to state that:

> 4. While AP-Boyd did not submit this disclosure statement, it should be noted that AP-Boyd submitted its New Jersey Notice of Classification Letter and Certificate verifying AP-Boyd, Inc is a licensed HVAC, Plumbing & Sprinkler Contractor. By definition AP-Boyd, Inc. could not be so licensed unless at least one corporate stockholder is a licensed master plumber and owns 10% of the corporate stock. Both John Krohn and I are licensed master plumbers who each own 10% of the issued and outstanding stock. Our respective wives, Kathleen Krohn and Susan M. Poulos, each own 40% of the remaining issued and outstanding stock.
>
> 5. Included in AP-Boyd's Bid Application is the Contractor's Qualification Statement where it is disclosed that Susan M. Poulas is President, I am Vice-President, Kathleen Krohn is Secretary and John Krohn is Treasurer of the corporation. In the Contractor's Qualification Statement, it is further disclosed that AP-Boyd is a licensed plumber legally qualified to do business in New Jersey. Attached to the Contractor's Qualification Statement are our Resumes in which both John Krohn and I disclose we are Licensed Master Plumbers. (Exhibit H-1 to H-9) [Attachments to Poulos Certification.]
>
> 6. AP-Boyd also acknowledges its awareness of *N.J.S.A.* 52:25-24.2 requiring all owners of 10% of the stock of AP-Boyd be disclosed. I believed we had done that by disclosing the names of the 4 individuals who are officers (and the only stockholders). This, combined with the requirement that John Krohn and I must own at least 10% of the stock for AP-Boyd in order to be licensed, led me to believe AP-Boyd had substantially complied.

According to Mr. Poulos, the bids were opened on May 16, 2002. On May 21, 2002, respondent Board sought clarification of certain bid deficiencies. (Exhibit A). Petitioner was given 24 hours to produce documentation, which Mr. Poulos asserts included the stockholder disclosure statement. Petitioner immediately produced documentation as to the uncompleted work projects that it believed was respondent Board's most important concern. Respondent Board did not respond to Mr. Poulos' request for 48 hours (until noon of May 23) in order to respond to its request, instead of the 24 hours it required. Mr. Poulos states that he was not

available in the office to respond for the middle 24 hours of that time period (ie. May 22) because of a prior commitment. He then faxed two letters to respondent Board's representative, Hill International, forwarding information as to contracts and advised them he would forward the balance of the information by noon on May 23, 2002. (Exhibit B-1 to B-3). Instead, respondent Board of Education awarded the contract to respondent Gibson on May 22, 2002. By letter dated May 24, 2002, which AP-Boyd received on May 31, 2002, Mr. Poulos was notified of the rejection of AP-Boyd's bid. (Exhibit C).

Petitioner contends that the taxpayers of Middletown have been asked to pay the additional cost of $45,581 for the sake of the waiveable requirement of the 10% stock disclosure ownership form.

Respondents rely on *Muirfield Const. v. Essex County*, 336 *N.J. Super.* 126 (App. Div. 2000), in support of their contention that the failure of the lowest bidder to comply with a statutory disclosure requirement is a material defect in the bid requiring its rejection. However, it may be argued that *Muirfield* is distinguishable from the present matter because it dealt with the alleged failure on the part of the lowest bidder to comply with two separate statutory disclosure requirements. In addition to the disclosure requirements of *N.J.S.A.* 52:25-24.2, the provisions of *N.J.S.A.* 45:14C-2(h) require that a licensed master plumber own at least 10% of a bidding entity's stock in order to qualify as a "plumbing contractor" competent to participate in the public bidding process. It also involved the provisions of *N.J.S.A.* 40A:11-23.2c of the *Local Public Contracts Law* prohibiting any subsequent cure of defects in a statement of corporate ownership required by bid plans and specifications. In discussing the reasons for its decision, the *Muirfield* Court stated that the duty to disclose under *N.J.S.A.* 52:25-24.2 becomes a significant imperative when considered with the mandate of *N.J.S.A.* 45:14C-2(h), indicating that the purpose of licensed master plumber 10% ownership insures that a person of requisite skill and knowledge who is exposed to appropriate sanctions for violations, will have an interest in and control over the performance of the public contract. *Muirfield, supra,* 336 *N.J. Super.* at 135.

There are a number of other cases that appear to clarify the law on this point. In *George Harms Construction Co., Inc. v. Borough of Lincoln Park,* 161 *N.J. Super.* 367, (Law Div.1978),

it was determined that a bidder's purported inadvertent failure to submit a list of all shareholders or partners owning 10% or more of the company in accordance with the mandate of *N.J.S.A.* 52:25-24.2 was neither waivable nor curable, even though the required list was provided ***shortly after*** the opening of bids. [Emphasis added.] The Court indicated at p. 376 that in furtherance of the public policy of open competition on common terms, the courts of New Jersey have consistently held that where an error is deemed material, it cannot be cured after bids are opened, even where the error results from simple negligence. The Court stated that to permit correction of material deficiencies after bid opening would open the door to fraud and favoritism and defeat the statutory purpose of protection of the public. The Court reasoned that if the bidder was dissatisfied with the bids or determined to avoid the contract the bidder could refuse to supply the missing statement. The municipality would then be without authority to award the contract and the bidder would have been given the option to frustrate the bidding procedure. *Id.* at 377.

In *Stano v. Soldo Constr. Co.,* 187 *N.J. Super.* 524, 531, 539 (App.Div.1983), the Appellate Division distinguished the incurable bid defect in *Harms* from a non-defective but "unavoidably confusing" bid disclosure statement which was accurate but was later "clarified". It agreed with the trial court's assessment that the bidder had provided an accurate shareholder's statement, and that "[t]he later clarification was simply intended to aid the county in its interpretation of the statement and was permissible." *Id.* at 539. The Court limited the decision in *George Harms Constr. Co.* to cases where there has been no submission of a proper statement at all. *Id.* at 539. In doing so, the Court accepted the decision in *Harms* as a valid statement of the law.

In *Schlumberger Industries, Inc. v. Borough of Avalon,* 252 *N.J. Super.* 202, 211-12, (App.Div.1991), certif. denied, 130 *N.J.* 8 (1992), the Court recognized that a bidder's later clarification of the commonly-known fact that it was a wholly-owned subsidiary of a large public corporation with no single 10% shareholders did not impact upon the bidding process in a manner implicating the bid award biases that the mandate of *N.J.S.A.* 52:25-24.2 was intended to preclude. The Court stated the following:

> Furthermore, in the case of a public corporation, where the principal disclosure anticipated by the statute relating to any individuals owning over 10% of the corporate stock would have resulted in an answer of 'none" or "not applicable," there may even be a consideration of relaxing this requirement if there is an immediate cure and there is no deception concerning the identity of the bidder. [Id. at 209.]

However, the Court specifically noted that "if there had been undisclosed shareholders holding 10% or more of the stock or if the identity of even a public company had been purposely withheld, the bid might properly have been rejected." *Id.* at 212.

See also Impac, Inc. v. City of Paterson, 178 *N.J. Super.* 195, 202-03 (App. Div. 1981), *certif. denied sub nom. Impact, Inc. v. City* of *Paterson,* 87 *N.J.* 414, (1981), affirming the rejection of a bid where the requisite statement of ownership "substantially departed from the requirements of *N.J.S.A.* 52:25-24.2, and gave erroneous information of a significant nature.

Based on the foregoing, I **FIND** that *N.J.S.A.* 52:25-24.2 specifically prohibits the awarding of any contract to be paid with public funds, unless prior to the receipt of the bid or accompanying the bid, a corporation or partnership submits a statement setting forth the names and addresses of all stockholders who own 10% or more of its stock or of all individual partners in the partnership who own a 10% or greater interest therein. I **FIND** that this mandate is neither waivable nor curable, even if the required statement is provided shortly after the opening of bids. Finally, I have carefully reviewed all of the documents referred to by Mr. Poulos in paragraphs 5 and 6 of his Certification. While several of them divulge the names of the President, Vice-President, Secretary and Treasurer of petitioner AP-Boyd, and one of them sets forth the Resumes of the Principals (H-5), I **FIND** that not one of the documents referred to by petitioner complies with the requirement for a statement setting forth the names and addresses of all stockholders who own 10% or more of the stock of AP-Boyd. Therefore, I **CONCLUDE** that respondent Board of Education was correct in rejecting petitioner's bid, accepting the next lowest bid of respondent Gibson for $1,359,411 and awarding the contract to respondent Gibson for the plumbing and fire protection portion of the project.

2. Mootness issue

I next turn to the question whether the petition should be dismissed as moot based on the amount of work performed to date by respondent Gibson? I should note that it is not necessary to deal with this issue in view of my determination that petitioner's bid was properly rejected by respondent Board of Education. However, I recognize that the transmitting agency, or the Courts if there is an appeal, may disagree with my determination as to that issue. Therefore, in order to make a complete a record and avoid time-consuming remands, I will attempt to set forth my rulings on any open issues, if possible.

Respondents Gibson and Board of Education argue that pursuant to *Richardson Engineering Co. v. Rutgers, et al.,* 52 *N.J.* 207, 219 (1968), it should be so dismissed. In *Richardson,* the Court stated:

> When a party seeks review of the award of construction contracts for projects of the type involved in that matter, the attack must be made with the "utmost promptitude." *Bullwinkel v. City of East Orange, 4 N. J. Misc.* 593 *(Sup. Ct.* 1926). Whenever public money is to be expended or if the successful bidder has made substantial preparations for the work, incurred considerable expenses and obligated himself still further in undertaking to carry out the contract, ordinarily, review of the award will be denied unless sought promptly. *Gunne v. Borough of Glen Ridge,* 11 *N. J. Misc.* 3 (Sup. Ct. 1932); *Brown v. Atlantic City,* 5 *N. J. Misc.* 397 (Sup. Ct. 1927); *Read v. Atlantic City,* 49 *N. J. L.* 558, 562 (Sup. Ct. 1887). [*Id.* at 219]

In the *Richardson* case, the plaintiff did not file suit until 18 days after the execution of the contract it was challenging. In this matter, petitioner filed its petition with the Commissioner of Education on June 6, 2002, approximately 6 days after petitioner was notified if the rejection of its bid. The contract with respondent Gibson was signed on June 17, 2002. Under these circumstances, it appears that a determination whether petitioner failed to challenge the bid award with the utmost promptitude cannot be decided on the facts before me based on the factual scenario in the *Richardson* case. Thus, a hearing would be necessary in order to understand the

circumstances surrounding petitioner's filings in this matter in order to determine whether petitioner acted with the utmost promptitude. Accordingly, I **CONCLUDE** that this issue cannot be decided by a motion for summary decision. See, *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995).

3. Claim for legal fees

I next turn to the question whether petitioner, as an unsuccessful protester to the award of the bid, is obligated to pay counsel fees to respondent Board of Education pursuant to the Instructions to Bidders? It is noted that respondent Board of Education sought the relief of the award of counsel fees in defending petitioner's bid protest in its Reply and Cross-Petition filed in this matter.

In paragraph 12 through 14 of his Certification, William Doering, respondent's Business Administrator and Board Secretary states:

> 12. Section 5.2.2 of the Instructions to Bidders (Exhibit B) further provided that by submission of its bid each bidder "agrees and understands that if it initiates a bid protest to question either the action of the owner in rejecting one or more bids or in accepting any bid, and the appropriate tribunal determines that the owner acted within its legal rights and its actions were appropriate and are sustained, that the bidder raising the protest shall be liable and responsible to the owner for any and all costs incurred by the owner as a result of any delay caused in awarding the contract to which the bid protest applied, as well as any and all costs and expenses, including legal fees, incurred by the owner in defending such protest".
>
> 13. It was the position of the Board that not only was it within its rights to reject the Boyd bid on the basis of the bid submittal deficiencies, but that with regard to the absence of the stockholder and partner disclosure statement as required by *N.J.S.A.* 52:25-24.2, that the Board was mandated to reject the bid in that this bid submittal attachment was deemed as a mandatory, non-waivable bid requirement.

> 14. Although the project has moved forward and has been in progress for close to a year, and therefore no delays in the progress have occurred, the Board has incurred significant cost in legal fees in defending this current protest. To date, the Board has incurred legal costs in the amount of $4,519.21 for which it is entitled to recovery from AP Boyd under the terms of Section 5.2.2.

The general rule is that counsel fees are the responsibility of each litigant and are not recoverable absent express authorization by statute, court rule or contract. *R.* 4:42-9; *State Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473, 504 (1983). It has also been held that the Commissioner of Education does not have plenary authority to award counsel fees in determining "controversies and disputes" presented for determination under Education Law. *Balsley by Balsley v. North Hunterdon Regional Sch. Dist. Bd. of Educ.,* 225 N.J. Super. 221, 225-226 (App. Div. 1988), reversed on other grounds, 117 *N.J.* 434, 441-442 (1990). In *Fisher v. Bd. of Educ. Union Tp., et al.,* 99 *N.J. Super.* 18, 22 (App. Div. 1968), it was held that since the Commissioner and State Board play a significant role in relation to contracts for school construction, it was appropriate that a controversy involving a construction contract be decided in the first instance by the Commissioner and State Board under school law. Therefore, I **CONCLUDE** that a contractual provision for counsel fees in a school construction matter may be decided by the Commissioner of Education.

It is undisputed that the Instructions to Bidders provided that by submission of its bid each bidder agrees and understands that if it initiates a bid protest and it is determined that the owner's actions were appropriate and are sustained, the bidder raising the protest shall be liable and responsible to the owner for any and all costs and expenses, including legal fees, incurred by the owner in defending such protest. This provision is an undertaking by the bidder by contract, and is one of the exceptions to the general rule. See, Comment, paragraph 2.11 to *R.* 4:42-9, wherein it is stated that counsel fees may be allowed where the parties have agreed thereto in advance by stipulation in a promissory note, power of attorney or other agreement or contract or where there is a statutory or contractual indemnity so providing, citing, e.g. *Satellite Gateway Com. v. Musi Dining Car Co.,* 110 *N.J.* 280 (1988); *Ryan v. Biederman Industries,* 223 *N.J. Super.* 492 (App. Div. 1988); *Liqui-Box v. Estate of Elkman,* 238 *N.J. Super.* 588 (App. Div. 1990), certif. den. 122 *N.J.* 142 (1990); *Holbert v. Great Gorge Village,* 281 *N.J. Super.* 222.

228-229 (Ch. Div. 1994); *Belfer v. Merling.* 322 *N.J. Super.* 124, 141 (App. Div. 1999). Such a provision will, however, be strictly construed in light of the general policy disfavoring counsel fee awards, referring to *McGuire v. City of Jersey City.* 125 *N.J.* 310 (1991).

It should be noted that in this case, petitioner did not challenge or otherwise question the amount of counsel fees being sought by respondent Board of Education. Attorney for respondent Board of Education also submitted a certification as to counsel fees and costs (RB-3). I **FIND** that the hourly rate of $165.00 per hour is not unreasonable and should be approved. However, I **FIND** that billings annexed to the certification of counsel total $4,453.21 rather than the amount set forth in his certification. *See, Pardo v. Chevrolet Motor Division,* 92 *N.J.A.R.* 2d (CMA) 105, approving a counsel fee based on an hourly rate of $150.00 in 1992. Therefore, I **FIND** that respondent Board of Education is entitled to recovery of legal fees and costs from AP Boyd under the terms of Section 5.2.2. of the Bid Specifications. Accordingly, I **CONCLUDE** that petitioner is obligated to reimburse to the respondent Board of Education the legal fees and costs it has incurred in defending petitioner's protest in the corrected amount of $4,453.21.

Conclusion

In the foregoing discussion, I have determined that respondent Board of Education of the Township of Middletown was correct in rejecting petitioner's bid and accepting the next lowest bid of respondent Gibson and awarding the contract to respondent Gibson for the plumbing and fire protection portion of the project. With respect to whether the petition should be dismissed as moot based on the amount of work performed to date by respondent Gibson, I found that I could not make a determination on a motion and that a hearing would be necessary in order to assess all of the surrounding circumstances. However, based on my decision regarding the propriety of rejecting petitioner's bid, I **FIND** that it is unnecessary to schedule a hearing to determine this issue. Finally, I have determined that petitioner is obligated to reimburse respondent Board of Education for the legal fees and costs it has incurred defending petitioner's protest in the amount of $4,453.21. I **FIND** that as a result of these determinations, this matter is concluded and should result in the dismissal of petitioner's petition.

DECISION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that the actions of respondent Board of Education in rejecting petitioner's bid for failure to comply with the provisions of *N.J.S.A.* 52:25-24.2, accepting the next lowest bid of respondent Gibson for $1,359,411 and awarding the contract to respondent Gibson for the plumbing and fire protection portion of the project is hereby **AFFIRMED**. It is further **ORDERED** that respondent Gibson's motion to dismiss the petition as moot based on the amount of work performed to date by respondent Gibson is hereby **DENIED.** It is further **ORDERED** that petitioner shall reimburse respondent Board of Education the legal fees and costs it has incurred in defending petitioner's protest in the amount of $4,453.21. It is further **ORDERED** that petitioner's petition is hereby **DISMISSED.**

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

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

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

April 22, 2003
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

4-24-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 25 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF EXHIBITS:[2]

For petitioner:

P-1 Petitioner's cross motion for summary judgment filed March 24, 2003

P-2 Certification of Andre Poulos in response to respondent's motion and in support of petitioner's cross motion filed March 24, 2003

P-3 Petitioner's memorandum of law in opposition to respondent's motion and in support of petitioner's cross motion, filed March 24, 2003

P-4 Certification of Andrew Poulos in response to respondent Gibson's motion to dismiss, filed March 31, 2003

P-5 Memorandum of law in opposition to respondent Gibson's motion to dismiss filed March 31, 2003

For respondent Board of Education:

RB-1 Respondent Board of Education motion for summary judgment, filed March 5, 2003

RB-2 Respondent Board of Education brief in support of motion to dismiss and for fees and costs, filed March 5, 2003

RB-3 Certification of James Landgraf, Esq., in support of motion and for fees and costs, filed March 5, 2003

RB-4 Certification of William Doering in support of motion and for fees and costs, filed March 5, 2003

RB-5 Certification of Joseph Lucarelli in support of respondent Gibson's motion to dismiss, filed April 2, 2003

[2] While these documents were not the subject of evidentiary rulings and were not formally admitted into evidence, I have given them exhibit numbers and have referred to them in this Initial Decision as a matter of convenience and to avoid confusion.

RB-6 Letter in lieu of brief in reply to petitioner's opposition, dated March 28, 3002, filed on April 15, 2003 [delayed by U.S. Postal Service]

For respondent Gibson:

RG-1 Respondent Gibson's cross motion for dismissal for mootness, filed March 18, 2003

RG-2 Certification of Joseph J. Hocking, Esq., in support of motion, filed March 18, 2003

RG-3 Certification of Frank C. Gibson, Jr., in support of motion, filed March 18, 2003

RG-4 Brief in support of respondent Gibson's motion to dismiss, filed March 18, 2003

RG-5 Letter brief on behalf of respondent Gibson in reply to petitioner's opposition to Respondent Gibson's motion, filed April 9, 2003

OAL DKT. NO. EDU 4723-02
AGENCY DKT. NO. 170-6/02

AP-BOYD, INC., A NEW JERSEY CORPORATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY AND FRANK C. GIBSON, INC., RESPONDENTS.	:	DECISION

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

Upon his full and independent review, the Commissioner concurs with the determination of the Administrative Law Judge (ALJ) that petitioner's failure to submit a timely stockholder or partnership disclosure statement, pursuant to *N.J.S.A.* 52:25-24.2, rendered its bid materially defective and, therefore, the Board was correct in rejecting petitioner's bid, accepting the next lowest bid and awarding the plumbing and fire protection contract to this company. The Commissioner, similarly, agrees with the ALJ that the within Board is entitled to a recovery of legal fees and costs, pursuant to the provisions of the Instructions to Bidders, in the amount of $4,453.21.

Accordingly, the recommended decision of the OAL is adopted for the reasons stated therein. Petitioner is directed to reimburse the Board, in the amount of $4,453.21, for

legal fees and costs incurred in defending against petitioner's protest here. The instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/09/03

Date of Mailing: 6/09/03

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

285-05

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JANICE ROBBIE, BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

June 9, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1793-02

AGENCY DKT. NO. 15-1/02

BOARD OF EDUCATION OF THE
TOWNSHIP OF MONTCLAIR,
ESSEX COUNTY,
Petitioner,

v.

JANICE ROBBIE,
Respondent.

Mariann Crincoli, Esq., appearing for Petitioner
(Schenck, Price, Smith & King, LLP, attorneys)

Mary J. Hammer, Esq., appearing for Respondent
(Bucceri & Pincus, attorneys)

Record Closed: May 8, 2003 Decided: May 12, 2003

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on February 15, 2002, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The Board charged

Respondent with leaving her employment position without providing the requisite prior notice and sought suspension of her teaching certificate for one year.

A hearing was scheduled for October 7, 2002 at the OAL, 185 Washington Street, Newark, New Jersey but was adjourned as a result of our office relocating to 33 Washington Street, Newark. The matter was rescheduled for October 25, 2002, which was adjourned at the parties request due to school vacation and tentative settlement discussions. After numerous adjournment, the parties reached a settlement.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Mutual General Release indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

May 12, 2003
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

5/16/03
DATE

Kathleen Lawson
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 16 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
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(973) 539-1000
Attorneys for Petitioner,
Montclair Board of Education

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JANICE ROBBIE, MONTCLAIR BOARD OF EDUCATION, ESSEX COUNTY	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDUOR 01793-02N Agency Reference No. 15-1/02 **STIPULATION OF SETTLEMENT AND MUTUAL GENERAL RELEASE**

THIS STIPULATION OF SETTLEMENT AND MUTUAL GENERAL RELEASE (hereinafter "Stipulation") is made and entered into this 28th day of ~~February~~ Apr. 1, 2003 by and between the BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, with its administrative offices located at 22 Valley Road, Montclair, New Jersey 07042 (hereinafter referred to as the "Board" or "District"), and JANICE ROBBIE, whose address is 305 East Baldwin Street, Hackettstown, New Jersey, 07840 (hereinafter referred to as the "Employee").

WITNESSETH:

WHEREAS, the Employee commenced employment as a teacher with the Board on September 5, 2000 and worked in the District pursuant to an employment contract (hereinafter referred to as the "Contract") through June 21, 2001; and

WHEREAS, by memorandum dated May 19, 2001, the Board informed the Employee that it had voted to renew her contract for the 2001-2002 school year; and

WHEREAS, the Employee tendered a verbal resignation of employment on or about August 17, 2001; and

WHEREAS, a dispute arose relative to the Employee's resignation from her employment in the District, which gave rise to the Board's application to the Commissioner of Education to have the Employee's teaching certificate suspended; and

WHEREAS, the parties hereto are in agreement that this resolution is not a determination on the merits of this case in any manner; and

WHEREAS, in order to avoid the time, expense and uncertainty of litigation, the parties desire to resolve this dispute and have negotiated in good faith regarding the terms and conditions of this Stipulation; and

WHEREAS, the parties hereto wish to memorialize their promises and covenants in this Stipulation.

NOW, THEREFORE, the Board and the Employee, for the consideration specified below, stipulate as follows:

1. SETTLEMENT OF CASE. The parties hereto stipulate to request that the Court and the Commissioner of Education dismiss the above captioned action, with prejudice, as settled.

2. MUTUAL GENERAL RELEASE. As further consideration for the parties' covenants as set forth in this Stipulation, upon the full execution of this Stipulation, the Employee, for herself and her past, present and future heirs, agents and representatives, and the Board, and its past, present and future directors, officers, trustees, employees, attorneys, agents, representatives, subsidiaries, parent corporations, successors, predecessors, executors, administrators, insurers and assigns (collectively the "Board"), forever and irrevocably release and discharge each other from any and all claims they may have against the other resulting from anything that has happened up to the date of this Stipulation, including claims of which the parties are unaware and claims which are not specifically released and given up in the following language. The parties specifically release and give up any and all claims which they may have against each other arising from or relating to Employee's employment with the Board and/or arising from or relating to Employee's separation from employment with the Board, including, but not limited to, claims arising under (1) the Constitution of the United States, (2) the Age Discrimination in Employment Act of 1967, as

amended, 29 U.S.C. § 621 *et seq.*, (3) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, (4) the Civil Rights Act of 1866, 42 U.S.C. § 1981 *et seq.*, (5) the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, (6) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (7) the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, (8) the Family Leave Act, *N.J.S.A.* 34:11B-1 *et seq.*, (9) the Constitutions of the United States of America and the State of New Jersey, (10) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (11) the Conscientious Employee Protection Act, *N.J.S.A.* 35:19-1 *et seq.*, (12) the Education Laws of the State of New Jersey, *N.J.S.A.* 18A:1-1 *et seq.,* including but not limited to the Tenured Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.,* (13) the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, (14) any expressed or implied contract between the Board and the Employee, whether oral or written, (15) any collective negotiations agreement, (16) all regulations promulgated pursuant to any of the aforementioned laws, (17) any other Federal, State, County, local or Board common law, statutes, ordinances, resolutions and regulations not mentioned above, and (18) any employment manual or handbook or personnel or Board policies. Specifically excepted from this release are any claims or rights arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*, the Teachers' Pension and Annuity Fund Law, and for health insurance continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that the Employee is not entitled to have the Board pay any amounts for her or her dependents' health insurance continuation coverage under COBRA.

3. NO ADMISSION OR PAST PRACTICE. Neither the Board nor the Employee admit to any liability or that any procedures followed in this case were unlawful, inappropriate or ineffective.

4. SAVINGS CLAUSE. If, during the term of this Stipulation, it is found that a specific provision(s) of the Stipulation is/are illegal under federal or state law, it is the parties' wishes that such provision(s) is/are conformed and enforced to achieve the parties' intent to the maximum extent permissible under law and that the remainder of the Stipulation not affected by such a ruling shall remain in full force and effect.

5. GOVERNING LAW. This Stipulation is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

6. CONSULTATION. The Employee represents that she has been represented by Mary Hammer, Esq., of the firm of Bucceri & Pincus, during the negotiations and development of this Stipulation and that Ms. Hammer fully explained all provisions of this Stipulation and their consequences before Employee signed this Stipulation. The Employee represents that she is fully satisfied with the advice she received from Ms. Hammer.

7. SIGNATURE. The Employee affirms that the only consideration for signing this Stipulation is the terms actually stated in this Stipulation and that no other promises or agreements of any kind have been made to the Employee by any person or entity whatsoever to cause the Employee to sign this Stipulation. The Employee represents that she fully understands the meaning and intent of this instrument and that she is voluntarily signing this Stipulation of her own will without coercion or duress. The Employee understands, accepts and agrees to all of the terms of this Stipulation.

8. PLAIN MEANING. The terms and conditions of this Stipulation shall be construed according to their plain meaning, and shall not be construed in favor of or against either the Employee or the Board.

9. HEADINGS. The headings set forth in this Stipulation are merely for the convenience of the reader and it is expressly understood and agreed that the headings shall not control or modify the meaning of this Stipulation in any way.

10. WHO IS BOUND. All parties are bound by this Stipulation and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, as well as the Employee's heirs and the executor of her estate, also are bound. This Stipulation is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, employees, agents, attorneys, successors and assigns.

11. NOTICES. Any notices required to be sent pursuant to this Stipulation shall be considered to be effective when sent by certified mail, return receipt requested, to:

To the Employee:	To the Board:
Mary Hammer, Esq. Bucceri & Pincus 1200 Route 46 Clifton, New Jersey, 07013-2440	James B. Patterson, Personnel Administrator Montclair Board of Education 22 Valley Road Montclair, New Jersey 07042

Any changes in the above addresses must be provided by certified mail, return receipt requested to the other party.

12. NON-AGREEMENT. If this Stipulation is not fully executed by all parties then this Stipulation shall become null and void and shall be of no effect.

13. COMPLETE AGREEMENT. This Stipulation embodies the entire agreement between the parties hereto and supersedes any prior or contemporaneous agreement, representation or understanding, whether written or oral. This Stipulation may not be modified except by written instrument executed by all the parties hereto.

PLEASE READ THIS STIPULATION CAREFULLY. IT IS A LEGAL DOCUMENT. IT INCLUDES JANICE ROBBIE'S AGREEMENT TO GIVE UP CERTAIN KNOWN AND UNKNOWN CLAIMS AGAINST THE BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, ITS OFFICIALS, OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES AND ATTORNEYS.

IN WITNESS WHEREOF, the parties hereto set their hands and seals to this Stipulation effective on the day and year first above written.

Janice Robbie
JANICE ROBBIE

STATE OF NEW JERSEY, COUNTY OF ESSEX SS.:

I CERTIFY that on ~~February~~ March 4, 2003,

Janice Robbie personally came before me and acknowledge under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as her act and deed.

Sworn and subscribed to before me this 4th day of ~~February~~ March, 2003.

Mary J. Hammer
An Attorney at Law of the
State of New Jersey

BOARD OF EDUCATION OF THE
TOWNSHIP OF MONTCLAIR,
ESSEX COUNTY

By: J. Clarence L. Kimmins

ATTEST:

Document #: 575753/MC

OAL DKT. NO. EDU 1793-02
AGENCY DKT. NO. 15-1/02

IN THE MATTER OF THE SUSPENSION OF	:	
THE TEACHING CERTIFICATE OF JANICE	:	
ROBBIE, BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF MONTCLAIR, ESSEX	:	DECISION
COUNTY.	:	
	:	

The record, Stipulation of Settlement and Mutual General Release and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/9/03

Date of Mailing: 6/9/03

* Although the Stipulation of Settlement does not so state, the record in this matter indicates that the Board of Education of the Township of Montclair accepted the terms of the agreement at its meeting on April 28, 2003.

283-04

283-03

T.B.R., on behalf of minor children, T.R. AND N.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINGWOOD, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning father challenged the Board's denial of his request to permit alternate week bus transportation for his children due to joint physical and legal custody of the children with their mother, who resides in the same District.

The ALJ determined that the Board acted within its scope of discretion and acted reasonably in rejecting the request for dual bussing to both residences. The Board has a reasonable policy assigning one seat on one bus route to each student. Moreover, the ALJ found no circumstances to dictate that the Board must deviate from this policy.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

June 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8382-02

AGENCY DKT. NO. 321-10/02

T.B.R. O/B/O MINOR CHILDREN

T.R. AND N.R.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF KINGWOOD,

HUNTERDON COUNTY,

Respondent.

Brian M. Cige, Esq., for petitioner

James T. Prusinowski, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: April 9, 2003 Decided: April 22, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, T.B.R., is the biological father of T.R and N.R., who lives in Pittstown. E.R. is the biological mother of T.R. and N.R. who lives in Stockton. T.R. and N.R. are minor children who are enrolled in and attend the Kingwood Elementary School. The Honorable

Marilyn Ryne Herr, J.S.C., entered a court order on June 28, 2002, which grants T.B.R. and E.R joint physical and legal custody of T.R. and N.R. on alternating weeks.

Due to this joint custody arrangement, E.R. sought to have the Respondent, the Kingwood Township Board of Education (Board), arrange to have the bus pick up and drop off the children at each parent's respective residence based upon when the children were scheduled to stay with each parent. The Board denied this request at meetings held on August 27 and September 10, 2002. The Board determined that E.R.'s residence would be the children's domicile and the only location where bussing would be provided.

On September 18, 2002, T.B.R. filed a Complaint with the Hunterdon County Superior Court, seeking specific performance from the Board for the provision of dual bussing routes for the children. On September 23, 2002, the Board filed an Answer along with a brief seeking the removal of this matter to the New Jersey Department of Education. On October 2, 2002, the Honorable Robert P. Mahon, P.J. Ch., filed an order directing that this action be transferred to the New Jersey Department of Education.

The Department of Education transferred this matter to the Office of Administrative Law, where it was filed on December 9, 2002. On a conference call on January 30, 2003, the parties agreed that it did not appear that an evidentiary hearing was necessary. Accordingly, by confirming letter on February 4, 2003, I ordered the parties to file a Joint Stipulation of Facts, to be due on March 5, 2003, and to file simultaneous dispositive motions, to be due thirty days from the filing of the Joint Stipulation of Facts.

FINDINGS OF FACT

The Joint Stipulation of Facts submitted by the parties is accepted as the findings of fact in this matter. In summary, this Joint Stipulation of Facts includes the following material facts:

1. Prior to June 24, 2002, T.B.R., E.R., T.R., and N.R. lived together as a family at 3 Hampton Road, Pittstown, New Jersey. During the time they lived at this

residence as a family, the Board provided the children with bussing to Kingwood Township Elementary School.

2. On or about June 24, 2002, E.R. left the marital residence and began living in Stockton, New Jersey.

3. T.B.R. filed for divorce on June 26, 2002. On June 28, 2002, a court order was entered granting T.B.R. and E.R. joint physical and legal custody of the children on alternating weeks.

4. T.B.R. and E.R. both live in the Kingwood School District.

5. The Board provides bussing to all students in grades K-8.

6. The Board assigns students one seat on one bus route which will be on the route of the child's residence of record. The policy further states, "In the event that permanent child-care arrangements have been made, parents may request in writing that the assigned seat be on the route of the childcare provider. In this case, the child will forfeit the original seat on the resident route for both pick-up and drop-off for the entire school year."

7. On or about July 16, 2002, T.B.R. received a letter from the Board stating that based upon T.B.R's conversation with the Board, it had been determined that the residence of record for the children was the Pittstown residence, and that transportation would be provided to and from that address.

8. Through both letter and e-mail dated August 22, 2002, E.R. notified the Board that pursuant to court order, both herself and T.B.R. were to share custody of the minor children on alternating weekly schedules. This correspondence requested that the Board arrange to have the bus pick up and drop off the children at each parent's respective residence based upon when the children were scheduled to stay with each parent.

9. At an August 27, 2002, Board meeting, E.R.'s request for alternate week bussing was denied by the Board.

10. On August 29, 2002, Daria Wasserbach, School Business Administrator/Board Secretary, consulted with Patricia Cranley of the County Superintendent's Office and was informed that the New Jersey residency laws should be used in determining where a student should be picked up for bussing purposes. Cranley

advised Wasserbach that *N.J.A.C.* 6A:28-2.4 was to be used to determine residency, and therefore school bus pick-up locations.

11. In a letter dated September 4, 2002, E.R. advised the Board that the children would be staying at her residence in Stockton on October 15, 2002. E.R. further stated that she wished to appeal the Board's decision not to provide alternate week bussing.

12. Wasserbach consulted with Greg Fera, Senior Transportation Specialist of the Department of Education, who confirmed that the Department utilizes *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A) to determine a child's domicile, and therefore appropriate school district pick-up locations.

13. At a September 10, 2002, Board meeting, the Board reconsidered E.R.'s appeal and reaffirmed its denial of the request for alternate week bussing.

14. Wasserbach advised T.B.R. by letter dated September 11, 2002, that the children would be considered domiciled at E.R.'s residence in Stockton in accordance with *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A). The letter also advised T.B.R. that an exception would not be made and that the Board would only bus the children from E.R.'s residence in Stockton.

15. At the request of T.B.R, Elizabeth Smith, Ph.D., drafted a letter indicating that the children were in need of a consistent and stable routine in order to support their sense of security. This letter indicated that any discrepancy in bussing arrangements might disrupt the minor children's adjustment to their new living arrangements. Smith voiced particular concern in regards to N.R.'s reaction to this new arrangement given the fact that he needs a high degree of structure and predictability in his daily routine.

16. The Board does not operate its own bussing service. The Board is part of the Joint Transportation Agreement with two other school districts. As part of this Agreement, one of the other school districts subcontracts with private bus companies. The Board participates in a Joint Transportation Agreement because it is cost-effective.

17. The Board receives at least one or two requests per year for dual residence transportation. All such requests are denied based upon the Board's policy of assigning all students one seat on one bus route.

18. The Board imposes its bussing policies strictly and requires that students only ride their designated bus. Permission to alter a student's bus assignment, even for one-time events, is refused, regardless of whether the student has written parental permission to do so.

ANALYSIS

The applicable standard of review is whether the local school board's decision was arbitrary, capricious or unreasonable. *See Kopera v. Board of Educ. of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960) (it is a well-established rule that the action of a local school board "which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.")

Pursuant to *N.J.S.A.* 18A:39-1, each school district shall provide transportation to and from school for any elementary school pupil who resides more than two miles from their public school of attendance. It is undisputed that pursuant to this statute and the Board's policies that the children are entitled to receive transportation to and from their respective school in the Kingwood Township School District.

Each school district is also authorized pursuant to *N.J.S.A.* 18A:39-1 to make rules and contracts for the public transportation of its students. Pursuant to this statutory authority, the Board has adopted policies governing the bussing of its students. Specifically, the Board adopted a policy assigning one seat on one bus route that will be the route of the child's residence.

The Board did not have a specific rule governing the scenario presented in this matter in which there are two residences within the district and the children spend equal time at the residences. In an effort to determine which residence will be the residence entitled to bussing, the Board consulted the County and the Department of Education for guidance. The Board was referred to *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A), which sets forth the mechanism to designate a student's domicile when living in more than one district. The regulation essentially states that if a student's physical custody is shared on an equal-time basis, then his or her domicile is that of the parent with who they resided on October 15 of the current school year. Since the children

were scheduled to be with E.R. on October 15, the Board decided that E.R.'s place of residence is the one entitled to bussing.

The Board contends that it acted within its scope of discretion and acted reasonably in rejecting the request for dual bussing to both residences. The Petitioner, on the other hand, contends there is nothing as a matter of law that precludes the Board from accommodating the request of the Petitioner. The Petitioner cites that the Board in making its determination should consider the best interest of the children and that dual bussing will make the children more secure in light of the recent divorce. The Petitioner also argues that *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A) is not applicable because it applies where parent's are domiciled in different districts. This situation, however, involves parent's being domiciled in the same district.

I agree with the Petitioner that *N.J.A.C.* 6A:28-2.4(a)(ii)(1)(A) is not directly applicable to this situation because it does not involve parents who are domiciled in the same district. However, the Board acted reasonably in looking to this regulation for guidance based upon the advice of the County and the Department of Education. The Board's policy assigning one seat on one bus route is also reasonable and is based on an effort to contain costs and reduce confusion regarding the proper bussing routes for students. The Board has enforced this policy in the past by denying other requests for dual bussing of children similar to the present circumstances.

The Petitioner is also correct that there is nothing in the law that precludes the Board from accommodating the Petitioner's request. However, this is not the issue. The issue is whether the Board exercised its discretion in an arbitrary manner. I find and conclude that there is no evidence to indicate that the Board's decision was arbitrary or unreasonable. The Board has a reasonable policy assigning one seat on one bus route. This policy is within its discretionary authority. There are no circumstances here that dictate the Board must deviate from this policy. The fact that the Board did not deviate from its policy, despite the Petitioner's argument that the policy was not in the best interests of the children, does not render the decision arbitrary. In addition, the Petitioner's contention that granting its request would not result in additional costs to the Board does not justify an exception to its policy either. The fact is that the Board's decision was within its discretionary authority, not inconsistent with the law and based on a policy that reasonably seeks to contain costs and reduce confusion of bussing routes.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the decision of the Board denying the Petitioner's request for dual bus routes for his minor children is **AFFIRMED**.

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

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

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

April 22, 2003
DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

April 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 28 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

DOCUMENTS IN THE RECORD

J-1 Joint Stipulation of Facts and attachments

For Petitioner:

P-1 Petitioner's Brief and attachments

For Respondent:

R-1 Respondent's Brief and attachment

OAL DKT. NO. EDU 8382-02
AGENCY DKT. NO. 321-10/02

T.B.R., on behalf of minor children, T.R. AND N.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF KINGWOOD, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that the Board's decision to provide only one bus stop for petitioner's children, who share time between their divorced parents residing in separate residences within the same District, was not arbitrary or unreasonable and was within the Board's discretionary authority.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|05|03

Date of Mailing: 6|05|03

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

286-03

C.B., on behalf of minor child, Q.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that his child, Q.B., was not domiciled within the District. The Board sought tuition for the time of ineligible attendance in the District.

The ALJ found that, based on the testimony of the Township's residency investigator, Q.B. was not domiciled in the District but was domiciled in Trenton. The ALJ determined that petitioner failed to sustain his burden of proof that Q.B. was entitled to a free public education in the District. The petition was dismissed; petitioner was ordered to pay tuition in the amount of $5,914.92 for the period of Q.B.'s ineligible attendance in the District's schools.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

June 10, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0243-03

AGENCY DKT. NO. 376-11/02

C.B., on behalf of minor

Child, Q.B.,

Petitioner,

v.

HAMILTON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

No appearance by or on behalf of the petitioner

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis & Magee, attorneys)

Record Closed: May 12, 2003 Decided: May 16, 2003

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE

Pursuant to *N.J.S.A.* 18A:38-1, respondent, Board of Education (BOE), held a hearing and determined that Q.B., the child of C.B., was not domiciled within the BOE's school district, although she continued to attend a school within the BOE district. Consequently, the BOE

decided that the child should be removed from the school and that C.B. should pay tuition for the child.

According to the papers filed, C.B. alleges that he and his child, Q.B., are domiciled within the district and claims that the BOE was and is required to provide his child with a free public education. The BOE submits that C.B. has not met his burden of proof and counterclaims for an order requiring C.B. to pay tuition.

PROCEDURAL HISTORY

On November 15, 2002, the BOE informed C.B. that he was required to withdraw Q.B. as a student from the Hamilton Township School District and enroll her in the City of Trenton School District, where the BOE determined that Q.B. was domiciled. See R-4. On November 20, 2002, petitioner, C.B., filed a residency appeal with the Commissioner of Education. On December 19, 2002, the BOE filed an answer to the aforesaid petition, including a counterclaim for tuition. *N.J.S.A.* 18A:6-9, 38-1. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on January 28, 2003, where it was received and filed as a contested case pursuant to *N.J.S.A.* 52:14B-2(b). A hearing was scheduled for April 2, 2003, but was adjourned at respondent's request because petitioner had not responded to interrogatories previously served upon him. On April 3, 2003, a Letter Order was issued by the undersigned requiring the petitioner to respond to the interrogatories propounded upon him and to pay a sanction in the amount equal to the cost incurred by respondent for appearing at the hearing, which had to be adjourned. The hearing was rescheduled for May 12, 2003, at which time the respondent appeared; however, petitioner, C.B., failed to appear. At that time testimony was taken pertaining to Q.B.'s domicile and the cost of her education provided by the Hamilton Township Board of Education.

FINDING OF FACTS

The only witness to testify in this matter is Albert Offredo. He is a residency investigator for the BOE. He has been employed in that capacity for a period of eight years and prior to that employment he was a Hamilton Township police detective for ten years prior to his retirement

from that force. Mr. Offredo testified that C.B. submitted an affidavit to the BOE on or about September 19, 2002 (R-1) indicating that he and his daughter, Q.B., resided with his mother, K.B., at 207 Park Lane, Hamilton, New Jersey. This address is within the district of the Hamilton Township schools. On or about that same date, K.B., the grandmother of Q.B., submitted an affidavit (R-2) stating that Q.B. resided with her at 207 Park Lane in the Township of Hamilton and that this was Q.B.'s permanent domicile. Shortly thereafter, C.B. submitted to the BOE a pupil enrollment form (R-3), where again he indicated that both he and Q.B. resided at 207 Park Lane, Hamilton Township. This document, as well as the parent's affidavit (R-1), also indicate that Q.B.'s mother resides at 652 Washington Street in the City of Trenton.

In his capacity as residency investigator, Mr. Offredo conducted a routine investigation as to the domicile of Q.B. The investigation conducted by Mr. Offredo consisted of reviewing Q.B.'s transportation schedule and her records pertaining to her residency. Mr. Offredo found that the BOE had arranged for Q.B. to be transported to the Crockett Middle School by way of bus at approximately 7:40 a.m., which would pick her up on a corner a short distance from her alleged residence, that being 207 Park Lane. The investigation also consisted of surveillance, which is specifically detailed as follows: (1) On October 18, 2002, Mr. Offredo went to the residence at 207 Park Lane at 6:45 a.m. and observed the residence until 8 p.m. It was observed that Q.B. did not leave that residence that morning; however, on further checking, Q.B. was in attendance at the Crockett Middle School on that date; (2) On October 21, 2002, at 6:45 a.m. Mr. Offredo went to 652 Washington Street, Trenton, New Jersey, which was listed as the residence of Q.B.'s mother. That morning a male identified as C.B. drove Q.B. to 207 Park Lane, where Q.B. exited the vehicle and walked to the school bus stop and subsequently boarded her designated school bus; (3) On October 21, 2002, Mr. Offredo observed Q.B. boarding her designated school bus at the Crockett Middle School at 3 p.m. and Q.B. then proceeded to 207 Park Lane, Hamilton Township; (4) On October 29, 2002, Mr. Offredo went to 652 Washington Street, Trenton, New Jersey at 6:45 a.m. to observe that residence. At 7:35 a.m., C.B. and Q.B. departed that address and went to 207 Park Lane, where Q.B. departed the vehicle, walked to the school bus stop and was transported by bus to the Crockett Middle School; (5) On October 31, 2002, Mr. Offredo again went to 652 Washington Street, Trenton, New Jersey at 6:45 a.m. He observed Q.B. and C.B. departing that address at 7:45 a.m. and proceeding to 207 Park Lane. Since the school bus had already departed, C.B. drove Q.B. to the Crockett Middle School, where

exited that vehicle; (6) On October 6, 2002, Mr. Offredo again went to observe 652 Washington Street, Trenton, New Jersey at 6:45 a.m. At 7:40 a.m., Q.B. was driven by C.B. to 207 Park Lane and again because the school bus had already departed from its designated stop, C.B. continued the journey by taking Q.B. directly to the Crockett Middle School, where Q.B. departed the vehicle and entered the school building; (7) On November 11, 2002, at 6:45 a.m., Mr. Offredo again observed at 652 Washington Street, Trenton, New Jersey. At 7:35 a.m., Q.B. and C.B. left that residence and went to 207 Park Lane. Q.B. went into the house briefly, walked to the bus stop, where Q.B. entered the school bus and proceeded to the Crockett Middle School. I **FIND** that based on the investigation of Mr. Offredo that Q.B. is not domiciled within the Township of Hamilton and, in fact, is domiciled at 652 Washington Street, Trenton, New Jersey.

LEGAL ANALYSIS

N.J.S.A. 18A:38-1(b)(2) states that when the superintendent of a school district determines that a person is attending a district school but is not domiciled within the district, the parent may present proofs at a hearing to show by a preponderance of the evidence that the child is eligible for a free education based on domicile within the district. If the parent or guardian does not meet that burden, then they may be assessed for the child's tuition prorated on per diem basis. Based on the unrefuted testimony at the hearing it is clear that in spite of the affidavits submitted, C.B. and Q.B. do not reside or are domiciled in the Township of Hamilton, but, in fact, are domiciled and reside at 652 Washington Street, Trenton, New Jersey, a location not within the district of the BOE. The respondent has made an application pursuant to that statute for tuition reimbursement, which I **FIND** it is entitled to pursuant to *N.J.S.A.* 18A:38-1(b)(2). I also **FIND** that the allowable tuition for reimbursement purposes has been fixed at $44.81 per day for the 2002-2003 school year. Therefore, from October 2, 2002, the date of Q.B.'s enrollment, until the May 12, 2003, the date of hearing, there have been a total of 132 school days, which based on $44.81 per day equates to a tuition reimbursement of $5,914.92. It has also been represented that the sanction imposed upon C.B. as a result of his failure to provide answers to interrogatories in the amount of $202.50 has not been paid pursuant to my order of April 3, 2003. This sanction is lawfully do and payable by the petitioner.

ORDERS

Based on the above, and for good cause shown, I **ORDER** that the petition in this matter be and is hereby **DISMISSED WITH PREJUDICE**. I further **ORDER** that the BOE's counterclaim for tuition is **GRANTED** and I **ORDER** C.B. to pay $5,914.92. I further **ORDER** that because Q.B. is not domiciled within the district, she may be removed from the educational program offered by the BOE. I further **ORDER** C.B. to pay the sanction previously ordered in the amount of $202.50.

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

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

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

May 16, 2003
DATE

JOHN SCHUSTER III, ALJ

Receipt Acknowledged:

May 20 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For the petitioner:

None

For the respondent:

Albert Offredo

EXHIBITS

For the petitioner:

None

For the respondent:

R-1 Parents' affidavit

R-2 Host Family affidavit

R-3 Pupil Enrollment Form

R-4 Letter from Hamilton Township School District to C.B., dated November 14, 2002

R-5 Letter to C.B. from Hamilton Township Board of Education, dated March 28, 2003

OAL DKT. NO. EDU 0243-03
AGENCY DKT. NO. 376-11/02

C.B., on behalf of minor child, Q.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review, the Commissioner agrees with the determination of the Administrative Law Judge (ALJ) that petitioner has failed to sustain his burden, pursuant to *N.J.S.A.* 18A:38-1(b)(2), of establishing that his child, Q.B., was entitled to a free public education in the schools of Hamilton Township. The Commissioner similarly concurs with the ALJ that the Board must prevail on its counterclaim for tuition.

Accordingly, the recommended decision of the OAL is adopted. Petitioner is hereby directed to pay tuition in the amount of $5,914.92 for the period of Q.B.'s ineligible attendance in the District's schools and the instant Petition of Appeal is dismissed with prejudice.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/10/03

Date of Mailing: 6/10/03

[1] The Commissioner does not reach to the $202.50 sanction imposed on petitioner by the ALJ's Letter Order of April 3, 2003. Such sanction was imposed pursuant to *N.J.A.C.* 1:1-10.5 and, in accordance with *N.J.A.C.* 1:1-3.2(c)4, is outside the jurisdictional purview of the Commissioner of Education.

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

287-03

287-03

BRENDA MESKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 12, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03753-01

AGENCY DKT. NO. 77-3/01

BRENDA MESKO,

Petitioner,

v.

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

Respondent.

Michael T. Barrett, Esq., for petitioner
(Bergman & Barrett, attorneys)

Mary E. Hennessy-Shotter, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: May 20, 2003 Decided: May 23, 2003

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 14, 2001, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

5/23/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALJ

Receipt Acknowledged:

May 23, 2003
DATE

M. Kathleen Dean-Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 29 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT
Between
THE ELIZABETH BOARD OF EDUCATION
and
BRENDA MESKO

1. This Agreement is being entered into between the Elizabeth Board of Education ("Board") and Brenda Mesko ("Mesko") to resolve the litigation pending between them before the Commissioner of Education, Agency Docket No. 77-3/01 and O.A.L. Docket No. EDUOR 03753-01N and all grievances filed by Ms. Mesko against the Board of Education, as well as any litigation that could have been brought.

2. The Board agrees to return to Ms. Mesko's sick bank a total of thirty-four (34) sick days.

3. Ms. Mesko agrees to withdraw her case before the Commissioner of Education, Agency Docket No. 77-3/01.

4. Neither party makes any admission in the settlement of this case.

5. Ms. Mesko acknowledges that this Agreement is in settlement of disputed issues of fact and law, that she has had the right and opportunity to discuss all aspects of this Agreement with her legal counsel prior to entering into it and that she has availed herself of this right, that she has carefully read and fully understands all of the provisions of this Agreement, and that she is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

6. In consideration for this Agreement, Mesko irrevocably and unconditionally releases the Board, and any employee and/or official of the Board, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, causes of action, rights, costs, losses, debts and expenses of any nature whatsoever, known or unknown, which Mesko, her heirs, executors, administrators, successors and assigns ever had, now

have or hereafter can, shall or may have (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the date of this Agreement, including without limitation, all claims arising under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the New Jersey Law Against Discrimination Act, the New Jersey Conscientious Employee Protection Act, the Civil Rights Act of 1866, 42 U.S.C. §1983, The Americans with Disabilities Act, Title 18A of the New Jersey Statutes, title 6 and 6A of the New Jersey Administrative Code, all claims arising under the public policy of the State of New Jersey, all tortious claims (including intentional infliction of emotional distress and inducing breach of contract) and all other federal, state and local labor and anti-discrimination laws, the common law and any other purported restriction on the Board's employment related decisions.

7. In consideration of this Agreement, the Board releases Ms. Mesko from any claims the Board may have against her.

8. Each party hereto represents that, in executing this Agreement, such party has not relied and does not rely upon any representation or statement of any other party not set forth herein with regard to the subject matter, basis or effect of this Agreement or otherwise.

9. This Agreement sets forth the entire agreement among the parties hereto. This Agreement supersedes all prior agreements and understandings concerning the subject matter hereof, and it may not be changed orally but may be changed only in a writing signed by all parties. This Agreement shall be interpreted in accordance with New Jersey law.

10. Ms. Mesko has voluntarily and without coercion entered into this Agreement.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date set forth below.

For the Elizabeth Board of Education :

THE MURRAY LAW FIRM, LLC

By: Mary E. Hennessy-Shotter

Dated: 5-20-03

For Brenda Mesko

BERGMAN & BARRETT

By: Michael Barrett

Dated: 5-6-03

Brenda Mesko

Dated: 5/6/03

OAL DKT. NO. EDU 03753-01
AGENCY DKT. NO. 77-3/01

BRENDA MESKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|12|03

Date of Mailing: 6|12|03

288-03

CAMDEN EDUCATION ASSOCIATION AND CLARALIENE GORDON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND SYLVAN LEARNING CENTER,	:	DECISION
RESPONDENTS.	:	

June 12, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6987-01
AGENCY DKT. NO. 389-9/01

CAMDEN EDUCATION ASSOCIATION AND CLARALIENE GORDON,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND SYLVAN LEARNING CENTER,
Respondents.

Richard A. Friedman, Esq., for petitioners (Zazzali, Fagella & Nowak, attorneys)

Karen A. Murray, Esq., for respondent Board of Education (The Murray Law Firm, LLC, attorneys)

Thomas E. Redburn, Jr., Esq., for respondent Sylvan Learning Center (Lowenstein Sandler, PC)

Record Closed: May 20, 2003 Decided: May 21, 2003

BEFORE **JOSEPH F. MARTONE**, ALJ:

Petitioners, education association and resident taxpayer contend that an agreement beween the respondents which permits respondent Sylvan Learning Center to provide educational services to the school district's students is violative or unauthorized by law. This matter was transmitted to the Office of Administrative Law on November 16, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to

-13. Telephone conferences were held on February 5, 2002, May 20, 2002, and June 27, 2002, and in October, 2002 the parties represented that they were engaged in intense efforts to reach a settlement. When no settlement was forthcoming, the matter was scheduled to be heard on May 7, 2003.

On May 7, 2003, the parties advised that they agreed to a settlement, and they have prepared submitted a Stipulation of Settlement and Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

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

May 21, 2003
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

May 23 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioners

CAMDEN EDUCATION ASSOCIATION and CLARALIENE GORDON,	:BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:Docket No.: EDUOT 06987-01S
v	
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, and SYLVAN LEARNING SYSTEMS, INC.	**STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT**
Respondents.	

The parties to this matter hereby agree that this matter shall be deemed settled and resolved, based upon the terms and conditions set forth below.

1. The parties acknowledge that this agreement must be approved by the Commissioner of Education, and that if the Commissioner of Education does not approve each and every term of this agreement, the matter shall be returned to the Office of Administrative Law for further proceedings.

2. Upon the approval of the terms of this agreement by the Commissioner of Education, this matter shall be deemed settled, the

petition of appeal will be withdrawn, and this settlement shall have the force and effect of a decision of the Commissioner of Education.

3. The parties agree that all teaching staff members who are assigned to or provide services in the program provided by respondent Sylvan to respondent Camden Board of Education shall be supervised only by certified supervisors employed by the respondent Camden Board of Education, and that no such teaching staff members shall be supervised by any agents, representatives, or employees of respondent Sylvan.

4. The parties agree that all assignments to the reading program provided by respondent Sylvan to respondent Camden Board of Education shall only be made by respondent Camden Board of Education, that all teaching staff members assigned to such programs shall be selected, assigned and chosen for retention only by respondent Camden Board of Education, and that no such assignments, selection, or retention shall be subject to approval by respondent Sylvan. The parties further agree that nothing herein shall be construed to abrogate or limit any teaching staff member's or other employee's tenure or seniority rights.

5. In all circumstances where it is determined that as a result of any teaching staff member's performance in the reading program provided by respondent Sylvan to the respondent Camden Board of Education that consideration may be given to any formal

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

action relating to or against the teaching staff member, including but not limited to transfer, reassignment, termination, non-renewal of employment, or discipline, any conferences with the school management team shall include the entire school management team, and shall not include only some of the members of the school management team.

6. The parties agree that all formal observations and evaluations of teaching staff members in the reading program provided by respondent Sylvan to respondent Camden Board of Education shall be performed only by certified supervisors employed by respondent Camden Board of Education, and that any observations or evaluations by agents, employees, representatives, or personnel employed by Sylvan shall not constitute part of the employee's formal evaluations, shall only be used in relation to the Sylvan program, and shall not be used or considered in relation to the teaching staff members' employment status, benefits, or rights in the respondent district.

7. The parties agree that all teaching staff members assigned to, retained, or placed in the reading program provided by respondent Sylvan to respondent Camden Board of Education are and shall be deemed to be employees of respondent Camden Board of Education, that all of their employment has been and shall be without loss or restriction of tenure or seniority rights, and that all teaching staff members assigned to such program have acquired

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

and shall acquire tenure and seniority credit for their assignment in such program.

8. In consideration of the foregoing terms, the parties agree that the above matter shall be deemed settled and resolved.

9. The petitioners, Camden Education Association and Claraliene Gordon, hereby waive, release, and give up any and all claims either petitioner may have against respondents (including any of respondents' past and present officers, directors, employees, shareholders, attorneys, agents, heirs, subsidiaries, affiliates, successors and assigns)that: (1) were asserted in the petition of appeal filed in the above-captioned administrative proceeding in relation to the Professional Services Agreement between Sylvan Learning Systems, Inc. and the Camden Board of Education referred to in that petition (the "Agreement"), or (2) are known to petitioners as of the date of this stipulation and could have been asserted in this proceeding. The preceding sentence notwithstanding, in the event that any administrative agency or court subsequently declares any term, practice or procedure included in the Agreement illegal, or any statute is enacted to that effect, petitioner Camden Education Association may assert a claim in relation to the illegal provision in the contract at that time. Nothing herein shall cause the release of any claims held by any person not a party to this stipulation.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Camden Education Association

By: Claraliene Gordon
Claraliene Gordon, President

Dated: May 2, 2003

Claraliene Gordon, Petitioner

By: Claraliene Gordon
Claraliene Gordon

Dated: May 2, 2003

Sylvan Learning Systems, Inc.

By: _____
Stephen Freeman, President

Dated: _____

The Murray Law Firm, LLC
MURRAY, MURRAY & CORRIGAN
Attorneys for Respondent
Board of Education of the
City of Camden

By: _____
Karen A. Murray, Esq.

Dated: _____

ZAZZALI, FAGELLA, NOWAK KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 6987-01
AGENCY DKT. NO. 389-9/01

CAMDEN EDUCATION ASSOCIATION AND CLARALIENE GORDON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND SYLVAN LEARNING CENTER,	:	DECISION
RESPONDENTS.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|12|03

Date of Mailing: 6|12|03

294-03

294-03

ROBERT E.B. MANNING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

June 16, 2003

OAL DKT. NO. EDU 8340-02
AGENCY DKT. NO. 277-9/02

ROBERT E.B. MANNING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on May 17, 2003, providing them ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|16|03

Date of Mailing: 6|17|03

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

296-05

296-03

A.A., on behalf of minor child, R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 2436-03

AGENCY DKT .NO. 124-4/03

A.A. o/b/o R.A.,

Petitioners,

v.

BORO OF HADDON HEIGHTS BOARD OF EDUCATION, CAMDEN COUNTY,

Respondent.

Lee Ginsburg, Esq., (South Jersey Legal Services, Inc.) for petitioners

Robert P. Becker, Jr., Esq., (Becker and Duffield, attorneys) for respondent

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

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on April 28, 2003 for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -13. The matter was scheduled for a hearing on April 30, 2003. At that time, the parties agreed to a settlement and prepared a written agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

I have reviewed the record and the terms of the settlement and I find:

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

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

This order on application for emergency relief may be adopted, modified or rejected by Commissioner of the Department of Education, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

May 12, 2003
DATE

Ana C. Viscomi
Ana C. Viscomi, ALJ

/jck

EXHIBITS

Jointly Submitted

J-1 Settlement Agreement

R.A. by A.A.,
V. Petitioner

Haddon Heights BOE
Respondent

Before Commission of The N.J. Dept. of EDUCATION

Agency Docket #
124-4/03

SETTLEMENT Agreement and Withdrawal [redacted] 06

The parties having met before the court on 4/30/03 and a settlement of the dispute of the parties is hereby set forth as follows:

(1) Petitioner to Return to Class at Haddon Heights H.S. on Monday, May 5, 2003...

(2) Petitioner to be given full Credit for 2002-2003 School year in attendance

(3) Academic evaluation will be conducted to determine what academic process to follow to ensure full academic credit is provided to R.A. and thereafter such educational process to be provided by respondent

(4) Petition is Dismissed.

[redacted] 06

x Lee Gordon, Esq.
Attorney for Petitioner

x Anthony Ali

x Robert P. Boyle, Jr.

x Edward [illegible]

OAL DKT. NO. EDU 2436-03
AGENCY DKT. NO. 124-4/03

A.A., on behalf of minor child, R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this emergent matter, along with Administrative Law Judge Ana C. Viscomi's Order and attached Settlement Agreement, have been reviewed. Upon such review, the Commissioner approves the agreement. In that it appears that all issues in controversy have been satisfactorily resolved by the parties in their agreement, this matter is hereby dismissed, subject to the compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|18|03

Date of Mailing: 6|19|03

297-03

297-03

BOARD OF EDUCATION OF THE WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Regional High School District challenged the Department's determination that petitioner was the "district of residence" for P.P., a student placed by DYFS in a skills development home. Petitioner asserted that respondent Board was responsible for the tuition and transportation costs of P.P.'s educational placement.

The ALJ found that P.P. resided with and was in the physical custody of his father, D.P., in the respondent District of Ramsey prior to his placement in the skills development facility. The ALJ found that respondent failed to provide any proof that D.P.'s parental rights were terminated. Thus, the ALJ determined that pursuant to statute, respondent Ramsey, the district of residence of P.P.'s father with whom P.P. live, albeit for a matter of weeks, prior to admission to a State facility, was the district responsible for P.P.'s educational costs. *N.J.S.A.* 18A:7B-12b and *N.J.A.C.* 6A:23-5.2(1) and (2).

The Deputy Commissioner adopted the findings and determination in the Initial Decision as his own.

June 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO.: EDU 10198-00

AGENCY DKT. NO. 384-10/00

WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

v.

RAMSEY BOARD OF EDUCATION,

Respondent.

Ellen S. Bass, Esq., for petitioner
(Rand, Algeier, Tosti & Woodruff, attorneys)

Susanna L. Mould, Esq., for respondent
(Fogarty and Hara, attorneys)

Michael Lombardi, Deputy Attorney General
(Peter C. Harvey, Acting Attorney General of New Jersey, attorney)

Record Closed: March 18, 2003 Decided: May 8, 2003

BEFORE **JEFFREY A. GERSON**, ALJ:

PROCEDURAL HISTORY

On February 8, 2000, Wallkill received a letter from the Warren County Educational Services Commission advising Wallkill that it would be responsible for the tuition and transportation costs of P.P.'s educational placement. On May 2, 2000,

counsel for Wallkill wrote to Melvin L. Wyns, Director, Division of School Finance, Department of Education ("Department" or "DOE"), seeking a formal determination of "district of residence" pursuant to N.J.S.A. 18A: 7B-12. On June 26, 2000, Melvin Wyns notified the Ramsey Board of Education that it was the responsible school district for P.P. pursuant to the requirements of N.J.S.A. 18A: 7B-12, N.J.A.C. 6:20-5.3 and -5.4.

Ramsey appealed the determination on July 21, 2000, to Thomas McMahon, Assistant Commissioner of the DOE. Ramsey argued that D.P. did not have joint custody that D.P.'s parental rights had been terminated, and that P.P.'s stay in his father's home was only temporary. Ramsey contended that P.P.'s custodial parent was his mother and that the mother's district was therefore responsible for the placement.

By letter dated August 1, 2000, the Department reversed its determination, and concluded that Wallkill was the responsible district of residence based on the following additional findings: (a) that the initial placement was in the skills development home rather than the placement in the father's home, (b) P.P.'s father did not have joint custody of P.P., (c) P.P.'s stay with his father was temporary, (d) P.P.'s father's parental rights may have been terminated, and (e) P.P.'s custodial parent prior to placement in the skills development home was his mother who resided in Hamburg as of the date of the initial state placement.[1] Letter from Thomas McMahon to Susanna Mould, Attorney for Respondent, dated August 1, 2000.

On August 7, 2000, Wallkill sent a letter to Mr. McMahon requesting the basis for his determination that D.P.'s parental rights were terminated. The Assistant Commissioner responded, "I based my findings solely upon information presented to me in the letters I received from you and Ms. Mould [counsel for Respondent]. No other information was considered." Letter from Thomas McMahon, Assistant Commissioner, Department of Education, to Ellen S. Bass, Attorney for Petitioner, dated August 14, 2000 (emphasis added).

[1] In its earlier determination by Melvin Wyns, Director of the Division of Finance, the Department had not made any factual findings as to placement, but rather found only that Ramsey was the responsible school district.

Petitioner subsequently filed a petition of appeal with the Commissioner of Education, challenging the DOE's determination of residence. See Petition for Appeal, dated September 20, 2000. The matter was transmitted to the Office of Administrative Law as a contested case for a hearing on the merits. The parties subsequently moved for summary decision.

In its motion for summary decision, Petitioner argues that Ramsey is the district responsible for the tuition of the child in the state facility pursuant to N.J.S.A. 18A: 7B-12. Specifically, Petitioner argues that it should not have to pay for P.P.'s education since P.P. resided with his father at the time of placement and the applicable district of residence prior to placement is Ramsey.

Respondent cross-moved for summary decision, arguing that because the father's parental rights had been terminated and DYFS' placement of P.P. in the father's home was a state-ordered placement, Ramsey is not responsible for P.P.'s education pursuant to the statute and applicable regulations. Respondent further argues that because D.P. did not have legal custody of P.P., P.P.'s placement by DYFS in the father's home amounted to a foster care placement, N.J.S.A. 18A: 7B-12(a), and under that statute the placement with the father is ignored making the mother's district his school district of residence.

Petitioner replied to Respondent's cross-motion for summary decision arguing that respondent's allegations lacked evidentiary value and were based wholly on unsubstantiated hearsay. Specifically, Petitioner argues that Respondent has supplied no proof that the father's parental rights have been terminated. Petitioner further argues that DYFS would not have sent P.P to live with his father if the father's parental rights had been terminated. Moreover, Petitioner asserts that Respondent has presented no proof that P.P. was removed from his mother's home, nor that P.P.'s mother abused or neglected him.

By letter dated October 27, 2000, Petitioner requested that the DOE be named a Respondent in the matter.[2] In addition, Petitioner brought a motion compelling the

[2] While the DOE is a named respondent in this matter, Respondent as it used here refers only to the Ramsey Board of Education and not the DOE.

production of DYFS records to ascertain whether certain facts relied upon by Ramsey were accurate. An *in camera* review of the DYFS file was conducted.

UNDISPUTED FACTS IN THE BRIEFS:

1. P.P. is educationally handicapped. He was born on July 27, 1983. He suffers from Down's syndrome, ADHD, Tourette's syndrome, and has been diagnosed as oppositional defiant.

2. During the 1997-1998 school year, until March 29, 1998, P.P. resided with his mother, K.H.T. and her husband, T.T., in Hamburg, New Jersey, the constituent sending district in the Wallkill Valley Regional High School District ("Petitioner").

3. When P.P. resided with his mother, he was educated at the Association for the Help of Retarded Citizens in Middletown, New York, a special education placement of the Wallkill Child Study Team.

4. On March 31, 1998, the Division of Youth and Family Services ("DYFS") removed P.P. and his sister from K.H.T.'s home and placed them with their father, D.P.

5. P.P.'s father, D.P., has, at all times relevant, resided at 17 Garden Street in Ramsey, New Jersey. As of October 1999, D.P. remained a resident of that address. See Letter to Mr. Bruce De Young, Superintendent Ramsey Board of Education, from Melvin L. Wyns, Director, Office of School Finance, Department of Education, dated June 26, 2000.

6. On April 1, 1998, the Wallkill Child Study Team received correspondence from the Ramsey Public Schools requesting P.P.'s records, insofar as P.P. now resided in Ramsey with his father. Certification of Francesca Cappelletti, dated January 9, 2003, page 2.

7. Wallkill subsequently forwarded the records to Ramsey and has had no further involvement in P.P.'s educational programming. Ibid.

8. The Ramsey Board of Education ("Respondent") immediately placed P.P. in Ramsey High School's Special Education program, which P.P. attended until June of 1998, while living at home with his father and stepmother. Letter from Petitioner to Melvin Wyns, Director, Division of School Finance, Dep't. of Education, dated May 2, 2000, page 2.

9. On June 5, 1998, DYFS placed P.P. in a state-sponsored skills development home located at 893 Stuykens Road, Phillipsburg, New Jersey. Certification of Francesca Cappelletti, supra, at 2.

10. P.P. remains in this placement to date. During the day, P.P. receives his educational program at the Sandhill School in Flemington, Hunterdon County, New Jersey. Letter from Petitioner to Melvin Wyns, supra, at 2.

DISPUTED FACTS IN THE BRIEFS[3]

1. Respondent Ramsey asserts that P.P. was removed from the mother's home based on findings of abuse and neglect and that DYFS "placed" P.P. in his father's home. Petitioner disagrees, arguing instead that P.P. merely went to live with his father because his mother was incapable of caring for him.

2. Respondent asserts that when P.P. was removed from K.H.T.'s home, P.P. became a ward of the state. Petitioner disagrees.

3. Respondent asserts that at all times the DYFS placement of P.P. with his father was temporary.

4. Respondent maintains that D.P.'s parental rights "may have been" terminated. See Certification Of Fredericka Shpetner In Support Of Cross-Motion For Summary Decision, Exhibit C, Letter to Susanna Mould, Esq., from Thomas McMahon, Assistant Commissioner for Department of Education dated August 1,

[3] Many of the disputed facts in this memo are resolved by information contained in the DYFS file.

2000. Petitioner disagrees, asserting there is no factual support for this contention.

5. Petitioner argues that the initial state placement occurred when P.P. was placed in the state facility. Respondent argues that the initial placement occurred when DYFS placed P.P. in his father's home. The Department of Education finds that the initial state placement was in the skills development home. Certification Of Fredericka Shpetner In Support Of Cross-Motion For Summary Decision, Exhibit C, Letter to Susanna Mould, Esq., from Thomas McMahon, Assistant Commissioner for Department of Education, dated August 1, 2000.

FACTS IN THE DYFS FILE

1. Until March 1998, K.H.T., the mother of P.P., had legal and physical custody of P.P. pursuant to a divorce obtained in 1990. D.P., P.P.'s father, was granted visitation rights, which provided that P.P. would stay with him at least one weekend every three weeks.

2. P.P. remained with his mother until approximately March 27, 1998, when DYFS removed him and his sister from K.H.T.'s home based on findings of abuse and neglect by K.H.T. and her husband, T.T., of P.P. and his sister T.P.

3. On March 30, 1998, DYFS placed the children in their father's physical custody in Ramsey, New Jersey.

4. Prior to the placement with the father, DYFS contacted him and asked if he would prefer that the children be placed in foster care or in his home.[4]

5. The father insisted that the children be placed in his care and that the children not be placed in foster care and DYFS complied.

[4] Although the above facts may not be directly relevant to the determination of summary decision, they do serve as evidence refuting the allegation that D.P.'s parental rights were terminated, since he was allowed to make decisions regarding the child's welfare and was not a stranger to the children as Respondent's brief implies.

6. DYFS conducted meetings with P.P.'s father and stepmother, P.B. At these meetings, both D.P. and P.B. informed DYFS that they would actively seek custody of the children.

7. After the placement of P.P. and T.P. in their father's home and at least until June of 1998, DYFS allowed K.H.T. to visit the children on a weekly but supervised basis. These visits were not very successful as K.H.T. frequently cancelled the visits and the children did not appear eager to visit with their mother.

8. K.H.T. has had no recent contact with the children and her exact whereabouts are presently unknown.[5]

ANALYSIS

Summary Decision

The New Jersey Supreme Court in Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995) held:

> "The judge is required to consider whether competent evidential materials presented, when viewed in light most favorable to nonmoving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the nonmoving party, ...and "[w]hether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

[Id. at 535-536.][6]

[5] As of 2000, K.H.T. was believed to have moved to Ohio. Although she contacted her daughter T.P. on several occasions when T.P. resided with D.P., she has never attempted to contact her son P.P., since his removal from her home in 1998.

[6] See also Frank v. Ivy Club, 120 N.J. 73 (1990) (a hearing must be granted by an agency only if material disputed adjudicative facts exist).

The rule for summary decision pursuant to the Uniform Administrative Procedure Rules, specifically N.J.A.C. 1:1-12.5 are essentially the same as the summary judgment rules pursuant to the New Jersey Rules of Court. It provides as follows:

> [A] party may move for summary decision if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue, which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [N.J.A.C. 1:1-12.5(B).]

A contested case can be "summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law." In the Matter of Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div. 1988) (citing N.J.S.A. 52:14B-2(b); N.J.A.C. 1:1-12.5 (a)). A summary decision must be based on an examination of the totality of the circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. Ibid.

Summary decision is appropriate in this case because the material issues relevant to a resolution of the matter are not in dispute.

Applicable Statutes And Regulations

The district of residence determination is governed by section N.J.S.A. 18A: 7B-12 of the State Facilities Education Act of 1979, which provides, in relevant part:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> ...
>
> b. The ***district of residence for children*** who are in residential State facilities, or who ***have been placed by State agencies in*** group homes, ***skill development***

> ***homes***, private schools or out-of-State facilities, ***shall be the present district of residence of the parent*** or guardian ***with whom the child lived prior to his most recent admission to a State facility*** or most recent placement by a State agency.
>
> ...

[N.J.S.A. 18A:7B-12b. (emphasis added).]

The regulations implementing Title 18A define "present district of residence" as follows:

> ...
>
> 2. The ***present district of residence of a child placed by a State agency*** in a group home, ***skill development home***, private school or out of state facility also referred to in the first paragraph of N.J.S.A. 18A: 7B-12b ***means the New Jersey district of residence of the child's parent***(s) or guardian (s) ***immediately prior to his or her initial admission to a State facility*** or placement by a State agency.

[N.J.A.C. 6A: 23-5.2 (1) and (2) (emphasis added).]

If the language of a statute is plain, unambiguous, and uncontrolled by other parts of the regulation, the words of the statute are to be given their ordinary and well-understood meaning. Fahey v. Jersey City, 52 N.J. 103, 106-07 (1968); Safeway Trails, Inc. v. Furman, 41 N.J. 467, 478 (1964); Lane v. Holderman, 23 N.J. 304, 313 (1957). A regulation is subject to the same rules of construction as a statute and should be construed according to the plain meaning of the language. Medford Convalescent and Nurs. Ctr. v. Div. of Med. Assist. and Health Servs., 218 N.J. Super. 1, 5 (App. Div.1985). "In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed within their context, and shall, unless inconsistent with the manifest intent of the legislature, or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." Forstrom v. Byrne, 341 N.J. Super. 45, 55 (App. Div. 2001) (emphasis added).

A plain reading of the statute suggests that it specifically relates only to situations where a state agency, such as DYFS, has placed a disabled child into a facility requiring educational funding. See South River v. N.J. State Dep't. of Educ., Div. Of Finance EDU 6441-01, Initial decision (April 12, 2002) <http://lawlibrary.rutgers.edu/search.html> (the statutory and regulatory plan of N.J.S.A. 18A: 7B-12 plainly assigns financial responsibility for a child placed in a residential or other state facility by a state agency). Indeed, the name of the act, the State Facilities Education Act, further evidences that the Legislature specifically enacted legislation limited to funding responsibility for state agency placements in state facilities. See Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Pirozzi, 198 N.J. Super. 297, 312 (L. Div. 1983) (Title given a statute is indicative of its scope as well as legislative intent).

The statute relates specifically to placements requiring educational funding. No other types of placements are listed in the statute. Respondent asserts that the term "placement," as used in the statute, refers to P.P.'s placement into his father's home and, therefore, requires that Wallkill be deemed the responsible school district of residence. No such funding was required when P.P. moved into his father's home. When P.P. lived with his father, his education was provided by Ramsey. In fact, the DOE, in reversing its initial determination, where it found Wallkill responsible for the tuition relating to P.P.'s placement in the skills development home, still concluded that the initial state placement of P.P. was in the state facility rather than with his father.

Next, the statutory language plainly references the district in which a child "lived" prior to admission by a state agency to a state facility. The statute refers to the residence of the parent with whom the child lived. It does not refer to the permanency or the period of time that the child has lived in a parent's home. Where domicile has been raised in these cases, the issue has been a question of the parents' domicile.[7]

[7] Cases interpreting N.J.S.A. 18A: 7B-12, do not reference domicile other than to describe it as it relates to the 'transient' parent with whom the child lived prior to placement. See Bd. of Educ. Borough of Somerville v. Bd. of Educ. City of New Brunswick and N.J. State Dep't. of Ed., EDU 677-96, Initial Decision (November 7, 1996), Final Agency decision (February 5, 1997) <http://lawlibrary.rutgers.edu/search.html > (Commissioner rejected ALJ's findings, but upheld the notion that residence is based on the intended domicile of the parent, not the child). Moreover, "the domicile of an unemancipated child is the domicile of the parent, custodian, or guardian N.J.S.A. 18A: 38-1(a)." P.B.K. v. Board of Education, Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Such is not the case here where the domicile of the father is known and the mother's was known when she lived in N.J.

There is no dispute that D.P. was domiciled in Ramsey. On June 5, 1998, when P.P. was placed in the skills development home in Phillipsburg, he lived with his father. D.P. resided in the district of Ramsey at that time and continues to do so. Thus, because D.P.'s residence is not in dispute, only Ramsey can be the responsible district of residence pursuant to the plain meaning of the statute.

Respondent asserts that P.P.'s placement by DYFS into D.P.'s home was designated a temporary placement. As noted, there is no indication in the statutory language that the child must be living with the parent permanently in order to designate the school district of residence.[8] Even if permanence were relevant, there is no evidence in the DYFS file to suggest that P.P.'s placement in his father's home was intended by DYFS or his father to be temporary.[9] At the time DYFS removed P.P. from the Wallkill school district, it was no longer possible for P.P. to live with his mother, nor was there any indication that P.P. would be returned to his mother's custody. DYFS notes from conversations and meetings with P.P.'s father indicate that D.P. intended for the placement to be permanent.[10] At the time of the placement by DYFS in March of 1998, P.P.'s father attempted to secure permanent custody. The father later realized that he could not provide the special care his son required. As a result, the father called DYFS requesting that P.P. be removed from his home and placed in a facility that could better care for his special needs.

Respondent further asserts that the district of residence is determined by the parent who has legal custody of the child and that P.P.'s mother, K.H.T. had physical and legal custody of P.P. The statute does not refer to custody. Instead, the statute

---

[8] Respondent argues that Summit v. Bd. of Educ. Twp. Of Millburn is applicable to the facts of this case. There, the tribunal found that a child's temporary stay with a non-custodial parent while the custodial parent is incapable of caring for the child did not constitute the child's domicile. 95 N.J.A.R. 2d (EDU) 506. Summit is inapplicable to the facts of this case, since it does not interpret N.J.S.A. 18A: 7B-12, which refers specifically to state placement situations.

[9] If Respondent could show that DYFS intended the placement to be temporary and the placement of the child was merely a step on the way to DYFS' intended placement in the skills development home, then summary decision in favor of petitioner would not be proper, as genuine issues of fact would remain. Namely, It would need to be decided whether DYFS was in fact in legal custody of the child as respondent suggests. However, respondent has failed to provide any evidence of this fact in its cross-motion for summary decision.

[10] For example, D.P. and his wife expressed their intent that the children remain permanently in their home and not be "shifted around". When questioned, the children maintained that they did not intend to return to their mother even if her condition improved and she complied with the court order. In fact, the mother remains in defiance of the court order directing her to seek treatment. Currently, her exact whereabouts are unknown.

plainly states that in so far as the child lives with a parent prior to a state placement, that district of residence is responsible for tuition relating to the placement. Physical custody by the parent of a child at the time of the state placement is sufficient. See Bd. of Educ., Lower Camden Co. v. Dept. of Educ., Bureau of School Finance, EDU 8578-98 Initial Decision (June 4, 1999) <http://lawlibrary.rutgers.edu/search.html> (current residence of parent with whom the child lived prior to most recent placement in state facility after transfer of physical custody is responsible district of residence for purposes of N.J.S.A. 18A: 7B-12). It is undisputed that at the time of P.P.'s initial state placement into the skills development home, D.P. had physical custody of P.P.

Respondent also asserts that D.P.'s parental rights were terminated, but has provided no proof in this regard. Respondent has concluded that the father's rights were terminated because the mother retained sole custody of the children after the divorce. If D.P.'s parental rights had been terminated and DYFS had legal custody of P.P. as Respondent suggests, then Wallkill would be the financially responsible district of residence. See Bd. of Educ. Bor. of Prospect Park v. State of N.J. Dept. of Educ., Div. of Finance, 97 N.J.A.R.2d (EDU) 134 (If child in custody of DYFS, DYFS would be the financially responsible agency); see also Bradley Beach v. N.J. Dep't. of Educ., Div. of Finance, EDU 4975-99, Initial decision (May 15, 2000) <http://lawlibrary.rutgers.edu/search.html> (whether DYFS or adoptive parents had guardianship of child was determinative for purposes of determining district of residence under N.J.S.A. 18A:7B-12).

Indeed, the fact that DYFS placed the child with D.P. evidences D.P.'s parental control. It is highly unlikely that DYFS would place a child in his father's home if his rights had been terminated. Termination of parental rights generally requires a showing, by clear and convincing evidence, of four factors, including a finding that the child's health and development will be endangered by the parental relationship pursuant to N.J.S.A. 30:4C-15.1(a). New Jersey Division of Youth & Family Services v. A.W., 103 N.J. 591 (1986).

Lastly, Respondent asserts that D.P. was acting as a foster parent. N.J.A.C. 10:122B-1.4 sets forth extensive requirements for the establishment of a foster care arrangement. Respondent has also failed to provide any proof in this regard.

Therefore, D.P. could not be considered a foster parent for purposes of determining district responsibility.

CONCLUSION

Summary decision for Petitioner is appropriate because the essential facts are not in dispute. P.P. did not reside with his mother in the Wallkill district prior to his placement in the skills development facility. The facts indicate, instead, that P.P. resided with and was in the physical custody of his father in the district of Ramsey.

The respondent has failed to provide any proof that D.P.'s parental rights were terminated. All available evidence indicates that P.P. was under the legal control of his father. The statute places responsibility on the school district where the child resides prior to placement by a State agency. Accordingly, for school funding purposes, respondent is the responsible school district.

ORDER

It is **ORDERED** that Ramsey is the district of residence and responsible for funding P.P.'s education.

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

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

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

May 8 03
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

May 13 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Exhibits:

P-1 Certification of Francesca Cappelletti

P-2 Letter Memorandum dated January 13, 2003

R-1 Certification of Fredericka Shpetner dated January 24, 2003

R-2 Letter Memorandum dated January 22, 2003

OAL DKT. NO. EDU 10198-00
AGENCY DKT. NO. 384-10/00

BOARD OF EDUCATION OF THE WALLKILL VALLEY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions were submitted by Respondent Board of Education of the Borough of Ramsey (hereinafter, "Ramsey"); a reply thereto was filed by petitioner in accordance with *N.J.A.C.* 1:1-18.4.

Ramsey's exceptions acknowledge that the issue herein is whether it, or petitioner, the Board of Education of the Wallkill Valley Regional High School District, is the "district of residence" for P.P. who has been placed by DYFS in a skills development home from June 5, 1998 to the present, pursuant to *N.J.S.A.* 18A:7B-12(b) and *N.J.A.C.* 6A:23-5.2(a)(1) and (2). (Ramsey's Exceptions at 3) Ramsey maintains that P.P.'s placement with his father, D.P., for approximately six weeks was merely a temporary arrangement, upon his father's option, to

avoid having to place P.P. in foster care. (*Id.* at 4) Ramsey also contends that D.P. never obtained custody of P.P., notwithstanding his stated intent and, therefore, concludes:

> [W]hile the [Administrative Law Judge] A.L.J. determined that P.P.'s father assumed physical custody of P.P. on March 30, 1998 when P.P. was placed in his home ***, such custody ended immediately on June 5, 1998 upon P.P.'s departure from his father's home. Indeed, the fact that DYFS unilaterally removed P.P. from his father's home upon his father's request to do so irrefutably proves that DYFS had legal custody of P.P. throughout his temporary residence in Ramsey. Otherwise, DYFS could not have removed P.P. from his father's home absent a showing of neglect or abuse.*** (citation omitted) (*Id.* at 5)

Ramsey maintains that the phrase "district of residence" assumes an intent for a permanent residence and cites *Bd. of Ed. of Summit v. Bd. of Ed. of Twp. of Millburn*, 95 *N.J.A.R.*2d (EDU) 506 to advance its argument, notwithstanding that this case involves the application of *N.J.S.A.* 18A:38-1 *et seq.,* rather than *N.J.S.A.* 18A:7B-12. (*Id.* at 7-8)

Ramsey next asserts "that principles of equity require that, when a student resides temporarily in a district with a parent who is not vested with any legal custody, a 'district of residence' cannot be established." (*Id.* at 9) Here, the parties do not dispute that P.P.'s mother had sole legal and physical custody through March 29, 1998, and that P.P. lived with her for approximately eight years in the boundaries of Wallkill. Thus, Ramsey reasons:

> Simply because P.P.'s father agreed to temporarily have P.P. live with him in Ramsey rather than reside with a foster family should not compel Ramsey to bear the educational costs for P.P. through his twenty-first birthday. In other words, a temporary six (6) week placement should not be allowed to override the eight (8) year history of residence established by P.P.'s mother in Wallkill. *** While the A.L.J. concluded that the address of P.P.'s mother is either unknown *** or out-of-state ***, responsibility should not revert to P.P.'s father as the default "district of residence" simply because P.P. lived with him briefly prior to attending the skill development home.*** (*Id.* at 10)

Ramsey, therefore, urges the Commissioner to reverse the ALJ's decision and find that petitioner is P.P.'s "district of residence."

In reply, petitioner notes that the Initial Decision correctly disposes of Ramsey's contention that D.P.'s parental rights had been terminated and, therefore, the underpinning of the Department's determination was, in fact, faulty. (Petitioner's Reply at 4-5) Additionally, petitioner argues that the ALJ correctly interpreted the applicable statutes and regulations governing a "district of residence" determination for school funding purposes because "[t]he pertinent statutes do not speak in terms of domicile, or custody, or permanency." (*Id.* at 6) For this reason, petitioner asserts that Ramsey improperly relies on the decision in *Summit, supra,* which, as the ALJ noted, does not analyze the provisions of *N.J.S.A.* 18A:7B-12. Finally, petitioner urges the Commissioner to reject Ramsey's equitable arguments as "baseless," inasmuch as it is not supported by the facts on record. (*Id.* at 7)

Upon careful and independent review of the record in this matter, the Deputy Commissioner, to whom this matter has been delegated for review pursuant to *N.J.S.A.* 18A:4-33, concurs with the ALJ that petitioner has proven that the Respondent Department's determination of residence for funding purposes cannot be sustained, where petitioner has duly demonstrated that Ramsey is the present district of residence of P.P.'s father,[1] with whom P.P. lived, albeit for a matter of weeks, prior to P.P.'s most recent admission to a State facility upon his placement by DYFS therein in June of 1998. *See, N.J.S.A.* 18A:7B-12b and *N.J.A.C.* 6A:23-

[1] Indeed, the parties do not dispute that P.P.'s father has, at all times, resided in Ramsey. (Initial Decision at 4)

5.2(1) and (2).[2]

Accordingly, the Initial Decision of the ALJ is adopted for the reasons set forth therein.

IT IS SO ORDERED.[3]

DEPUTYCOMMISSIONER OF EDUCATION

Date of Decision: 6|18|03

Date of Mailing: 6|19|03

[2] In so concluding, the Commissioner is not persuaded by Ramsey's reliance on the decision in *Summit, supra,* for support of its contention that legal custody is essential to a "district of residence" determination under *N.J.S.A.* 18A:7B-12(b). To the extent an analysis pursuant to *N.J.S.A.* 18A:38-1 is even relevant herein, the Commissioner notes that, subsequent to the issuance of *Summit*, the State Board of Education adopted regulations that render inconsequential whether a parent has legal custody of a child in those instances where parents are domiciled in different districts and a local board must determine whether the student is entitled to attend school in the district pursuant to *N.J.S.A.* 18A:38-1(a) through (e). *N.J.A.C.* 6A:28-2.4(a)1ii.

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

298-03

298-03E

K.R.C. AND N.L.C., ON BEHALF OF MINOR CHILD, L.M.U.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, WILLIAM ADAMS AND JOHN CLIFFORD,	:	
RESPONDENTS.	:	

June 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 4202-03
AGENCY DKT. NO. 213-6/03

K.R.C. & L.L.C. o/b/o L.M.U.,

Petitioners,

v.

BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL TECHNICAL SCHOOLS, WILLIAM ADAMS, AND JOHN CLIFFORD,

Respondents.

K.R.R. & L.M.C., parents of **L.M.U.**, for petitioners pro se

Robert A. Muccilli, Esq., for respondents (Capehart & Scatchard, attorneys)

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

STATEMENT OF THE CASE

Respondent Board of Education of the Salem County Vocational Technical Schools (BOE) operates two high schools: the Salem County Career and Technical High School and the Salem County Arts, Science and Technology High School, in which there are 5 academies, including the Academy of Biological and Environmental Sciences (ABES). Petitioners K.R.C.

and L.M.C. and petitioner L.M.U., their daughter, a graduating senior in ABES program, claim that the BOE should name L.M.U. a "distinguished student speaker" for the upcoming ABES graduation. Respondents submit that she does not meet all of the criteria for that distinction, particularly because she has not been a student in the ABES program for all 4 of her high school years.

For the reasons detailed below, I deny the petitioners' request for emergent relief, i.e., an order requiring the BOE to name L.M.U. as a "distinguished student speaker."

PROCEDURAL HISTORY

On June 12, 2003, the petition was filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested case as a request for emergent relief to the Office of Administrative Law (OAL), where it was filed on June 13, 2003 and scheduled for a hearing on June 16, 2003. N.J.S.A. 52:14B-2(b). (The petition names as respondents only William Adams, Ed.D., Superintendent of the BOE's school system and John Clifford, Ed.D., principal of the BOE's Career and Technical High School. The Department transmitted the case to the OAL with a case caption showing the BOE as a respondent.) On June 16, 2003 in the OAL, Trenton, respondents' answer and exhibits were filed and the request for emergent relief was argued on a taped record.

FINDINGS OF FACT

The BOE operates two high schools: the Salem County Career and Technical High School and the Salem County Arts, Science and Technology High School.

The Salem County Career and Technical High School primarily prepares students to directly enter specific fields of vocational or employment. The Salem County Arts, Science and Technology High School (on campuses other than its own) operates 5 educationally rigorous academies, including the ABES.

On December 17, 1996, the BOE approved establishment of a Law Enforcement and Public Safety Program at the "Career Center" and provided that it "may become a full-time and an academy program." R-C. On July 15, 1997, the Law Enforcement and Public Safety Program's "Vo Tech Career Center Curriculum" was presented and the BOE approved implementation of that program during the 1997-98 school year. R-C. On August 26, 1998, the BOE again approved the Law Enforcement and Public Safety Program as part of the "Career Center." R-G.

On August 3, 1999, the BOE approved courses for the 1999-2000 school year for the ABES program and the Law Enforcement and Public Safety Program. The ABES program's courses, e.g., "Algebra I," "Honors English I" and "Honors History II," were more rigorous than the Law Enforcement and Public Safety Program's courses, e.g., "Pre Algebra," "Algebra," "English 9" and "US History II – 20th Century America." R-E.

Substantial differences among the BOE's schools and programs make it difficult if not impossible to reconcile the weights and values of the various courses. Therefore, the BOE has not recognized a valedictorian or salutatorian. Instead, Dr. Adams, the Superintendent of the BOE's school system, has determined an academy's "distinguished student speaker" on the following criteria: (1) at the time of graduation, the academy must have been in operation for a minimum of 4 years, (2) to be eligible a student must have participated in the same academy's program for a minimum of 4 years, (3) the student must have the highest grade point average (GPA) of eligible students, and (4) the student must be of good character. R-1, R-A

In past years, Dr. Adams determined who would be the "distinguished student speaker" and reported the student's name to the BOE. The criteria were not written or formally adopted by the BOE in a policy, etc.

During the 1999-2000 school year, L.M.U. was a freshman in the BOE's school system's Law Enforcement and Public Safety Program, so that she took Law Enforcement and Public Safety Program courses and not the more rigorous ABES program courses. R-F.

During the 2000-01 school year, L.M.U. was a sophomore in the BOE's school system's Law Enforcement and Public Safety Program, so that she again took Law Enforcement and Public Safety Program courses and not the more rigorous ABES program courses. R-F.

During the 2001-02 school year, L.M.U. was a junior in the BOE's school system, she transferred from the Law Enforcement and Public Safety Program to the ABES program and took that program's courses. R-D.

On July 23, 2002, the BOE approved "Career and Technical Programs", including the Law Enforcement and Public Safety Program as a full-time program option. R-C. Thus the BOE has reiterated that the Law Enforcement and Public Safety Program is not an academy program.

During the 2002-03 school year, L.M.U. has been a senior in the BOE's school system's ABES program and she will graduate in a few days.

Dr. Adams, applying the above-described criteria, has determined that I.R. is the ABES program "distinguished student speaker" for the 2003 ABES graduating class.

Petitioners allege that L.M.U. has performed well academically and that she has attained the highest average in her class, so that she and I.R. should both be named "distinguished student speakers." However, unlike I.R., L.M.U. has not been a student in the rigorous ABES program for all 4 of her high school years.

CONCLUSIONS OF LAW

Generally, in administrative adjudication, the claimant bears the burden of persuasion (proof), by the preponderance (greater weight) of the competent and credible evidence of facts essential to his or her claim. See N.J.S.A. 52:14B-10(c); see also N.J.S.A. 2A:84A-1 et seq.; N.J.R.E. 101(b)(1); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); Snyder v. I. Jay Realty Co., 53 N.J. Super. 336, 347 (App. Div. 1958), rev'd in part on other grounds, 30 N.J. 303 (1959); Collins Realty Co. v. Sale, 104 N.J. Eq. 138, 142 (E. & A. 1929).

To succeed in a motion for a temporary restraint and interlocutory injunction, a movant must show that (1) the parties' rights and duties are clear; (2) when the case is fully heard, he or she will probably prevail; (3) if the relief is not granted, he or she will suffer immediate and irreparable harm; and (4) relief can be ordered and limited so that it will not be unfair to another person or party. See, e.g., N.J.A.C. 1:1-12.6; R. 4:52-1; Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982).

Petitioners here claim that the BOE and respondent school system officials should be ordered to designate L.M.U. as a "distinguished student speaker" for the upcoming graduation.

However, the ABES program's courses are more rigorous than the Law Enforcement and Public Safety Program's courses, which L.M.U. took her first two years in high school. Consequently, the above-described criteria for determination of what graduate will be the "distinguished student speaker" appear to be reasonable and fair. Further, presumably, from the past years' practice, the BOE is well aware of the criteria and that it has accepted if not essentially ratified it and petitioners have cited no law requiring the BOE to, e.g., adopt a written policy setting forth criteria. Further, petitioners have not shown that they will be irreparably harmed if the emergent relief demanded is denied.

Given the above-described circumstances, the petitioners have not proven that when the case is fully heard they will probably prevail. To the contrary, it appears that they will fail to succeed in this claim.

ORDER

Consistent with the above, I **DENY** the motion for emergent relief.

The parties may serve discovery requests, and a telephone conference to discuss the progress of the case and a hearing date will be set.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 16, 2003
DATE

JOHN R. TASSINI, ALJ

EXHIBITS

For Petitioners:

P-1 Board resolution: Approval of New Career Center and Salem County Arts, Science and Technology High School Curricula and Curriculum Modifications for the 2000-01 School Year

For Respondents:

R-1 Affidavit of Dr. Adams

R-A Memorandum (relative to honors distinction) from Superintendent William H. Adams, Ed.D., May 17, 2001

R-B Letter (relative to selection of students for distinguished speaker status) from Superintendent Adams to petitioners, June 11, 2003

R-C Board Minutes: Approval to Establish a Law Enforcement and Public Safety Program for the 1997-98 School Year, December 17, 1996; Board Minutes: Approval of Career Curriculum Changes for the 1997-98 School Year, July 15, 1997; Board Minutes: Board Review and Approval of the 2002-03 District Educational Curriculum, July 23, 2002

R-D Transfer Information, School: Salem County Arts, Science and Technology High School, 2002-03 School Year, Term: Marking Period 3, L.M.U.

R-E Board Minutes: Request and Recommendation for Board of Education Approval of the Career Center and the Salem County Arts, Science and Technology High School Curriculum and Curriculum Modifications for the 1999-2000 School Year, August 3, 1999

R-F Official Transcript, Salem County Vocational Technical Schools, L.M.U.

R-G Board Minutes: Request and Recommendation for Board of Education Approval of the Career Center Curriculum for the 1998-99 School Year, August 26, 1998

WITNESSES

For Petitioners:

K.R.R.

L.L.C.

For Respondents:

Dr. Adams

OAL DKT. NO. EDU 4202-03
AGENCY DKT. NO. 213-6/03

K.R.C. AND N.L.C., ON BEHALF OF MINOR CHILD, L.M.U.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, WILLIAM ADAMS AND JOHN CLIFFORD,	:	
RESPONDENTS.	:	

The record of this matter, including the audiotape of proceedings at the Office of Administrative Law, and the recommended Order of Administrative Law Judge (ALJ) have been reviewed.

Upon review, the Commissioner concurs with the ALJ that petitioners have not met their burden of demonstrating entitlement to extraordinary relief. Like the ALJ, the Commissioner finds that petitioners have not generally satisfied established criteria for the granting of such relief, and in particular that they have not shown a likelihood of prevailing on the merits of a claim that respondents' actions in not selecting L.M.U. as a "distinguished student speaker" at graduation were arbitrary, capricious or contrary to law. Consequently, there are no grounds on which the Commissioner may direct interim relief pending a final determination on the merits of this matter.

Accordingly, the Commissioner adopts the ALJ's Order Denying Emergent Relief and directs that this matter proceed, if petitioners wish to continue its pursuit, in accordance with the instructions of the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/03

Date of Mailing: 6|18|03

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

299-03

299-03E

C.M., on behalf of minor child, D.S.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

June 20, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 4147-03

AGENCY DKT. NO. 176-6/03

C.M. O/B/O D.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,

Respondent.

Charles R. Iannuzzi, Esq., for petitioner

Thomas Campo, Esq., for respondent

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

STATEMENT OF THE CASE

Petitioner, C.M., on behalf of her minor son, D.S., appeals from a decision of the Respondent, Board of Education of the City of Woodbury, precluding D.S. from participating in the Woodbury High School graduation ceremony scheduled for the week of June 23, 2003. The Petitioner claims that the Board's determination is arbitrary, capricious and unreasonable. The Board asserts that D.S.'s egregious behavior as a student justifies this action, which is a valid exercise of the Board's authority.

PROCEDURAL HISTORY

Petitioner's appeal petition and request for emergent relief was filed with the Commissioner of Education on June 2, 2003. The Commissioner determined this dispute to be a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13 and transmitted it to the Office of Administrative Law, where it was filed on June 9, 2003. Oral argument on the emergent petition was scheduled and conducted on June 16, 2003. The parties also advised at that time that no other issues remain once the emergent relief matter is resolved. Witnesses and documentary evidence was presented at that time.

EVIDENCE

Judith Wilson, Superintendent, testified on behalf of the Board. She testified that on January 7, 2003, D.S. appeared before the Board for a disciplinary hearing involving alleged incidents of verbal and physical sexual harassment in December 2002. The Board upheld the sexual harassment charges against D.S. and passed a resolution on January 7, 2003, stating that D.S. be placed in an alternative education program. R-3. The resolution also prohibited D.S. to be on school grounds or participate in school activities or senior privileges. Finally, the resolution states:

> A determination on whether the student may walk in the Woodbury High School Graduation Ceremony is dependent on credit completion and behavior will be made by the Board no later than June 10, 2003.

On January 8, 2003, Wilson sent a letter to C.M. concerning her son D.S. and the actions by the Board on January 7, 2003. The letter outlined the resolution and likewise stated that the "Board will evaluate [D.S.'s] academic and behavioral progress before June 10th in order to determine whether or not he will be permitted to walk in graduation ceremonies, if he has indeed met his credit requirements." R-1.

Wilson testified that the January 7 decision to send D.S. to an alternative school was a result of the sexual harassment charges and also due to his past disciplinary record. D.S.'s suspensions are listed in R-5, and include numerous incidents between September 2002 and

December 2002 such as using profanity, stating there was a bomb during a fire drill, pulling a fire alarm and locking a substitute teacher out of the classroom.

D.S started at the Gloucester County Alternative School in late January or early February 2003. On February 19, 2003, Wilson received a phone call from the Principal of the alternative school. The Principal advised Wilson that he terminated D.S.'s placement at the school because D.S., while on a school bus, possessed a controlled dangerous substance with the intent to distribute. The Principal advised Wilson of this termination in writing on February 20, 2003. R-2. D.S. was then provided homebound instruction for the remainder of the school year.

Wilson testified that it was the fact that D.S. was terminated from the alternative school that resulted in her decision not to allow D.S. to walk in the graduation ceremony. She testified that had he completed his education at that school and had good behavior that he would have been able to walk in the ceremony. Wilson did not speak to D.S.'s tutor in the homebound instruction to see how his behavior was for the remainder of the school year. She admits that there were no behavioral problems reported to her from the tutor.

Wilson advised the Board of the fact that D.S. was terminated from the alternative school and of his placement in homebound instruction. The Board, however, never affirmatively took action prohibiting D.S. from walking in the ceremony, except for its January 7, 2003, resolution on the subject. Wilson testified that she alone made the decision not to allow D.S. to walk at the ceremony because in her opinion there was no basis to allow D.S. to walk at the graduation in light of the Board's January 7, 2003, resolution. Wilson admitted to not advising C.M. in writing or verbally regarding the decision not to allow D.S. to walk in the ceremony.

Wilson testified that it would send the wrong message to the community and to the students if D.S. were allowed to walk in the ceremony. She said that the graduation ceremony is more then just a ceremony but is a forum that reinforces and upholds high academic and civic standards. She said that allowing D.S. to walk in the ceremony would undermine those standards.

C.M. and D.S. testified in support of the Petitioner's case. C.M. testified that she found out about Wilson's decision not to allow D.S. to walk in the ceremony through D.S.'s tutor. She testified that she was never advised by Wilson in writing or verbally. C.M. thought she would be entitled to another hearing before the Board prior to this decision being implemented since the January 8, 2003, letter from Wilson says that the "Board" will re-evaluate D.S.'s behavior to see if walking in the ceremony is appropriate.

Importantly, C.M. testified that D.S. was found not-guilty in a criminal court for the drug possession/distribution charge that resulted in his termination from the alternative school. C.M. testified that she did not appeal the decision by the alternative school to terminate D.S.'s placement because she was happy with the homebound instruction that D.S. was receiving. C.M. also disputed D.S.'s responsibility for the pulling of a fire alarm that resulted in his suspension in the fall of 2002.

C.M. also testified that the tutor of D.S.'s homebound instruction has advised her that D.S. has been working really hard and doing well. She stated that D.S. is going to a college in Pittsburgh on a scholarship. Finally, C.M. testified to how she and her family had been looking forward to D.S. walking in the ceremony.

D.S., a 17-year old student, testified that he wants to walk in the ceremony because of his accomplishments in school, including his contributions to the football and track team. He noted that it is important for him to walk in the ceremony because many of his friends dropped out of school and the ceremony highlights his ability to finish. D.S. testified that the person he was alleged to have sexually harassed in December 2002 will not be at the ceremony.

D.S. denied responsibility for the drug charge that led to him being terminated from the Alternative School. He also denied responsibility for some of the incidents that led to suspensions in the fall of 2002.

ANALYSIS

The Board's action is accorded a presumption of reasonableness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd*, 46 N.J. 581 (1966).

The evidence before me clearly demonstrates that the action of the Board at its January 7, 2003, meeting was reasonable. There was no affirmative showing by the Petitioner that the Board acted arbitrarily, capriciously or unreasonably in transferring D.S. to an alternative school, prohibiting him from school grounds, and stating that whether he can walk at the graduation ceremony will be dependent on his future behavior.

The future behavior that resulted in Wilson deciding not to allow D.S. to walk was the fact that he was terminated from the Alternative School. The only knowledge she has of what caused this termination was a brief conversation she had with the school's principal who stated that D.S. possessed and intended to distribute drugs on a school bus.

D.S. was charged criminally in juvenile court for this same action that resulted in him being terminated from the Alternative School. Counsel for D.S., who was also his counsel in the criminal drug proceeding, advised me that the drug charges were dismissed against D.S. in juvenile court. Counsel for the Board did not contest this fact.

Despite the charges being dismissed, Wilson thought it was still appropriate to not allow D.S. to walk at the ceremony because he was terminated from the alternative school. Essentially, the Board is contending that the fact that D.S. was kicked out of that school indicates there is some evidence of D.S.'s guilt and this justifies its action in not allowing D.S. to walk. However, the only competent evidence before me is that this charge was dismissed in a juvenile court and that D.S. continues to deny responsibility. The Board, on the other hand, has no competent evidence that D.S. was culpable for the actions that led to his dismissal from the alternative school. The fact that D.S. was terminated from that school, by itself, is not sufficient to show that he engaged in improper behavior, especially in light of the dismissal of the juvenile charge

and D.S.'s denial of culpability. Notably, the Board choose not to present potentially competent evidence on this issue of D.S.'s responsibility in the drug charges, *i.e.* calling the principal of the alternative school as a witness, etc.

Wilson's decision to go ahead with not allowing D.S. to walk in the ceremony in light of the dismissal of the juvenile complaint is arbitrary, capricious and unreasonable. She should have investigated the decision of the alternative school principal further after the juvenile charges were dismissed. Wilson also should have gone back to the Board and had them evaluate D.S.'s behavior since the January 7, 2003, resolution. Indeed, the January 8, 2003, letter to C.M. stated that the "Board would evaluate" D.S.'s behavior before June 10 to determine whether he can walk at the graduation ceremony.

CONCLUSION AND ORDER

I conclude that the Petitioner has established that the Board's action was arbitrary, capricious and unreasonable. I hereby **ORDER** the decision of the Board prohibiting D.S. from walking at the Woodbury High School graduation ceremony be **REVERSED** and that the relief requested by the Petitioner be **GRANTED**.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 17, 2003
DATE

DOUGLAS H. HURD, ALJ

/lam

WITNESSES

For Petitioner:

C.M.

D.S.

For Respondent:

Judith Wilson, Superintendent

DOCUMENTS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 January 8, 2003 letter from Wilson to C.M.

R-2 February 20, 2003, letter from Principal of the alternative school

R-3 Board Resolution

R-4 February 27, 2003, memorandum regarding homebound instruction

R-5 D.S.'s suspension record

OAL DKT. NO. EDU 4147-03
AGENCY DKT. NO. 176-6/03

C.M., on behalf of minor child, D.S.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law (OAL) and the Order of the Administrative Law Judge (ALJ) granting emergent relief, have been reviewed.

Upon such review, the Commissioner agrees with the decision of the ALJ as he is persuaded that, under the circumstances existing here, petitioner has satisfied the requisite standards entitling her to the relief she seeks.

Accordingly, the recommended Order of the ALJ granting petitioner's Motion for Emergent Relief is adopted. In that the parties are in agreement that, with the issuance of the Commissioner's decision herein, there are no remaining issues requiring adjudication, the instant Petition of Appeal is hereby dismissed and the OAL is requested to return the file to the agency.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|20|03
Date of Mailing: 6|20|03

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

300-03

#300-03E

VINCENZA RATTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

June 20, 2003

PAUL S BARBIRE ESQ
9 LINCOLN AVENUE
RUTHERFORD NJ 07070
(201) 939-4868
Attorney for the **CARLSTADT-EAST RUTHERFORD REGIONAL BOARD OF EDUCATION**

Vincenza Ratto, Petitioner vs. Carlstadt-East Rutherford Regional Board of Education, and Dr. Samuel G. Feldman, Superintendent of Schools, Respondents	**ORDER** OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO.: EDU 5636-03 AGENCY DKT. NO.: 214-6/03

This matter having been brought before the Office of Administrative Law by Notice of Motion for Emergent Relief with supporting affidavits and letter brief by Maycher Lynch, LLP attorneys for petitioner and the respondent, Carlstadt-East Rutherford Regional Board of Education through its attorney Paul S. Barbire, Esq. having filed a response to the Motion for Emergent Relief and the Court having read the papers filed and for the reasons stated on the record at the Office of Administrative Law, 33 Washington Street, 15th Floor, Newark, New Jersey **ORDERS** as follows:

The petitioner's request for emergent relief be and is hereby denied.

This Order may be reviewed by the Commissioner of Education either upon interlocutory and/or emergent review pursuant to N.J.A.C.1:1-14.10, or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6.

Dated: June 19, 2003

, A.L.J.

OAL DKT. NO. EDU 5636-03
AGENCY DKT. NO. 214-6/03

VINCENZA RATTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

Petitioner's application for emergent relief was opened before the Commissioner of Education on June 13, 2003. Therein, petitioner sought to participate in graduation ceremonies scheduled for June 23, 2003, notwithstanding that she has not demonstrated proficiency in the mathematics portion of the High School Proficiency Assessment (HSPA) or the Special Review Assessment (SRA). The matter was immediately transmitted to the Office of Administrative Law (OAL), whereupon, a hearing was conducted on June 18, 2003. At that time, the Administrative Law Judge (ALJ) issued an oral Order recommending that the requested relief be denied, which was memorialized by written order dated June 19, 2003.

Upon review of the audio tape of the emergent hearing conducted at the OAL and the recommended Order of the ALJ, the Deputy Commissioner, to whom this matter has been delegated for hearing pursuant to *N.J.S.A.* 18A:4-33, concurs that emergent relief is properly denied. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the Deputy Commissioner adopts the recommended Order of the ALJ. This matter shall continue at the OAL for those proceedings which may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

DEPUTY COMMISSIONER

Date of Decision: 6/20/03

Date of Mailing: 6/20/03

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

304-03

IN THE MATTER OF THE TENURE :
HEARING OF LORRAINE BANKS, :
STATE-OPERATED SCHOOL DISTRICT OF :
THE CITY OF NEWARK, ESSEX COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

June 24, 2003

AGENCY DKT. NO. 113-4/03

IN THE MATTER OF THE TENURE HEARING OF LORRAINE BANKS, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

This matter was opened before the Commissioner of Education on April 17, 2003 through the certification of tenure charges alleging excessive absenteeism and unbecoming conduct against a tenured teacher employed by the State-operated School District of the City of Newark (hereinafter, "District").

The Commissioner directed respondent, via both certified and regular mail on April 17, 2003, to file an Answer to the tenure charges against her.[1] This communication from the Bureau of Controversies and Disputes clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been a submission by the charged employee of a responsive filing indicating that she does not contest the charges, **will** result in the charges being deemed admitted by the charged employee.

[1] The notice sent via certified mail was returned as "unclaimed."

On May 13, 2003, well outside the 15-day period provided by regulation and without obtaining an extension of time in which to answer, Ms. Banks responded to the charges.[2] By letter dated May 14, 2003 from the Bureau of Controversies and Disputes, respondent was afforded the opportunity to provide reasons for her untimely filing and her failure to request an extension, as well as to address why the Commissioner should not, under these circumstances, deem the charges brought by the District to be admitted. Respondent submitted a response to this request by letter dated May 20, 2003. In essence, she states that she has been beset by a series of family losses over the years which have contributed to her poor performance, and that she was away from home when the initial notice of charges was sent by the Bureau of Controversies and Disputes. Respondent reiterates that she has suffered from Post Traumatic Stress, but that she is currently in control of her stress, has undergone counseling and is feeling

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[2] In her responsive filing, respondent states, in full:

> This written letter is my response to the "tenure" charges filed by the Commissioner's office [sic] on April 17, 2003.
> I deeply regrett [sic] that these charges are filed. I've been teaching in Newark for many years – my records of teachings were always "Excellent" if not good. I have always loved children and I am a good person, as well as a good teacher. However, in the past few years of my teaching profession I've sufferred [sic] some misfortunes, and personal illness.
> I deeply hope my tenure isn't taken because I've worked soo [sic] hard to achieve it.
> Please accept my sincerest apologies for any unprofessional behavior or conduct that may have caused the state to file charges against me.
> I would deeply regrett [sic] losing my tenure, even my employment with the Newark School District.
> I still love children, respect them and want to continue to teach should the State Commissioner grant me a second chance.
> Please write me soon so I may know my status ("job") once a decision has been made on my behave [sic]. "Thank you."
> Sincerely, Lorraine Banks ***

Two post scripts from the letter state:

> Currently, I am physically and emotionally stressed – suffering from Post Traumatic Stress, "P.T.S." since the year 2000. I can provide medical records if needed by the State Board of Education proving the poor health I have. Thank you. Lorraine Banks.
> Please excuse my late response to the charges filed against me.

much better. She asserts that she would like "a second chance to prove I am productive, and can teach again." (Banks' Letter, May 20, 2003 at 2)

In reply, the District contends that, pursuant to *N.J.A.C.* 6A:3-5.3(c), the charges against respondent should be deemed admitted. In this connection, the District argues that respondent's filing on May 13 should be considered untimely, as it was submitted 11 days late, with no explanation for such lateness. To the extent respondent argues that she was away from home at the time the charges were certified to the Commissioner, the District counters that respondent was on notice since March 18, 2003, the date the District actually filed tenure charges against her, that the District would consider certifying such charges to the Commissioner. (District's Reply at 3-4)

If, however, respondent's submission is considered, the District asserts that, substantively, respondent does not, in her Answer, "indicate that she disagrees with the charges or that they are false." (*Id.* at 3) The District continues,

> In fact, her Answer amounts to an apology for her excessive absenteeism, blaming "misfortune and personal illness" for her poor attendance record. Instead of challenging the veracity of the charges, Respondent asks the Commissioner to "grant her a second chance." Since there is absolutely no indication that Respondent contests the charges, the District's view is that Respondent's Answer should be deemed an admission of the charges. (*Ibid.*)

Upon review, the Commissioner initially notes that the pertinent regulations regarding answers to tenure charges provide:

> Where no answer is filed within the requisite time period and no request for an extension is made, or such request is denied by the Commissioner, or where the charged employee submits an answer or other responsive filing indicating that he or she does not contest the charges, the charges shall be deemed admitted by the charged employee. *N.J.A.C.* 6A:3-5.3(c).

Therefore, even assuming, *arguendo*, that respondent's submission of May 13, 2003 was timely filed, the Commissioner concurs with the District's view that respondent does not challenge any of the specific facts which underlie the tenure charges in this matter, notwithstanding that she clearly expresses her dismay that such charges were, in fact, filed against her. Consequently, pursuant to *N.J.A.C.* 6A:3-5.3(c), the Commissioner finds that respondent does not contest the tenure charges brought by the District.

The Commissioner's review of the tenure charges certified against respondent by the District and the statement of evidence in support of those charges indicate that from September 1995 through September 2002, respondent was absent from her duties a total of 443 days, as follows:

- In the 1995-1996 school year, respondent was absent 22 days;
- In the 1996-1997 school year, respondent was absent 15 days;
- In the 1997-1998 school year, respondent was absent 26 days;
- In the 1998-1999 school year, respondent was absent 73 days;
- In the 1999-2000 school year, respondent was absent 66 days;
- In the 2000-2001 school year, respondent was absent 83 days;
- In the 2001-2002 school year, respondent was absent 154 days; and
- In September 2002, respondent was absent 4 days.

The District avers, and the record demonstrates, that respondent has been repeatedly advised that her attendance is unsatisfactory and in need of improvement. It further contends that respondent's absenteeism has resulted in a disruption in the continuity of instruction to the pupils in the District. (Tenure Charges at 1-2)

The Commissioner recognizes that the enabling statute provides that tenured staff shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause***." *N.J.S.A.* 18A:6-10. Deeming the above charges to be admitted, and noting that respondent does not deny the specific allegations contained therein, the Commissioner finds that the District has demonstrated that respondent's pattern of

excessive absences, and its resultant negative impact on the District, constitutes conduct unbecoming a teaching staff member sufficient to warrant her dismissal.

IT IS ORDERED this 25th day of June 2003 that summary decision shall be granted to the District, and respondent shall be dismissed from her tenured position as a teacher in the District's employ as of the date of this order. This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[3]

COMMISSIONER OF EDUCATION

Date Decided 6/24/03
Date Mailed 6/25/03

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

305-03

305-03

IN THE MATTER OF THE TENURE	:	
HEARING OF SABINO VALDES,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF UNION CITY, HUDSON COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board certified tenure charges of unbecoming conduct and insubordination against respondent plumber.

Following 25 days of hearing and the testimony of many witnesses, the ALJ determined that on a variety of occasions between April 1999 and extending into early 2002, respondent acted in an unbecoming manner, was insubordinate to his superiors by failing to comply with their lawful directives, abused sick leave and, with his lies and unsubstantiated charges of discrimination and corrupt behavior against the Board, became an obstacle to the efficient operation of the School District. The ALJ concluded that the Board proved by a preponderance of credible evidence that respondent was guilty of the tenure charges and ordered his removal from his tenured position.

Having reviewed the record, including the transcripts of the hearing and the ALJ's credibility determinations and judgments concerning the witnesses, the Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner concurred that the appropriate penalty was dismissal. He ordered respondent dismissed from his position as of the date of this decision.

June 24, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3620-01
AGENCY DKT. NO. 328-9/00

IN THE MATTER OF THE TENURE HEARING OF SABINO VALDES, BOARD OF EDUCATION OF CITY OF UNION CITY, HUDSON COUNTY

Thomas R. Kobin, Esq., for petitioner Union City Board of Education (Chasan, Leyner, Bariso & Lamparello, attorneys)

Sabino Valdes, *pro se*, respondent

Record Closed: December 27, 2002 Decided: May 15, 2003

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

This matter was transmitted by the Department of Education to the Office of Administrative Law (OAL) on May 7, 2001, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13 and was heard by the undersigned during 2001 and 2002. Several adjournments were granted due to a variety of reasons, including efforts to settle, witness unavailability and changes in counsel.

Posthearing proposed findings of fact and replies thereto have been submitted and the following is my Initial Decision. By Order of Extension, the time within which to submit this Initial Decision was extended to June 26, 2003.

FINDINGS OF FACT

Voluminous posthearing proposed findings of fact and conclusions of law, and replies, were filed totaling hundreds of pages with attachments. The hearing, itself, took up all or part of over 25 days and included testimony of many, many witnesses. Large portions of the testimony turned out to be either repetitive or essentially tangential to the basic issue in the case—whether the Board of Education of Union City proved by a preponderance of the credible evidence that Sabino Valdes was insubordinate and/or engaged in conduct unbecoming a tenured employee as charged. Rather than repeat the testimony, I believe it to be appropriate to make specific **Findings of Fact** in seriatim form which cover the fundamental matters involved and then to discuss their consequences:

1. Petitioner is a body corporate and politic of New Jersey and charged with the statutory and constitutional obligation to operate and administer the public schools within its boundaries in such fashion as to deliver a thorough and efficient system of education to the students attending its public schools.

2. Respondent, Sabino Valdes, is a New Jersey licensed master plumber who was hired by the petitioner in 1994 in the position of plumber and enjoys tenure status.

3. The following persons who testified at the hearing had relevant interactions with respondent:

    a) Carl Johnson, Board Secretary, who has served in that position for over 14 years and employed for over 33 years. Johnson is the Board's chief financial officer and custodian of school records, and also oversees the non-instructional activities of the Board, including maintenance.

b) William F. Hogan, who was Director of Buildings and Grounds prior to June 30, 1999 and was Valdes' immediate supervisor. In July 1999, Hogan became Director of Facility Planning and Development.

c) John E. Knudsen, who succeeded Hogan as Director of Building and Grounds. Like Hogan, Knudsen's primary responsibilities were to manage the maintenance department, which included overseeing maintenance personnel (including Valdes). Prior to becoming employed by the Board, Knudsen had been a member of the Union City Police Department for 22 years where he achieved the rank of captain. During most of his employment with the Board (he left its employ at the end of June 2002), he directly supervised Valdes and in that capacity he met with him and other maintenance staff nearly every morning in the facilities office to distribute work assignments. Knudsen's duties also included supervision of Valdes and others "in the field" where he oversaw their work and determined whether additional equipment or tools were needed. Knudsen, like Hogan, conducted annual evaluations for the maintenance employees and office staff under his control, including Valdes, and typically completed those evaluations in March or April each year.

d) Gerald Caputo has been employed by the Board for over 30 years. He was a teacher for 26 years and the Assistant Principal of Edison Elementary School from August 1999 until December 2000, when he was appointed Executive Director of Facilities and Safety while Knudsen was on leave. Caputo also has been a vice-president of the Union City Education Association since 1988.

e) Alberto Pita was employed by the Board in June 1995 as a maintenance person and later became a plumber.

f) Joseph Chieco was employed as a maintenance person in the facilities department and subsequently was appointed to the position of security guard.

g) Frank Cocuzza is a representative of the New Jersey Education Association (NJEA), Valdes' labor representative. In that capacity Cocuzza assists members in collective negotiations, arbitrations and filing grievances.

4. Prior to the spring of 1999, the Board never had any disciplinary issues with Valdes. However, in the spring of 1999, Valdes was out of work on the following 28 school days: April 5, 6, 28, May 7, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, June 1, 2, 3, 4, 7, 8, 9, 10, 11, 14 and 16. Some of those absences were covered by notes from a chiropractor who was treating Valdes; many were not.

5. Valdes utilized at least some of those sick days to campaign on behalf of Neftali Cruz who had been a Board employee in the facilities department. Valdes assisted in Cruz's campaign for Hudson County Freeholder in 1999 and was his campaign manager.

6. The Hudson County Freeholder primary election was held on June 8, 1999. Valdes returned to work on June 17, 1999.

7. An independent private investigation firm hired by the Board to surveille Valdes verified some of his activities on behalf of the Cruz campaign. They observed him on May 25, 26 and June 1, 1999, all regular work days. This included videotaping Valdes during work hours on May 25, 1999 when he was traveling to Cruz's home. On that same day, Valdes, dressed in a suit and tie, traveled around Union City interacting with various people without displaying any overt signs of physical problems.

8. On May 26, 1999, Valdes was videotaped leaving his home at 7:58 a.m., driving Cruz's car. He dropped the car off at Cruz's home, and then went to a diner until 9:47 a.m. He did not report for work that day.

9. On June 1, 1999, Valdes was again videotaped. He left his home in Paramus at 9:07 a.m. and traveled to Cruz's home. Cruz and Valdes left Cruz's home at 1:21 p.m. and proceeded to drive to another location in Union City, where Valdes

and Cruz stayed for about 15 minutes. They then came out, picked up additional passengers and drove off. This day, too, was a regular work day.

10. Alberto Pita also observed Valdes in Union City on five separate occasions during work hours on days Valdes allegedly was out sick. One of these days was Primary Election Day, June 8, 1999, a work day.

11. On at least five separate occasions, including Primary Election Day on June 8, 1999, Joseph Chieco also observed Valdes traveling around Union City during work hours.

12. Valdes' explanation for use of some of his sick days in 1999 to campaign for Cruz rather than report for work was that although he had a cervical neck condition which prevented him from doing strenuous physical work, he could engage in campaigning which was not physically stressful.

13. During April-June 1999, Valdez had been relieved of having to perform significant physical labor at work because of his cervical condition and, at that time, basically was working on developing computer software for a preventative maintenance program. He was engaged, as well, in ordering materials and giving out assignments. Thus, virtually all the functions he carried out in this period while at work were non-physical in nature. Indeed, in his evaluation of Valdes in April 1999, Hogan suggested he also spend more time "in the field."

14. Although Valdes produced notes relative to that time frame, they do not support his claim that he was capable of campaigning, but not capable of continuing to carry out the non-physical duties he had been allowed to perform. For example, although respondent produced chiropractor's notes which recommended that he take some days off from work, he proceeded to take many more days.

15. A chiropractor's note, dated May 27, 1999, submitted in response to a request from Johnson, indicated that Valdes "is under care in this office for a spinal related condition" and that "normal work activities as described by the patient are slowing the progress of his healing." However, the note contains no explanation

of what Valdes' "normal" work duties were at that time, which essentially were non-physical.

16. On June 17, 1999, immediately upon his return from sick leave, Valdes and Chieco had a shouting match at Washington Elementary School.

17. During a discussion with Hogan later the same day about this incident, Valdes, according to Hogan, said, "If this is the way it's going to be ... let the games begin." Valdes admits this conversation took place, but claims he stated, "[I]f it is games that you guys want to play, then I'm going to have to defend myself." Hogan sent an e-mail documenting his version of the event contemporaneously with its occurrence.

18. On October 5, 1999, at a hearing held with Valdes and his NJEA representative, Cocuzza, concerning the allegation that Valdes abused sick days by engaging in activity that exhibited he was in good enough health to have come to work instead, Valdes admitted these activities.

19. By letter dated November 16, 1999, the Board, through Johnson, advised Valdes that because of his conduct, his pay would be "docked" for five days (May 25, 26, June 1, 2 and 8, 1999) of the 28 days he was absent.

20. Valdes challenged the five-day pay dock through the contractual grievance process, but the grievance has never been decided due to superseding events.

21. Given the distinctly limited nature of the physical aspects of the duties assigned to him by Hogan, Valdes' utilization of so many sick days during which time he was observed actively engaged in assisting Cruz in his campaign was an abuse of his sick leave entitlement.

22. Prior to November 18, 1999, the Board provided uniforms for custodians. Valdes customarily wore shoes or boots and pants necessary to his type of work.

23. Board policy (not always enforced) required that maintenance and custodial employees wear a uniform, which consists of a T-shirt that says "Union City

Board of Education" and Board-issued paints. In winter, a long-sleeved shirt was supplied and employees could choose to wear jeans.

24. On November 18, 1999, after receiving the November 16 disciplinary letter from Johnson docking his pay for five days, Valdes reported to work wearing a sports jacket, dress shirt, tie, dress slacks and dress shoes. When questioned by Knudsen about his inappropriate attire (he was no longer on limited duty), he replied he was dressing that way in his "supervisory" position.

25. Valdes explained to Knudsen that he interpreted the November 16, 1999 letter from Johnson as describing his position with the Board as "coordinator of plumbing." The letter had noted the primarily non-physical activities which Valdes was performing in April-June.

26. Knudsen told Valdes he was not a coordinator and should resume his normal duties and change back into normal work attire. Valdes disregarded his supervisor's directive, refused to change clothes, remained seated in the office and demanded that Knudsen put his direction in writing.

27. In further disregard of Knudsen's order immediately to change into work clothes and go to work, Valdes sought assistance from his NJEA representative who was not then available.

28. Sometime after 10:30 a.m. that day, Valdes returned to the facilities office still dressed in business-type attire. When Knudsen told him he could not acknowledge him as working unless he changed clothes, Valdes left the office. Only later, after Cocuzza advised Valdes to put his uniform on and return to work, did he do so.

29. On November 18, 1999, Knudsen was Valdes' supervisor and respondent knew or should have known that rejecting or ignoring his supervisor's directive, especially in the manner he did, constituted insubordination. Valdes admitted, "I didn't know too much about insubordination, but I know that when our boss says something, you have to do it."

30. Valdes knew his attire that day was inappropriate and by his obstreperous conduct he further disregarded the directive of his supervisor. In a letter dated November 22, 1999, Valdes admitted that even after being told to change, "My decision was to continue performing my job duties [and not obeying the order] until I spoke with my association representative."

31. On November 24, 1999 at approximately 9:00 a.m., Knudsen saw Valdes at Union Hill High School and observed him wearing a collar shirt, a cloth vest and slacks, which were not Valdes' customary work attire as a plumber. When questioned by Knudsen about his attire, Valdes, again in disregard of the clear direction of his supervisor concerning how to dress at work, responded he first would be obliged to contact his union representative about it, which he did. Valdes later told Knudsen that the representative advised him to change into his customary work clothes.

32. On January 19, 2000, Knudsen twice paged Valdes between the hours of 3:30 p.m. and 3:45 p.m. regarding a broken pipe at Wilson Elementary School. At 3:48 p.m., when Valdes contacted Knudsen on his cellular phone, Knudsen asked where he then was located and respondent replied he was at home because his working hours were from 7:00 a.m. to 3:00 p.m., not 4:00 p.m.

33. To the contrary, all maintenance department personnel, including plumbers, were required by their labor contract to work from 7:00 a.m. to 4:00 p.m., unless the employee received special permission to work through lunch, which Valdes did not do that day. Thus, he was aware he was not permitted to leave work until 4:00 p.m.

34. Previously, at a meeting held on January 11, 2000 with his union representatives, Valdes, according to a letter dated January 18, 2000, from his grievance chairperson, raised a "number of issues surrounding an ongoing dispute with [his] supervisors, a dispute which began when the Board Secretary/Business Administrator challenged sick days taken by [Valdes] in November 1999." One of the issues Valdes raised at the meeting was his hours

of work and the letter, sent one day before the January 19 incident with Knudsen at Union Hill High School, explained that:

> From the first day of your employment you have worked in accordance with the latter posting [7:00 a.m. to 4:00 p.m.], as have all other custodian and maintenance personnel in the district.

35. The letter went on to advise Valdes that the 7:00 a.m. to 4:00 p.m. hours constituted an established practice which had remained static through two separate contract negotiations. Notwithstanding the advice and Valdes' established knowledge of his work hours, and in disregard of the collective negotiations contract, policy and practice, he still left work early on January 19, 2000.

36. At a meeting held with Johnson and others on February 14, 2000, Valdes claimed he always left work between 3:45 and 4:00 p.m. This was not true.

37. On February 2. 2000, Valdes discovered that the heater in his regularly assigned school van was not functioning. Thus, he was given another vehicle (a Dodge pickup truck) to use. Soon thereafter, he called Knudsen and complained the dashboard anti-lock brake lights and directional lights were not functioning properly. Knudsen then instructed Valdes to take the vehicle immediately to a designated service center. Instead, in disregard of the directive, Valdes proceeded to the facilities office to pick up a personal letter.

38. Following a discussion concerning the vehicles later that morning, Knudsen told Valdes to take his lunch from 12:00 to 1:00 p.m. Since he had no assigned vehicle to use, Valdes replied, "You are not going to give me my vehicle? What do you want me to do[,] walk? Why don't you give me your vehicle?" Valdes was pacing back and forth in the office and with a raised voice inappropriately kept stating, "Why don't you give me your vehicle? I mean you want me to walk?"

39. After the lunch hour that same day, at about 1:00 p.m., when Knudsen directed Valdes to go back to work, Valdes objected, claiming that he had worked through lunch (apparently because he did not have a car to drive to lunch, but had stayed in the office) and, therefore, he intended to leave work at 3:00 p.m. that day, not 4:00 p.m. Knudsen warned Valdes he would be "written up" if he persisted in his threat to leave work early.

40. In disregard of Knudsen's clear directive, and having been told he was required to work until 4:00 p.m., Valdes left work an hour early. He also called and left a message for Knudsen indicating that he arrived at Union Hill High School at 2:37 p.m. and since he would be leaving work at 3:00 p.m., Knudsen should send Pita to take over. At 2:53 p.m., Mark Novembre, Valdes' assistant, called in to ask what he was supposed to do because Valdes was leaving work at 3:00 p.m., which he did.

41. Thus, beginning on February 2, 2000, and on subsequent days, Valdes called the facilities office incessantly to report his whereabouts. On February 3, 2000, for example, Valdes called in 16 times between 9:25 a.m. and 3:21 p.m.

42. On February 4, 2000, Knudsen told Valdes to stop unnecessarily calling the office so often and told him he should only call if he had difficulty completing an assignment. On that day, he called approximately nine times between 8:55 and 10:28 a.m.

43. Despite Knudsen's directive, Valdes continued to make incessant, unnecessary telephone calls to the office. Between February 4 and February 8, 2000, Valdes made 27 telephone calls.

44. From time to time, Valdes also wore a baseball-type cap that displayed provocative statements above the brim.

45. Some time after September 19, 2001, Valdes' cap displayed the following: "I was betrayed by my union representative." It referred to Caputo, who not only

was Valdes' union representative, he was, as well, Valdes' immediate supervisor since Knudsen then was on leave.

46. On December 13, 2001, Valdes wore a cap to work which stated, "Union City Board of Corruption." Caputo immediately directed Valdes not to wear this cap to work any further.

47. Nevertheless, Valdes wore it to work on December 14, 2001.

48. Caputo then gave Valdes a written directive not to wear the cap. Rather than follow Caputo's clear oral and written directives, Valdes tried to construe the order as prohibiting his wearing it only in the facilities office. Clearly, it was not so limited, which Valdes knew.

49. On December 20, 1999, Knudsen directed Valdes to repair two pumps in the boiler room at Union Hill High School. Valdes threw the work order back on Knudsen's desk and stated, "This is not within my job description." When Hogan, who also was present, reiterated Knudsen's direction to Valdes to perform the assignment, Valdes continued to refuse and contacted a labor representative who, as before, advised him he must complete tasks assigned to him and to grieve later rather than refuse to do so.

50. Nevertheless, in continuing disregard of the directive, Valdes then told Knudsen he was going home because he did not feel well. Later, he sent Knudsen a letter stating he would only do that type of work, which he defined as involving heating, not plumbing, under protest.

51. Valdes' conduct that day was in disregard of his supervisor's directive to perform the assignment since (a) he had repaired such equipment on prior occasions; and (b) he was obliged to obey such directives and grieve if he wished.

52. On January 7, 2000, Knudsen directed Valdes and his then assistant, Octavio Diaz, to install a water fountain on the third floor of Hudson Elementary School. Valdes telephoned Knudsen from the site and requested he be provided with a right angle drill in order to continue the assignment. Since a right angle drill is a

unique tool, Knudsen asked Valdes why he needed this particular type and whether he could perform the job using some other tool or instrument, such as a cordless gun or a speed bit which he would have had.

53. Valdes responded that previously he had given most of his tools to Pita and the other maintenance employees since, as far as he was concerned, his time now was to be devoted primarily to office work and he therefore did not need them. Knudsen then had to make various telephone calls in an attempt to obtain a right angle drill and also to dispatch another maintenance person to help Valdes.

54. When Valdes then called Knudsen to complain that the person sent to help did not have a drill, Knudsen again inquired why Valdes needed a right angle drill and Valdes explained it was a preference plumbers had.

55. Knudsen then had to send Pita to help Valdes complete the job. In respect to this incident, Valdes again turned what should have been a simple assignment into an unnecessarily confrontational and potentially disruptive episode.

56. On the morning of January 20, 2000, Knudsen gave Valdes an assignment at Columbus Elementary School. When Valdes said he needed a helper, Knudsen inquired why he thought so without even having first reviewed the assignment.

57. Valdes then asked what another plumber, Pita, was then doing and Knudsen replied that he and the other employees were working on other assignments.

58. Valdes then proceeded to go to the job site, but called several times insisting upon an assistant and declaring the situation to be an "emergency." Knudsen eventually did send a helper when he was able to do so. This incident again reflects Valdes' propensity constantly to question authority and to dictate which personnel should be doing which job, conduct which tended to disrupt the efficient functioning of the facilities department. Indeed, later that same day, Knudsen received a page from Edison Elementary School regarding a broken pipe and when Knudsen paged Valdes and requested he respond to the

emergency, Valdes again questioned why another plumber could not respond instead.

59. On March 31, 2000, Knudsen asked Valdes to review the annual evaluation he prepared and to sign and return it so he could forward it to Johnson in accordance with required procedures. Valdes refused, stood directly in front of Knudsen's desk and said, "Let's go outside like gentlemen where there are no witnesses." By refusing even to sign, Valdes rejected the explicit legitimate directive of his supervisor.

60. Valdes has written letter after letter unjustifiably alleging harassing and discriminatory treatment against him by the Board and others. His first letter alleging discrimination was on December 13, 1999, and when Johnson responded on December 30, 1999, Valdes disregarded the response and began to bombard Johnson and the Board with letters accusing employees who were in supervisory positions above Valdes of harassment and discrimination. Valdes simply refused to accept or recognize legitimate Board action choosing, rather, to level charges of discrimination, or worse. The Board, some of its members, Johnson and other Board employees, became inundated with letters from Valdes unjustifiably alleging harassment, discrimination, and other difficulties.

61. When Johnson responded to the initial charges raised by Valdes, respondent replied by disregarding Johnson's response and submitting even more letters raising largely the same allegations.

62. Both on February 8 and February 14, 2000, Johnson arranged meetings with Valdes and his representative (Cocuzza) to try to resolve their issues, but Valdes would accept nothing short of complete exoneration. Valdes' obstreperous behavior then continued as he dispatched letter upon accusatory letter to Johnson.

63. Exemples of Valdes' conduct in this regard is a letter he sent to Knudsen on December 3, 1999, wherein he makes the following comments or accusations:

a) Knudsen was "very offensive."

b) Knudsen decided to "demote" Valdes from "plumbing coordinator"

c) Knudsen harassed Valdes based on the following:

1. the use of an exclamation point;
2. asking Valdes to leave Knudsen's office;
3. asking Valdes if a desk Valdes was sitting on was Valdes' desk; and
4. removing Valdes from his "office."

d) Knudsen exhibited a lack of leadership qualities and displayed managerial ineptitude.

(64) In a letter dated December 13, 1999, Valdes accused the Board and its employees of discriminatory actions – a recurrent theme used by Valdes throughout this case. His so-called "support" for this accusation is as follows:

a) Knudsen's "demoting" Valdes (which he did not).

b) Hogan's annual evaluation of Valdes, dated April 30, 1999, wherein Hogan politely and quite innocuously comments: "Although the [preventative maintenance] program is very important, I would like you to spend more time in the field with the men. I don't feel one "plumbing team" is sufficient to maintain/address deficiencies in the District".

c) The same Hogan evaluation where he honestly rates Valdes' ability to accept criticism as "below average".

d) The November 16, 1999 disciplinary letter from Johnson advising of the docking of Valdes' pay.

e) The Board allegedly not reimbursing Valdes $229.50 for a license renewal seminar.

f) The Board's use of a private investigator to verify whether Valdes was properly utilizing sick days.

g) The "delay" in the Board's decision on his unauthorized use of sick days to campaign for Cruz.

h) Knudsen asking Valdes if a desk he was sitting on was Valdes'.

i) Knudsen not allowing Valdes (one of only two plumbers the Board employs) to spend three to five hours per day doing other type work.

j) Knudsen requesting that Valdes vacate an office Valdes had been using.

k) Knudsen's use of the exclamation point in a written response to Valdes.

There is, in short, a complete absence of illegal discriminatory, harassing or other untoward conduct by Johnson, Hogan, Knudsen, the Board or anyone else against Valdes. Simply put, by late 1999 Valdes had become a resentful, disgruntled employee merely because he was docked five days' pay and because his new supervisor perhaps was more "hands on" and did not allow Valdes to continue to schedule his own assignments. Whereas Hogan often allowed Valdes to schedule his own work and to complete tasks the way he, Valdes, wanted; Knudsen, and later Caputo, managed differently. Valdes chafed under Knudsen's and Caputo's managerial style and chose personally to attack them rather than performing his job.

65. In letters dated December 1 and December 10, 2001, Valdes accused Caputo of joining forces with what he described as a "corrupt" Board of Education. Valdes offered no competent evidence whatsoever to support his allegations. Indeed, while Valdes alleged that his application in March 1999 for the position to which Knudsen was appointed purposely was lost, he never even raised this contention until November 1999, after his pay was docked, and months after Knudsen was hired. No reason was offered for this inexplicable delay with respect to an action which directly impacted his employment status. In any case, even if he did

submit an application (which was never found), no proof was offered to support his claim it was lost in a deliberate effort to harm him.

DISCUSSION

The foregoing demonstrate, I believe, that little doubt exists that on a variety of occasions between April 1999 and extending into early 2002, respondent acted in a manner unbecoming a tenured public school employee, was insubordinate to his superiors by failing to comply with their lawful directives, abused sick leave, hurled unsubstantiated charges of discrimination, corrupt behavior and lying against senior Board personnel and, in general, created an intolerable situation wherein his expected performance as a public employee was swallowed up by his propensity to exalt himself into a supervisory-type position which never existed, except primarily in his own mind. His job no longer was about public service, it primarily became all about him.

That Valdes was insubordinate is clear. When told to stop wearing a hat containing a reference which leveled a scurrilous charge of corruption against the Board, he refused. When told to change into attire commensurate with his title, he refused. When told he was not permitted to leave work at 3:00 p.m., he continued to do so. When told to complete a certain repair, he declined to do so. It was not within Valdes' discretion to decide for himself what he would or would not do. As he conceded, even if he disagreed with an order from a superior he was bound to comply with it and, if necessary, file a grievance to challenge it. The decision to ignore directives was not his to make and he ignored them at his peril.

Regrettably, Valdes, who appears to have been a fine employee from his hiring in 1994 to the spring of 1999, suddenly changed. He became, instead, an obstacle to the efficient operation of the school district rather than an asset to it. Perhaps it was due in part to his belief that he, not Knudsen, should have succeeded Hogan as Director in 1999. Perhaps it was due in part to his having arrogated to himself a non-existent job title and come to the conclusion that this justified a significant modification of his basic plumbing responsibilities which the Board refused to recognize. Perhaps it

was prompted in part by his resentment at having, in his own mind, been "singled out" for participating in the Cruz political campaign during work hours. It is difficult to fathom why he so abruptly changed for the worse, but change he did.

Particularly symptomatic of Valdes' conversion in 1999 from a valued employee to one whose continued employment became problematic were his constant letters to Knudsen, Johnson and others and his eventual "falling out" with Caputo. As noted, after receiving the letter of November 16, 1999 from Johnson regarding the five-day docking of his pay, Valdes embarked on a campaign of letter writing falsely charging discriminatory treatment, harassment, official corruption and lying. The tone and content of those letters became even more strident in 2001 when renewed efforts to settle the tenure case following the Commissioner's rejection in October 2000 of an initial settlement agreement broke down. At that point, Valdes began to unleash a veritable barrage of accusatory missives whose main objective seems to have been an effort to destroy the reputation of those senior Board employees and members who he imagined had wronged him – especially Johnson. The following are exemplars of this intolerable conduct taken from letters dispatched by Valdes to the Board, the Superintendent of Schools, Johnson, Knudsen, Hogan and others:

(a) "In the past year ... I have endured discrimination, harassments, defamation of character and invasion of my families private rights. These actions have been orchestrated by ... Johnson and executed by ... Knudsen [and] ... Hogan...."

(b) "Mr. Johnson has clearly made this a personal quest. I believe all of these actions have been racially motivated..... I believe Mr. Johnson did not want a black employee in a managerial position."

(c) "It makes me feel uneasy [that Johnson] can fabricate evidence, [and] manipulate employees to make false statements...."

(d) "The [Board] has demonstrated a clear pattern of malice in their efforts to take away my achievements.... They are using discrimination tactics to hinder my growth."

(e) "Your [Caputo] participation in the Board's scheme to fire me is obvious.... The Board's actions have been malicious."

(f) "I believe the Board has purchased your [Caputo's] ethics...."

(g) "You [Johnson] instructed [Knudsen] to manufacture evidence to destroy my personnel file.... The ... wrong doings ... spotlight a corrupt organization."

(h) "He [Knudsen] seems to be obsessed with tarnishing my reputation."

(i) "The Board's intentions are to discredit my employment history ... by means of discrimination and character defamation."

(j) "Like in my previous letters, I am asking the Board to stop their discriminatory action."

(k) "My letters have been a way of relieving my pains and suffering from all the Board's malicious actions."

(l) "I hope the harassments discontinues and the Board decides to make use of my abilities instead of striving to tarnish them."

(m) "My allegations of a conspiracy between you ["Caputo"] and the Board I believe have erupted [*sic*] your latest attempts to emulate [Knudsen's]

harassments via fabricate charges.... All I could do at the time is continue to document your unethical behavior."*

(n) "I can't understand your [Knudsen's] decision to handicap a program that has taken almost five years of dedication to establish. I fail to understand [contrary to the collective negotiations agreement] you decide to demote me from plumbing coordinator to the duties of plumber without a just cause."

(o) "Even though I am no longer under the supervision of [Knudsen] his intimidation tactics continue."

(p) "Mr. Hogan outright lies in a letter where he claims Mr. Chieco never confronted him in a violent manner. This letter was written in an attempt to cover up a verbal assault which went totally ignored by Mr. Hogan."

(q) "My working environment continues to become more and more uncomfortable. I have to work around certain employees with bad intentions, a believed unstable supervisor and a Director who lied to possibly cover up violent assaults...."

(r) "Why did you [Hogan] lie in your memo?"

(s) "Now you [Johnson] come out in full armor to defend Mr. Hogan against my accusations, an employee who has obviously lied. Why do you treat my petitions with so much bias and stand up for a dishonest manager, a believed unstable supervisor and an employee who was released from his prior employer for suspicions of theft?"

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* The foregoing examples ((a) to (m)) of false accusations leveled by Valdez against a variety of persons all are extracted from his own exhibits. The remainder are taken from exhibits attached to the Board's amended charges.

(t) "I also avoid any form of communication every morning with [Hogan] or [DiFrancisco]. They tend to take the truth and twist it around to make themselves look like the victims, while protecting their dishonest confidants. This observation is clearly confirmed in Mr. Hogan's deceitful and irresponsible memo. The malicious actions by these individuals have left very little chance for any reconciliation."

(u) "I believe Mr. Johnson has used the misfortune of certain individuals to fabricate certain changes against me after I applied for [Knudsen's] position.... It is not easy being portrayed as a dangerous aggressive person."

(v) "As you [Caputo] know the Board has filed tenure charges against me. These charges were fabricated by an unstable supervisor with a license to carry a gun and co-workers with shady past. [Johnson] hired a private investigator to film my family after I applied for the position of [Director of Building and Grounds]. An ex-convict with a disqualifying record and an employee released from his prior employer for suspicion of theft fabricated a charge that got me suspended. An aggressive employee who threatened a supervisor also accuses me of threatening him and received a promotion following my suspension. A director lied in a letter I believed to protect himself, his confidant and the employee who once threatened him. Your dishonesty was always evident in your total abandonment in proper representation. I was left alone to defend myself against what I believe are tyrants and crooks."

(w) "Your [*sic*] [Caputo] joining forces with what I believe [to be] a corrupt Board, has tarnished what the Association stands for. As an officer of this union body I believe you have disgraced other leaders.... This situation has surpassed unethical behavior. I believe your actions are corrupt and discriminatory. The proof I have will review you conspired with the Board in their malicious attempt to destroy my families well been."

(x) "I believe the Board controls our local union via [Caputo's] none tenure Directors position ... [and] what goes in [Union City] is sad to say the least. I have tried every avenue to seek help and assistance against this corrupt organization.... I hope with time some of the above individuals, and agencies, really meddle into the Boards corrupt affairs and help bring an end, for lack of better words, to your evil empire."

As all the forgoing excerpts demonstrate, including those from Valdes own exhibits, over a lengthy period of time he could not and would not refrain from consistently charging the Board and its employees, both orally and in writing, with discriminatory, malicious and unethical behavior towards him. Certainly, conflicts in relationships between and among Valdes and others existed, some of which were for reasons not always attributable solely to Valdes. Certainly, at times he sincerely felt he was being oppressed. Certainly, he was free to express himself orally and in writing in a reasonable fashion. However, his constant propensity to exult himself in to a phantom position to which he was never appointed, and then continually to take umbrage at what he believed to be (unjustifiably) efforts to interfere with his work, constituted unbecoming conduct in the extreme. The Board and senior employees attempted at first to sincerely deal with his charges. But when Valdes continued over and over and over again to push his unproven claims of mistreatment, he went "over the edge." When this conduct is added to his abuse of sick leave and insubordinate behavior, the outcome was almost preordained.

I have chosen to omit findings and discussion of a variety of events about which several witnesses testified, but which I deem either too tangential to the charges, duplicative or totally irrelevant. These include, for example, confrontational episodes Valdes had with Pita, Caputo, Knudsen, Chieco and others. So, too, there was testimony which involved incidents concerning certain plumbing repairs that Valdes did or did not do, or did not do well. Also, there was substantial testimony about the settlement efforts made in 2000-2001. I have concluded they add little, if anything, to the decision and I have concentrated instead on the events which I believe paint a

picture of the sort of conduct which led to the conclusions I have had to make concerning Valdes' culpability.

During the course of this lengthy hearing I had substantial opportunity to hear and observe respondent. I found him often to be polite, respectful and articulate – the pre-1999 Valdes described by Hogan. That was the Valdes whom Hogan encouraged to qualify himself for greater responsibilities and to whom he gave assignments beyond merely plying his plumbing trade.

Sadly, however, after Knudsen succeeded Hogan in July 1999, and after Valdes was disciplined in November 1999 for his activities involving improper use of sick leave, respondent changed and often became, instead, a negative, sometimes obstreperous, insubordinate and belligerent employee. Again, the forces which precipitated this conversion from a valued employee to a confrontational one could have been due to a number of things – resentment over a perceived failure to be given the recognition he believed he deserved, his belief he had been subjected to disparate treatment in being docked pay, his disgruntlement over not being given a supervisory role over other persons, a belief he was discriminated because of his race or ethnicity, or simply a personality clash with Johnson and/or Knudsen. Further speculation as to why this stark change in attitude and behavior took place in 1999 is not necessary since, at bottom, the preponderance of the credible evidence proves the allegations of misconduct whatever their source. The remaining question, then, is what penalty should be imposed for these defalcations.

As I have noted previously in this initial decision, over time Valdes' job became primarily about him, not the school district. That is an intolerable situation. Perhaps none of the incidents, standing alone, or even some in combination with others justify removal. But, when all of his acts are put together, his abuse of sick leave, his insubordinate behavior, his scurrilous written diatribes and his confrontational attitude and demeanor, he so compromised his position as, in my judgment, to compel his removal. School employees like Valdes first and foremost are public servants whose performance must be devoted to the efficient carrying out of their assigned duties, Self-

aggrandizement, belligerence, disdain of authority and constant verbal and written false charges constitutes conduct which patently is inimical to the interests of the public school district and its employees, be they administrators, supervisors, teaching staff members or plumbers. They are not permitted to conduct themselves at work in such manner as constantly to frustrate and interfere with the operations of the district. As the Board argues, and I agree, between April 1999 and 2002 Valdes:

(1) Inappropriately used sick days to campaign;

(2) Engaged in verbal tirades with Knudsen, his supervisor, over such simple matters as the assignment of a vehicle;

(3) Made harassing telephone calls to the facilities department deliberately to mock and antagonize Knudsen;

(4) Exhibited an inability to work with any supervisor who gave legitimate directives to Valdes which he did not like and with which he disagreed;

(5) Wrote constant falsely accusatory letters to his supervisors, and even Board members; and

(6) Was insubordinate on several occasions.

Beyond that, Valdes self-promoted himself to a position of "coordinator" and, over time, resisted performing his normal plumbing duties. Valdes was a master plumber, and presumably a very competent one. But his vendetta against Johnson, Knudsen, Caputo, Hogan and others, which involved written personal attacks on their motives and characters, was unacceptable. When that pattern of abuse is combined with his other demonstrated misdeeds, his continued employment became untenable. The First Amendment does not insulate respondent, for "free speech ... [does] not endow [school district employees], with a license to vilify superiors publicly." *Pietrunti v. Bd. of Educ. of Brick Twp.*, 128 *N.J. Super.* 149, 166 (App. Div. 1974). So, too,

> [a]n aggressive, contentious and, perhaps, [a] controversial [school employee] working within the structure of a school district ... may confidently look to the First Amendment as a protective shield for his or her activities; however, an intemperate, venomous employee, be he or she a teacher or otherwise, cannot claim constitutional protection when he or she attacks his or her superiors in public in brawling terms for no purpose discernable other than to satisfy some personal needs.
>
> [*Id.* at 168 (emphasis added).]

In this case, the penalty of removal is appropriate.

CONCLUSIONS OF LAW

Accordingly, for the reasons set forth above, I **CONCLUDE** that the petitioner, Board of Education of the City of Union City, has proven by a preponderance of the credible evidence that the respondent, Sabino Valdes, a tenured master plumber, is guilty of the charges certified against him, as amended, and that his removal from his tenured position should be **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box**

500, Trenton, New Jersey 08625-0500, marked **"Attention: Exceptions."** A copy of any exceptions must be sent to the judge and to the other parties.

May 15, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

May 19 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 19 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

md/da/sej/cl

APPENDIX

WITNESSES

For Petitioner:

Carl Johnson
William Hogan
Alberto Pita
Gerald Caputo
John E. Knudsen
Joseph T. Chieco

For Respondent:

Nora Perez
Barbara Johnson
Frank Scarafile
Bruce Sesma
Rene Denis
Robert Gonzalez
Francisco Balzano
Jose G. Falto
Ruth E. Matamoros
Xavier Garces
Benjamin Perez
Louis Fusco
Michael A. Daletto
Raymond G. Vallee
Mark S. Novembre
Herminio Garcia
Frank Cocuzza
Nancy I. Oxfeld
Sabino Valdes

EXHIBITS

For Petitioner:

P-1 Original Tenure Charges, August 2000, with attachments
P-1a Affidavit of Carl Johnson Re: Amended Tenure Charges, January 2002, with attachments
P-2 Valdes Attendance Record
P-3a Videotape, May 25, 1999
P-3b Videotape, June 8, 1999
P-4a Investigative Report, May 27, 1999
P-4b Investigative Report, June 4, 1999
P-4c Investigative Report, June 21, 1999
P-5a Job Posting for plumber position (7 a.m. to 4 p.m.)
P-5b Job Posting for plumber position (8 a.m. to 4 p.m., June 14, 1994)
P-6 Letter, Valdes to Caputo, March 19, 2001
P-7 Memorandum, Knudsen to Valdes, November 24, 1999
P-8 Memorandum, Knudsen to Valdes, November 24, 1999
P-9 Letter, Valdes to Johnson, December 13, 1999
P-10 Organization Chart excerpt, Cruz campaign
P-11 Telephone message slips (February 2, 3, 4, 7, 8, 2000)
P-12 For identification - Memorandum, Knudsen to Johnson and Valdes, January 31, 2000
P-13 For identification - Memorandum, Knudsen to Johnson, March 31, 2000
P-14 Job Activities computer printout, November 29, 1999
P-15 Time Activity Detail computer printout, November 30, 1999
P-16 Letter, Valdes to Knudsen, January 3, 2000
P-17 Resolution Accepting Settlement, Union City Board of Education, September 19, 2000
P-18 Letter, Hespe to Damora and Valdes, October 2, 2000
P-19 Resolution Rescinding Prior Resolution, Union City Board of Education, March 29, 2001
P-20 Letter, Kobin to Judge Weiss, August 1, 2001
P-21 Resolution Modifying Prior Union City Board of Education Resolution, January 10, 2002
P-22 Note from Lawrence I. Livingston, M.D., September 28, 2000
P-23 Note from James R. Cole, M.D., May 2, 2000
P-24 Letter, Johnson to Dr. Cole, May 14, 2001

P-25 Letter, Dr. Cole to Union City Board Counsel, June 13, 2001
P-26 Letter, Johnson to Valdes, June 29, 2000
P-27 Novembre Settlement Agreement, December 1, 2000
P-28 For identification – Verified Petition, *Novembre v. Union City Board of Education*, September 1, 2000
P-29 Recommendations to Board for Approval, June 22, 1999
P-30 Letter, Kobin to Graifman, November 8, 2000
P-31 Attendance Records for John Knudsen, 1999-2002
P-32 Excerpts from Union City Board of Education meetings of January 27, 1998 and January 26 and June 22, 1999
P-33 Verified Complaint, *Valdes v. Union City Board of Education*, New Jersey Division on Civil Rights, Docket EJ10WE-46446-E, October 3, 2000

For Respondent:

R-1 Letter, Johnson to Valdes, September 15, 1999
R-2 Note from Steven J. Dobson, D.C., May 10, 1999
R-3 Excerpt from Collective Bargaining Agreement between Union City Board of Education and UCEA, p. 106
R-3a Videotape of surveillance – See P-3e
R-3b Videotape of surveillance – See P-3b
R-4 For identification – Excerpt from Verified Petition
R-5 Letter, Valdes to Johnson, October 18, 1999
R-6 Letter, Johnson to Valdes, February 2, 2000
R-7 Letter, Hogan to Sandler, NYU Program Director, January 13, 1997
R-8 Letter, Denis to Johnson, January 8, 2001
R-9 Letter, Valdes to Johnson, February 28, 2000
R-10 Minutes of Union City Board of Education meeting, May 26, 2000, with attachments
R-11 Letter, Johnson to Valdes, March 31, 2000
R-12 Letter, Damora to Tumelty, March 20, 2000
R-13 Letter, Valdes to Johnson, January 2, 2001
R-14 Document and Information Request, *Valdes v. Union City Board of Education*, New Jersey Division on Civil Rights, Docket EJ10WE-46446-E
R-15 Letter, Fusco to Johnson, January 3, 2001
R-16 Letter, Johnson to Valdes, February 26, 2001
R-17 Memorandum, Hogan to Johnson, June 12, 1995
R-18 For identification – Extract from Collective Bargaining Agreement, p. 133
R-19 Memorandum, Hogan to Valdes, March 3, 2000

R-20a Non-Instructional Employee Evaluation, April 28, 1995
R-20b Non-Instructional Employee Evaluation, April 8, 1996
R-20c Non-Instructional Employee Evaluation, April 21, 1997
R-20d Non-Instructional Employee Evaluation, May 27, 1998
R-20e Non-Instructional Employee Evaluation, April 30, 1999
R-21a to R-21o Assorted color photograph blowups
R-22a Letter, Valdes to Knudsen, January 28, 2000
R-22b Letter, Valdes to Perez, October 10, 2000
R-22c Letter, Valdes to Johnson, July 19, 2001
R-22d Letter, Valdes to Caputo, August 27, 2001
R-22e Memorandum, Valdes to Knudsen
R-23 Copies of four color photographs of pumps
R-24 Letter, Valdes to Caputo, September 29, 2001
R-25 Schematic of water piping system
R-26 Collective Bargaining Agreement between Union City Board of Education and UCEA (Instructional and Non-Instructional Members), September 1, 1998 to June 30, 2003 and August 31, 2003
R-27 Posting of job opening for Carpenter, January 23, 1992
R-28 Work Order Requisition, December 7, 2001
R-29 Memorandum, Knudsen to Valdes, November 30, 1999
R-30 Letter, Johnson to Valdes, April 27, 2000
R-31 Invoice from Gateway Business Services, December 12, 2000, for computer equipment
R-32 E-mail, Johnson to Cruz, October 24, 2000
R-33 Job posting for Director of Custodial Services, November 7, 2000
R-34 Letter, Caputo to Valdes, March 19, 2001
R-35 Letter, Johnson to Valdes, May 18, 2001
R-36 Letter, Valdes to Caputo, March 12, 2001
R-37 Letter, Johnson to Valdes, April 18, 2001
R-38 Non-Instructional Employee Evaluation, April 8, 2002
R-39 Valdes' hat
R-40 Letter, Valdes to Caputo, December 17, 2001
R-41 For identification – Letter, Dellon Sales Co. to Caputo, August 16, 2001
R-42 Time Activity Detail Printout, November 30, 1999
R-43a Blowup of Color Photograph
R-43b Blowup of Color Photograph
R-44 Schematic of Stand Pipe
R-45a Blowup of Color Photograph

R-45b Blowup of Color Photograph
R-46a Blowup of Color Photograph
R-46b Blowup of Color Photograph
R-47 Photocopy of Page from The Jersey Journal, February 2, 2000
R-48a Blowup of Color Photograph
R-48b Blowup of Color Photograph
R-49 Letter, February 29, 2000, Valdes to Knudsen
R-50 Memorandum of October 24, 2000, Knudsen to Johnson
R-51 Letter, August 7, 2000, Valdes to Highton
R-52 Certificate of Determination, September 19, 2000
R-53 Letter, February 2, 2001, Valdes to Johnson
R-54 Letter, January 8, 2001, Perez to Johnson
R-55 Computer printout of requisition, December 13, 2000
R-56 Recommendations for Board Approvals, April 18, 2000
R-57 Letter, February 28, 2000, Chieco to Valdes
R-58 Letter, October 13, 2000, Johnson, to Perez
R-59 Letter, November 6, 2000, Scarafile – To Whom It May Concern
R-60 Job position opening for Custodian, January 2, 1992
R-61 Job position opening for Maintenance Person, November 22, 1993
R-62 Excerpt minutes of regular meeting June 22, 1999
R-63 Maintenance sign-in sheet
R-64 Photocopy of two photographs
R-65 Letter, February 1, 2001, Matamoros to Johnson
R-66 Letter, February 28, 200, Valdes to Hogan
R-67 Memorandum, May 5, 2000, from Perez - To Whom It May Concern
R-68 Job position opening for Electrician, November 10, 1993
R-69 Job position opening for Maintenance Person
R-70 Custodial supplies budget book excerpt
R-71 Recommendations for Board Approval, May 23, 2002
R-72 Recommendations for Board Approval, August 30, 2001
R-73 Memorandum, Newton to Johnson and Valdes, January 31, 2000
R-74 Handwritten note from "Robert", regarding location of air vent
R-75 Recommendations for Board Approval, February 22, 2000
R-76 Letter, March 6, 2000, Valdes to Johnson
R-77 First report of accidental injury, February 21, 2000
R-78 Memorandum, March 2, 2000, Knudsen to Johnson
R-79 Letter, April 3, 2000, Valdes to Cocuzza
R-80 E-mail, Newton to Johnson, March 13, 2000

R-81 Recommendations for Board approval, December 21, 2000
R-82 Invitation to Christmas luncheon, December 28, 2001
R-83 Letter, June 12, 2001, Johnson to Valdes
R-84 Job position opening for Carpenter, February 4, 1998
R-85 Application for position from Olga Valdes, April 23, 2002
R-86 Memorandum from Vaccarino to all employees, July 30, 2001
R-87 Handwritten notes of meeting, February 8, 2000
R-88 For Identification - Handwritten notes of meeting, February 14, 2000
R-89 Letter, April 3, 2000, Valdes to Cocuzza
R-90 Letter, September 11, 2000, Damora to Oxfeld
R-91 Excerpt of Minutes of Executive Session, September 13, 2000
R-92 Letter, May 16, 2000, Oxfeld to Valdes
R-93 Letter, June 8, 2002, Damora to Oxfeld
R-94 Letter, May 12, 2000, Oxfeld to Johnson
R-95 Letter, June 15, 2000, Oxfeld to Valdes
R-96 Letter, July 19, 2000, Oxfeld to Valdes
R-97 Letter, August 2, 2000, Johnson to Valdes
R-98 Letter, August 7, 2000, Valdes to Highton
R-99 Letter, August 11, 2000, Valdes to Oxfeld
R-100 Letter, August 14, 2000, Oxfeld to Valdes
R-101 Letter, August 18, 2000, Oxfeld to Valdes
R-102 Letter, August 21, 2000, Valdes to Oxfeld
R-103 Letter, August 22, 2000, Kobin to Valdes
R-104 Letter, August 25, 2000, Oxfeld to Valdes
R-105 Letter, August 25, 2000, Oxfeld to Perez
R-106 Letter, August 28, 2000, Valdes to Oxfeld
R-107 Fax, August 29, 2000, Valdes to Oxfeld, with attachments
R-108 Letter, September 5, 2000, Oxfeld to Damora
R-109 Letter, June 10, 2002, Johnson to Valdes
R-110 Letter, September 15, 2000, Damora to Oxfeld
R-111a Purchase Orders, September 23, 1997 and February 1998, for course reimbursement
R-111b Purchase Orders, September 23, 1997 and February 1998, for course reimbursement
R-112 Letter, May 26, 1999, Johnson to Valdes
R-113 Letter, May 26, 1999, Johnson to Ms. Valdes
R-114 Note from Steven J. Dobson, D.C., May 27, 1999
R-115 Letter, November 2, 1999, Valdes to Johnson

R-116 Letter, November 2, 1999, Syrek to Cocuzza
R-117 Letter, November 4, 1999, Valdes to Knudsen
R-118 Letter, November 22, 1999, Dr. Dobson to Valdes
R-119 Job position opening for Plumber, November 22, 1999
R-120 Letter, June 28, 2000, Kobin to Cocuzza
R-121 Letter, December 20, 1999, Valdes to Knudsen
R-122 Letter, December 21, 1999, Valdes to Cocuzza
R-123 Letter, December 27, 1999, Valdes to Johnson
R-124 Letter, January 4, 2000, Valdes to Johnson
R-125 Letter, January 20, 2000, Valdes to Magyar
R-126 Letter, February 2, 2000, Magyar to Valdes
R-127 Job position opening for Affirmative Action/Equity Officer, January 19, 2000
R-128 Invoice, Automated Building Controls Inc., January 11, 2000
R-129a Invoices, AW Myers Company Inc., 1994 and 1995
R-129b Invoices, AW Myers Company Inc., 1994 and 1995
R-129c Invoices, AW Myers Company Inc., 1994 and 1995
R-130a Compensation Claims Medical Report Form
R-130b Compensation Claims Medical Report Form
R-130c Compensation Claims Medical Report Form
R-131 Letter, March 3, 2000, N.J. School Association Insurance Group to Johnson
R-132 Letter, March 6, 2000, Valdes to Hogan
R-133 Letter, Undated, from Consolidated Services Group to Dr. Cole
R-134a Doctors Note, James R. Cole, M.D., March 8, 2000
R-134b Doctors Note, James R. Cole, M.D., March 13, 2000
R-135 MRI, prescription from Dr. Cole, March 13, 2000
R-136 Letter March 15, 2000, Valdes to Johnson
R-137 Letter, March 30, 2000, N.J. School Association Insurance Group to Valdes
R-138 Letter, April 20, 2000, N.J. School Association Insurance Group to Valdes
R-139 Letter, April 24, 2000, Valdes to Dr. Cole
R-140 Letter, May 2, 2000, Dr. Cole to Valdes with attachments
R-141 Letter, May 24, 2000, Valdes to Oxfeld
R-142 Letter, March 31, 1999, Valdes to Johnson
R-143 Job position opening for Director of Building and Grounds, March 24, 1999
R-144 Letter, September 8, 2000, Johnson to Valdes
R-145 Letter, September 2, 2000, Johnson to Valdes
R-146 Notes of Lawrence I. Livingston, M.D., regarding Consultation and Treatment of Valdes (1991, 1993 and 2000)
R-147 Recommendation for Board Approval, October 19, 2000

R-148 Letter, November 1, 2000, Kobin to Graifman
R-149 Settlement Agreement of tenure charges, October 19, 2000
R-150 Letter, December 7, 2000, Oxfeld to Valdes, with attachment
R-151 Letter, December 13, 2000, Oxfeld to Damora, with attachment
R-152 Letter, January 3, 2001, Valdes to Johnson
R-153 Letter, January 26, 2001, Valdes to Johnson
R-154 Letter, February 5, 2001, Valdes to Oxfeld
R-155 Letter, February 16, 2001, Oxfeld to Valdes
R-156 Letter, February 20, 2001, Valdes to Damora
R-157 Letter, February 16, 2001, Valdes to Johnson
R-158 Letter, March 7, 2001, Valdes to Johnson
R-159 Letter, March 8, 2001, Johnson to Valdes
R-160 Copy of bench warrant, March 30, 2001
R-161a Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161b Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161c Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161d Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161e Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161f Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161g Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-161h Records, *etc.* regarding inquiring N.J. Department of Education Office of Criminal History Review for Eduardo Nunez
R-162 Letter, August 28, 2001, Valdes to Caputo
R-163 Letter, September 6, 2001, Johnson to Valdes
R-164 Letter, September 17, 2001, Judge Weiss to Mellk and Kobin
R-165 Letter, September 28, 2001, Valdes to Caputo
R-166 Photocopies of color photographs
R-167 Letter, May 15, 2001, Valdes to Ms. Wright, United Water Company
R-168 Letter, June 3, 2002, Wright to Valdes
R-169 Letter, October 5, 2001, Valdes to Caputo
R-170 Letter, August 2, 2001, Johnson to Valdes

R-171 Letter, October 18, 2001, Klausner to Hudson County Prosecutor Theemling
R-172 Letter, October 18, 2001, Kobin to Valdes
R-173 Letter, November 2, 2001, Valdes to Johnson
R-174 Note from Dr. Livingston, November 7, 2001
R-175 Letter, November 2, 2001, Valdes to Caputo
R-176 Letter, December 10, 2001, Johnson to Valdes
R-177 Letter, December 10, 2001, Johnson to Valdes
R-178 Letter, December 17, 2001,.Caputo to Valdes
R-179 Letter, December 31, 2001, Valdes to Caputo
R-180 Letter, January 2, 2002, Valdes to all school principals
R-181 Letter, January 7, 2002, Johnson to Valdes
R-182 Letter, January 7, 2002, Valdes to Highton
R-183 Recommendations to Board, April 25, 2002
R-184 Brochure, Building Construction Management Program
R-185 List of invoices, with attached purchase orders
R-186 Letter, New Jersey Department of Education, Office of Criminal History Review, December 9, 1994
R-187 Minutes of Board meeting, February 24, 1998, with attachments
R-188 Letter, December 18, 2001, Kobin to Judge Weiss
R-189 For Identification – Letter, January 3, 2001, Nunez to Johnson
R-190 For Identification – Letter, January 3, 2001, Nunez to Johnson
R-191 Letter, November 30, 2001, Valdes to Johnson
R-192 Letter, July 17, 2002, Valdes to Johnson
R-193 Recommendation for Board approval, July 25, 2002
R-194 Recommendation for Board approval, August 24, 2000
R-195a Letter, July 19, 2001, Kobin to Valdes
R-195b Letter, March 30, 2000, Perez to To Whom It May Concern
R-195c Letter, May 3, 2000, Hernandez to To Whom It May Concern
R-195d Letter, January 15, 2002, DeConiglio to To Whom It May Concern

OAL DKT. NO. EDU 3620-01
AGENCY DKT. NO. 328-9/00

IN THE MATTER OF THE TENURE	:	
HEARING OF SABINO VALDES,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF UNION CITY, HUDSON COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.[1]

Respondent submits extensive objections to the Administrative Law Judge's (ALJ) findings of fact, as well as the ALJ's failure to include a summary of the testimony from respondent's witnesses who showed him to be "a gentleman that displayed absolutely no signs of a disgruntle [sic] employee***" (Respondent's Letter Memorandum/Exceptions dated May 28, 2003 at 4), or who otherwise corroborated respondent's position (Respondent's Exceptions). With respect to the ALJ's recitation of excerpts from respondent's letters, respondent contends that, in general, the ALJ was either inaccurate in his presentation, or he "withheld all of the relevant evidence" that would tend to prove respondent's allegations. (Respondent's Letter Memorandum/Exceptions dated May 28, 2003 at 5-14) Respondent claims that the "OAL omitted all of the relevant evidence and testimony from [his] witnesses. This action by OAL totally disguised the case by concealing the motive and execution of Petitioner's plot to terminate Respondent's employ." (*Id.* at 15)

[1] Although respondent filed an "answer" to the Board's reply, it was not considered by the Commissioner since there is no provision in regulation for such a submission.

The Board counters that respondent's exceptions attempt "to break down each incident and attack the weight of the evidence by focusing on extraneous details, which are irrelevant to the charges at issue." (Board's Reply at 3) Once again, the Board avers that respondent attempts to blame everyone else for the two years of disruption he caused the facilities department. (*Ibid.*) With respect to how the ALJ weighed the evidence, the Board underscores that

> Valdes had approximately twenty days of testimony, multiple witnesses, and the Board's objections were overruled time and time again. Judge Weiss provided Valdes with [every] opportunity to present his case, and Judge Weiss should be deferred to in assessing the credibility of the witnesses. He was present at all the hearings and observed the witnesses testifying. He was obviously influenced not only by the witnesses' character and demeanor, but by common human experience not transmitted by the record. *** (citation omitted) (*Id.* at 13)

As to respondent's contention that there were errors in the ALJ's recitation of excerpts from respondent's letters, the Board argues that such allegations exemplify the non-substantive distinctions respondent attempts to draw to support his exceptions, a characteristic defense strategy for him. (*Id.* at 7) Finally, to the extent the ALJ did not, in his decision, account for the evidence relating to every event alleged in the tenure charges, the Board asserts that there is no requirement that it must prove every incident asserted in its charges. "In fact," the Board reasons, "there were so many incidents over such a long period of time, that to dwell on each and every one would be overkill." (*Id.* at 14-15) Thus, the Board urges the Commissioner to adopt the Initial Decision.

Upon careful and independent review of the complete record in this matter, including transcripts from 18 days of hearing,[2] together with exhibits, post-hearing briefs,

[2] The record includes transcripts from the following hearing dates in 2002: May 6, 8, 13, 16, 17, 23, 29, June 14, July 22, 23, 25, 26, 30, August 1, 2, 7, 16 and 20.

exception and reply arguments, the Commissioner determines to adopt the Initial Decision of the ALJ. In so doing, the Commissioner first notes that the factual findings issued by the ALJ are each supported by sufficient, credible evidence in the record.[3] In this connection, the Commissioner recognizes that "the ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them." *State, Dept. of Health v. Tegnazian*, 194 *N.J. Super.* 435, 442-443 (App. Div. 1984). The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." (*Id.* at 443) Here, the factual findings issued by the ALJ readily provide the Commissioner with a sufficient basis for reviewing his conclusions and recommendations.

Further, the ALJ's credibility determinations and judgments concerning *whose* testimony is to be accorded weight are entitled to the Commissioner's deference. *N.J.S.A.* 52:14B-10(c) "The reason for the rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div. 1989) *certif. denied*, 121 *N.J.* 615 (1989)." *In the Matter of the Tenure Hearing of Frank Roberts, School District of the City of Trenton*, 96 *N.J.A.R*2d (EDU). 549, 550. Contrary to respondent's allegations, the ALJ fairly summarized the testimony and evidence before him, notwithstanding that he did not recapitulate the testimony of *each and*

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[3] With respect to Factual Finding No. 11 at page 5 in the Initial Decision, the record herein did not include a transcript of Joseph Chieco's testimony. To the extent petitioner challenges this factual finding, the Commissioner notes that challenges to the factual findings predicated upon credibility determinations made by an ALJ require the party to supply the agency head with the relevant and necessary portion of the transcript. See *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987).

every witness. Moreover, a complete review of this extensive record leaves the Commissioner with no doubt that respondent "received a hearing conforming to principles of fundamental fairness." *In re Kallen*, 92 *N.J.* 14, 26 (1983).

The Commissioner, therefore, concurs with the ALJ's conclusion that the Board has proven that: respondent has engaged in a pattern of conduct that demonstrates a consistent, obstructive and defiant attitude toward Board policies, personnel and particularly a hostile attitude toward his supervisors; that respondent has demonstrated insubordinate conduct; respondent has, on occasion, neglected his duties, thereby demonstrating insubordination; respondent abused his sick leave and was otherwise absent (leaving early) without authorization; and respondent has demonstrated conduct unbecoming an employee for engaging in general harassment and interference with the proper discharge of supervisors' and other employees' duties. (Statement of Charges at 1-13; Exhibit P-1a)

The Commissioner further agrees that the appropriate penalty in this matter is dismissal, noting that tenured custodians have been terminated from employment for conduct that included abusive language and hostile behavior toward supervisors and colleagues in those instances where respondents were found to have exhibited a pattern of belligerent and offensive conduct. *See*, *In the Matter of the Tenure Hearing of John De Maio, School District of the Borough of Elmwood Park, Bergen County*, decided by the Commissioner June 3, 1998, *aff'd* State Board November 4, 1998; and *In the Matter of the Tenure Hearing of Saad Radwan, School District of the Borough of Carteret, Middlesex County*, decided by the Commissioner January 14, 1999, *aff'd* State Board May 3, 2000, *aff'd* 347 *N.J. Super.* 451 (App. Div. 2002). As the ALJ herein eloquently stated:

> [O]ver time, Valdes' job became primarily about him, not the school district. That is an intolerable situation. Perhaps none of

> the incidents, standing alone, or even some in combination with others justify removal. But, when all of his acts are put together, his abuse of sick leave, his insubordinate behavior, his scurrilous written diatribes and his confrontational attitude and demeanor, he so compromised his position as, in my judgment, to compel his removal. School employees like Valdes first and foremost are public servants whose performance must be devoted to the efficient carrying out of their assigned duties[.] Self-aggrandizement, belligerence, disdain of authority and constant verbal and written false charges [constitute] conduct which patently is inimical to the interests of the public school district and its employees, be they administrators, supervisors, teaching staff members or plumbers. They are not permitted to conduct themselves at work in such manner as constantly to interfere with the operations of the district.*** (Initial Decision at 22-23)

Accordingly, the Initial Decision is adopted as set forth herein, and respondent is dismissed from his tenured position with the Board as of the date of this decision.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/03

Date of Mailing: 6/25/03

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

306-03

306-03

S.H., on behalf of minor children, S.H., E.H. AND S.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged the Board's residency determination. The Board counterclaimed for tuition.

The ALJ determined that even though petitioner desired to move into respondent's school District, she never did. Thus, S.H. and her children were never domiciled within the District and, therefore, did not meet the requirements set forth in *N.J.S.A.* 18A:38-1a. The ALJ concluded that petitioner's children were not entitled to a free public education in the District. The ALJ ordered petitioner's appeal denied and ordered that petitioner be assessed the tuition costs for the period of the children's ineligible attendance.

The Commissioner adopted the findings and determination in the Initial Decision as his own and directed petitioner to reimburse the Board for the period of her children's ineligible attendance.

June 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1355-03
AGENCY DKT. NO. 363-11/02

S.H. ON BEHALF OF MINOR CHILDREN
S.H., E.H. AND S.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Daniel Ellis, Esq., for petitioner

Stephen J. Christiano, Esq., for respondent

Record Closed: May 2, 2003 Decided: May 21, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner S.H. challenges the residency determination made by the West Orange Board of Education ("Board"). The Board has counterclaimed for tuition.

The matter was transmitted to the Office of Administrative Law (OAL) on January 31, 2003, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and

N.J.S.A. 52:14F1 to -13. A hearing was held on May 2, 2003, at the OAL in Newark, New Jersey, and the record was closed on that date.

FACTUAL DISCUSSION

Based upon the undisputed facts presented at the hearing, I **FIND** the following **FACTS** in this case.

In or about the summer of 2002, petitioner's brother agreed that petitioner and her three children would move into the four-room carriage house at the premises he was under contract to purchase at 40 Wildwood Avenue, West Orange, N.J. The closing of title was scheduled to take place in or about the third week of August 2002. At the time, petitioner resided at 32 Forest Street, Montclair, N.J., with her three children.

In anticipation of the move into the carriage house, petitioner enrolled her children in West Orange schools. E.H. was enrolled in kindergarten and S.H. in fourth grade, both at the Redwood School, and S.H. was enrolled in the sixth grade at the Edison School. The closing of title on 40 Wildwood Avenue did not take place in August, September or October 2002.

In mid-November 2002, petitioner moved with her three children into a friend's house at 39 Old Indian Road, West Orange. Prior to that time petitioner and her three children had resided continuously with petitioner's mother at 32 Forest Street, Montclair. Petitioner and her children remained at 39 Old Indian Road, West Orange, until approximately mid-January 2003, when it became apparent that the closing on the home at 40 Wildwood Avenue, West Orange, would not take place. Petitioner and her children then moved back to petitioner's mother's home in Montclair. While residing at her friend's home at 39 Old Indian Road, petitioner had no lease, did not pay any rent, did not change her mailing address, and did not change the address on her license. Petitioner also did not register to vote in West Orange. Petitioner's permanent address remained 32 Forest Street, Montclair, N.J. Petitioner's 2002 tax return reflects the Forest Street, Montclair, address. Petitioner never advised the school district that she was residing at 39 Old Indian Road, West Orange.

Petitioner received correspondence from the Board dated October 30, 2002, advising that the Board sought to remove petitioner's children from the schools since she was not domiciled in West Orange. Petitioner was aware of the tuition consequences of leaving her children in West Orange schools. Petitioner is also aware of the amount of tuition the Board is seeking, and, further, that the Board may seek the entry of a judgement against her.

Petitioner has been attempting to secure a lease for a home on Oxford Place in West Orange but had not done so as of the date of the hearing. Petitioner believes the lease may be in place by the summer of 2003.

The tuition for the 2002-2003 school year for E.H., a kindergarten student, is calculated at $42.63 per day, which is $6,437.13 through the date of hearing and $7,844.00 until the end of the school year. The tuition for S.H., a fourth-grade student, is $48.17 per day, or $7,273.67 through the date of hearing and $8,864.00 until the end of the school year. The tuition for S.H., a sixth-grade student, is $64.83 per day, or $9,789.33 through the date of hearing and $11,929.00 until the end of the school year. The tuition for all three children through the end of the school year totals $28,637.00.

LEGAL DISCUSSION AND CONCLUSION

The Board has asserted that S.H., E.H. and S.H. were not domiciled within the district during the 2002-2003 school year and, consequently, are not entitled to a free public education in West Orange.

N.J.S.A. 18A:38-1 provides that the public schools of a district are free to persons domiciled within the district who are over five and under twenty years of age.

Domicile is the place of a person's abode, where he or she has the present intention of remaining and to which, if absent, he or she intends to return. *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd*, 58 *N.J.* 112 (1971). A person may have more than one residence but only one domicile, which is that place that

the person regards as his or her true and permanent home. *Board of Educ. of Middle Township, Cape May County v. K.K.*, 93 *N.J.A.R.*2d (EDU) 461.

The burden of proof rests with petitioner. In a proceeding such as this, the parent has the burden of proof by a preponderance of the evidence to establish that the children meet the eligibility requirements. In this matter, there is no dispute that S.H., E.H. and S.H. are not domiciled within the district. There is nothing more than the articulated desire of petitioner to move into the district.

Based upon the undisputed facts and circumstances, I **FIND** that S.H. and her children have never been domiciled within the district, and therefore do not meet the requirements set forth in N.J.S.A. 18A:38-1(a). I therefore **CONCLUDE** that S.H., E.H. and S.H. are not entitled to a free public education in the West Orange School District. I further **CONCLUDE** that the tuition costs set forth by respondent are uncontradicted. Therefore petitioner is assessed tuition in the base amount of $23,500.13 for the period of September 4, 2002, to May 2, 2003, and at a per diem rate of $42.63 for E.H., $48.17 for S.H. and $64.83 for S.H. for the period of May 3, 2003, to the date of removal from respondent's school district.

ORDER

It is hereby **ORDERED** that petitioner's appeal of respondent's determination is **DENIED**. It is further **ORDERED** that S.H., E.H. and S.H. are ineligible for attendance in respondent's school district. It is further **ORDERED** that petitioner be assessed tuition costs as set forth above for the period of S.H., E.H. and S.H.'s ineligible attendance in respondent's school district.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

May 21, 2003
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

May 23 2003
DATE

M. Kathleen Duncan (ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

APPENDIX

Witnesses

For Petitioner:

S.H.

For Respondent:

Josefa Lopez

Exhibits

For Petitioner:

For Respondent:

R-1 Letter from Superintendent of Schools to Petitioner
R-2 Registrar's data including tuition information for E.H.
R-3 Registrar's data including tuition information for S.H.
R-4 Registrar's data including tuition information for S.H.

OAL DKT. NO. EDU 1355-03
AGENCY DKT. NO. 363-11/02

S.H., on behalf of minor children, S.H., E.H. AND S.H., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, RESPONDENT.	:	DECISION

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

Upon his full and independent review, the Commissioner agrees with the conclusion of the Administrative Law Judge (ALJ) that petitioner has failed to meet her burden of proving, by a preponderance of the credible evidence, that she was a domiciliary of West Orange during the period from September 4, 2002 through the present time, so as to entitle her children, S.H., E.H. and S.H., to attend the Board's schools free of charge during this time. (*N.J.S.A.* 18A:38-1a.)

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. Petitioner is directed to reimburse the Board for the period of her children's ineligible attendance in its schools, in accordance with law, at the rate as calculated by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/23/03

Date of Mailing: 6/25/03

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

307-03

L.R.R., on behalf of minor child, R.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the District's school placement of her son, R.T., his disciplinary record and his grades.

The ALJ concluded that petitioner failed to carry her burden of proving that the District acted in an arbitrary or capricious manner with respect to R.T.'s education. The ALJ found that the District did not act in a punitive manner, it exercised its sound discretion and acted out of concern for R.T.'s safety by transferring him to East Side where he is doing well. If he continues this, he should return to day high school in September 2003. The ALJ also concluded that, with respect to R.T.'s disciplinary record and grades, the District acted appropriately and in full accord with District policies and procedures. Petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

June 19,2003

L.R.R. was told that R.T. could no longer attend the Shabazz Twilight School and she would be provided with a list of the other alternative high schools from which to choose. She claims that Paschall told her R.T. was expelled from Shabazz, could no longer attend school in the Newark District, and she would have to pay tuition to have him attend school somewhere else.

Paschall denied that he would have said such a thing to L.R.R. He explained that he did not have the authority to expel students. The most he could do would be to suspend them temporarily. He further explained that the Shabazz Twilight School does not even suspend students. Its goal is to have them attend, not miss, classes. Behavior problems are addressed by various interventions that do not involve separating students from their education.

All others who attended this meeting on March 10, 2003 and testified at hearing agreed that Paschall never said this to L.R.R.

Paschall provided her with a list of the other alternative programs. He excluded the one at Barringer High School because he thought a certain group of students there would be as bad an influence on R.T. as the ones at Shabazz. As stated above, L.R.R. picked the program at West Side High School but never enrolled R.T. there. She said she did not do it because she thought he could no longer attend school in Newark. For the same reason, she did not respond to efforts of Shabazz to contact her. The only further contacts occurred when the school was able to reach her by telephone. The end result of this situation was that R.T. did not attend school from March 5 through April 29, 2003.

R.T. has been doing well in school since he started to attend East Side. If this continues, he should return to the day high school in September 2003.

E.B. was enrolled in the Twilight Program because he was struggling in high school. The smaller environment and the support provided were more conducive to his learning. At no time has he ever been considered a behavior problem. He appears to

be a sensible young man who is committed to the truth of his story. His demeanor at hearing made him a thoroughly convincing witness.

Similarly, his mother, R.B., made the same impression. She appeared sincerely interested only in assuring herself of her son's safety. She fully cooperated with the school in attempting to seek a solution to the escalating level of confrontation and did not file a police complaint against R.T. until this failed.

L.R.R. testified as a witness at hearing on behalf of her son. She repeated his version of the incident on the record and stated her position with respect to his disciplinary record and his grades. When she was asked repeatedly by the undersigned if she wished to have her son testify, she said that she did not want him to. Consequently, R.T. never appeared as a witness on his own behalf and there is no competent, credible testimony to rebut that of the other witnesses.

Accordingly, I **FIND** the following **FACTS**:

1. R.T.'s transfer from the Shabazz day high school to the Twilight School in September 2003 was neither arbitrary nor capricious. R.T. was not doing well in the day school. The decision to transfer him to the alternative school was affirmed by the progress he was making there until the incident of March 5, 2003.
2. The incident of March 5, 2003 occurred as E.B. described it. R.T. assaulted him from the rear and, if this incident appears on R.T.'s disciplinary record, it is warranted.
3. R.T. was neither expelled nor suspended from Shabazz. His failure to attend school for a significant period of time is attributable to his mother's misunderstanding of the situation and was not the fault of the District.
4. The transfer of R.T. from the Shabazz Twilight School after March 5, 2003 was neither arbitrary nor capricious. It was not punitive. After the failure of its attempts to mediate the dispute and resolve the situation and in an exercise of its sound discretion, the District reasonably determined that, the best way to

ease tensions at Shabazz and to do the appropriate thing for both E.B. and R.T. was to separate them and move R.T.

5. There is no reason to be overly concerned for R.T.'s safety because he is going to East Side rather than Shabazz. He is fifteen years old and will be traveling home from school in daylight. In fact, he appears to have been in more danger at Shabazz based upon the presence of gangs in the neighborhood and upon the students he chose to associate with.
6. The transfer seems to have been an appropriate decision for R.T. who appears to be doing well at East Side.

The remaining issue raised by L.R.R. is that her son received inappropriate grades. This is based upon her belief that he received his report card before the end of a marking period so his grades do not reflect a complete cycle. According to the District's witnesses, the Twilight Schools have cycles rather than marking periods and these are six weeks long. They are shorter than those of the day high school to give the students and their parents more frequent information on students' progress.

L.R.R.'s confusion on this issue is clear from the submissions she attached to her motion for emergent relief. She attached the high schools' list of report card dates for the 2002-2003 school year. The marking cycle dates for the Twilight Schools appear on the same sheet. She circled two report card dates for the day high school marking periods as proof that her son did not receive his report cards at the right time. She attached a copy of his report card for the third cycle which runs from December 12, 2002 to February 5, 2003. I **FIND** that R.T. did not receive inappropriate grades, that is, his report cards were presented at the correct times. She produced no evidence that his grades did not accurately reflect the quality of his work.

Based upon the above, I **CONCLUDE** that L.R.R. failed to carry her burden of proving that the District acted in an arbitrary or capricious manner with respect to the education provided to R.T. *See, K.O.H. obo R.H. v. BOE Township of Edison, Middlesex*, 95 *N.J.A.R. 2d.* (EDU) 275. I further **CONCLUDE** that it acted appropriately

with respect to his disciplinary record and his grades. Accordingly, I **CONCLUDE** that there is no relief to which L.R.R. is entitled as a result of this appeal.

It is, therefore, **ORDERED** that her appeal is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

May 23, 2003
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

May 28 2003
DATE

H. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 29 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

L.R.R.

For Respondent:

Lamont Webb

E.B.

R.B.

Margaret Robinson

Lannie Paschall

Exhibits:

Petitioner's Affidavit with attachments

OAL DKT. NO. EDU 3596-03
AGENCY DKT. NO. 110-4/03

L.R.R., on behalf of minor child, R.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the ALJ that the District acted reasonably and within the scope of its lawful discretionary authority with respect to R.T.'s school placement, disciplinary record and grades. Therefore, like the ALJ, the Commissioner concludes that petitioner has not demonstrated entitlement to relief.

Accordingly, for the reasons expressed therein, the Initial Decision of the Office of Administrative Law dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6-19-03

Date of Mailing: 6-25-03

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

321-05

IN THE MATTER OF THE TENURE	:	
HEARING OF LIGIA PIOQUINTO-OKOSZKO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
VOCATIONAL SCHOOLS IN THE COUNTY	:	DECISION
OF MIDDLESEX, MIDDLESEX COUNTY.	:	

AGENCY DKT. NO. 156-5/03

IN THE MATTER OF THE TENURE	:	
HEARING OF LIGIA PIOQUINTO-OKOSZKO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
VOCATIONAL SCHOOLS IN THE COUNTY	:	DECISION
OF MIDDLESEX, MIDDLESEX COUNTY.	:	

This matter was opened before the Commissioner of Education on May 19, 2003 through the certification of tenure charges alleging incapacity to return to work, excessive absences and tardiness and unbecoming conduct, against a tenured teacher at the Piscataway Campus of the Vocational Schools in the County of Middlesex.

By letter of May 20, 2003, respondent was directed, via both certified and regular mail addressed to respondent at 700 West Avenue, Sewaren, New Jersey 07077, to file an Answer to the tenure charges against her.[1] The May 20 letter provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been no submission by the charged employee of a responsive filing indicating that s/he does not contest the charges, **will** result in the charges being deemed admitted by the charged employee. No reply has been

[1] The notice sent via certified mail was returned as "unclaimed" on June 6, 2003 following two notifications to respondent by the Post Office that there was certified mail awaiting pickup. The notice sent via regular mail was not returned.

received from respondent in response to the Board's charges. Accordingly, pursuant to *N.J.A.C.* 6A:5-3(c), each count of the charges against respondent is deemed to be admitted.

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicate that respondent was absent 35 days in the 2000-2001 school year, 22 ½ days in the 2001-2002 school year and has accumulated absences of 82 ½ days and numerous instances of tardiness in the 2002-2003 school year from September 2002 through April 8, 2003. Moreover, with respect to the 2002-2003 school year, respondent has been absent from her teaching position from December 12, 2002 to the present.

In reviewing the certifications by the school principal and the superintendent of schools, it is noted that respondent indicated to her school principal and the superintendent that her absences have been due to illness, but she has not provided medical documentation to support her failure to return to work, nor has she submitted any information as to when, or if, she will be able to return to employment. In an effort to assess her situation, the District scheduled appointments for respondent with the school physician on February 12, 2003, March 12, 2003, March 26, 2003 and April 15, 2003. The doctor rescheduled the March 12 appointment to March 26 and the March 26 appointment was rescheduled to April 15 at respondent's request. Respondent did not keep her appointments scheduled on February 12, 2003 and April 15, 2003 and provided no explanation for not doing so.

Accordingly, in that respondent has chosen not to deny the specific allegations contained in the Tenure Charges, the Commissioner deems such charges to be admitted and finds that the Board has demonstrated that respondent is incapable of fulfilling her duties as a teacher

2 The petitioner appeared at a meeting of the West Orange Board of Education on February 10, 2003. At that time she testified that she had moved out of West Orange in March 2002.

3 In addition, as part of her petition, K.L. stated, in a letter attached, that T.O. had been a student at Hazel Avenue School for over a year. Due to housing circumstances, "we were unable to stay in West Orange, but now reside five blocks into Orange".

4 The tuition calculations from March 1, 2002, to the end of the 2002 school year June 28, 2002, totaled $4,120.12 for 73 days at $56.44 per day.

5 For the 2002-2003 school year, from September 5, 2002 to March 17, 2003, the last day that T.O. remained on the school rolls in West Orange, there was a total of 121 days at $59.38 per day for total amount of $7184.98 for 2002-2003. The total for the entire period from March 1, 2002 through March 17, 2003 was $11,305.10.

6 This tuition rate was based on per pupil cost for a special education student. T.O. was a special education student in the West Orange School System. See R-2 attached.

LEGAL DISCUSSION

Public education must be provided free to persons over five and under 20 years of age, who are domiciled within the school district. *N.J.S.A.* 18A:38-1(a). "The domicile of a person is a place where he has his true, fixed, permanent home and principal, establishment, into which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving... " *In the Matter of Unanue* 255 *N.J. Super.* 362, 374 (Law Division 1991). Minors lack the capacity to chose their own domicile and thus their domicile is that of their parent or guardian.

The petitioner has failed to appear to present testimony that she, in fact, lived in the School District with her son during the period in question. In fact, by

her own admission, the petitioner stated that she lived outside of the school district, "due to housing circumstances". She asked permission in the petition for an extension to the end of the school year to reside back in West Orange. However, she did not move back to West Orange. According to the testimony presented by the investigator for West Orange, she has moved to Lake Hopatcong. Further, according to the uncontested testimony of the investigator, she lived outside of West Orange from March 2002. Therefore, it is clear, under the statute, that K.L. and T.O. were not domiciled in West Orange.

CONCLUSION

Thus, I **CONCLUDE** that the student was not entitled to a free public education in West Orange, as he did not reside in West Orange at the time in question.

The petitioner has not contested the tuition figures provided by the District. Hence, I **FIND** that the per diem rate for the year 2001-2002 was $59.38. The tuition due to the end of the 2002 school year amounted to $4,120.12. The per diem rate for the 2002-2003 year is $59.38 and the amount owed as of March 17, 2003 was $7,184.98. Therefore, the total amount owed to the West Orange Board of Education is $11,305.10.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the District's finding that the petitioner child is not entitled to attend the West Orange School is hereby upheld. The District's request for tuition reimbursement is hereby granted.

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

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

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

6/3/03
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

6-6-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN - 9 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

ld

EXHIBITS

R-1 Letter of Superintendent to petitioner dated 2/12/03 (2 pages).

R-2 Tuition Calculations. (6 pages).

OAL DKT. NO. EDU. 03309-03
AGENCY DKT. NO. 68-2/03

K.L., on behalf of minor child, T.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon his full and independent review, the Commissioner agrees with the conclusion of the Administrative Law Judge (ALJ) that petitioner has failed to meet her burden of proving, by a preponderance of the credible evidence, that she was a domiciliary of West Orange during the period from March 1, 2002 through March 17, 2003, so as to entitle her child, T.O., to attend the Board's schools free of charge during this time. (*N.J.S.A.* 18A:38-1a)

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly stated therein. Petitioner is directed to reimburse the Board a total of $11,305.10 for the period of her child's ineligible attendance in its schools.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/10/03

Date of Mailing: 7/16/03

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

335-03

335-03

TRACIE L. EVANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GATEWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

July 17,2003

WHEREAS, to avoid the burden, expense and uncertainty of future litigation, the parties desire to amicably resolve the issues raised in the Petition of Appeal, as well as to resolve any and all issues arising from Evans' employment with the Board and separation of employment;

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

1. Evans shall withdraw with prejudice her Petition of Appeal.

2. The Board will pay to Evans Three Thousand, Seven Hundred Fifty Dollars ($3,750) in full and complete settlement of any and all claims against the Board asserted in the Petition of Appeal and as more fully described in the following General Release. The settlement draft shall be made payable to "Barbara Riefberg, Esq. and Tracie Evans" and shall be delivered to the law offices of Barbara Riefberg, Esq. within 30 days of full execution of this Agreement and dismissal with prejudice of the Petition of Appeal.

3. Evans hereby **RELEASES AND FOREVER DISCHARGES** the Board, its past, current and future individual board members officers, administrators, agents, and employees, and successor Boards, of and from any and all claims, actions, liabilities, petitions, grievances, causes of actions, suits and/or demands, in law or equity, arising out of or related in any way to Evans' employment with the Board and/or separation of employment, whether known or unknown to me, or suspected or unsuspected, that I may have individually or as a member of a class, including but not limited to: 1) any claim asserted in the Petition of Appeal; 2) any claim for rehire and/or reinstatement, whether asserted under any collective bargaining agreement, the New Jersey Department of

Education laws or otherwise; 3) any claim under the Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Law Against Discrimination, the Employee Retirement Income Security Act of 1974, and any other civil rights statutes at the federal, state or local level; 4) any claim for wrongful discharge; 5) any claim under a collective bargaining agreement, including but not limited to discipline without just cause; and 6) any claim for attorney fees and/or costs, expert witness fees or litigation costs of any kind.

4. Evans understands and acknowledges that her employment with the Board has been terminated, and that she has no statutory, tenure, contractual or common law right to re-employment and/or reinstatement. Evans further understands and acknowledges that she will never sue the Board concerning any claim she may have relating to her employment with the Board or the termination of that employment.

5. This Agreement is not, and shall not be construed to be an admission by the Board, its members, officers, agents, and employees, of any wrongdoing or violation of the Board's constitutional, statutory, contractual and/or common law duties toward Evans. No findings of any kind have been made or issued by any court or administrative tribunal, and Evans does not claim to be a prevailing party.

6. Except as may be required by law, no party or their counsel shall disclose the financial terms and conditions of this Agreement to any person or entity, except to say that the matter has been amicably resolved to the satisfaction of both parties.

7. Evans certifies that: (1) She has read the terms of this Agreement; (2) She has discussed the Agreement with her counsel; (3) She understands its terms and effects; (4)

She is executing this Agreement of her own volition; and (5) Neither the Board nor its agents, representatives, or attorneys have made any representations to her concerning the terms or effects of this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties execute the foregoing Agreement.

Tracie Lyn Evans 3/17/03
TRACIE LYN EVANS Date

Barbara E. 3/24/2003
BARBARA RIEFBERG, ESQ. Date
Attorney for Tracie Evans

Angelo J. Natoli 4-23-03
ANGELO NATOLI Date
Board President
Gateway Regional High School
District Board of Education

EDGAR KEEPERS Date
Board Secretary/School Business Administrator
Gateway Regional High School
District Board of Education

Joseph F. Betley 1/14/03
JOSEPH F. BETLEY, ESQ. Date
Attorney for Gateway Regional High School
District Board of Education

g:\e&e\Gateway_Evans\359392

OAL DKT. NO. EDU 2835-01
AGENCY DKT. NO. 86-4/01

TRACIE L. EVANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF GATEWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 17, 2003

Date of Mailing: July 17, 2003

336-03

S.H., on behalf of minor child, L.C,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

July 17,2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 153-03
AGENCY DKT. NO. 7-1/03

S.H. O/B/O L.C.,
Petitioner,
v.
JACKSON TOWNSHIP
BOARD OF EDUCATION,
OCEAN COUNTY,
Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, George & Dortch, attorneys)

Robert A. Greitz, Esq., for respondent (Citta, Holzapfel, Zabarsky, Leahey & Simon, attorneys)

Record Closed: June 19, 2003 Decided: June 19, 2003

BEFORE **ANTHONY T. BRUNO**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 16, 2003, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

6/19/03
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

6/24/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

CITTA, HOLZAPFEL, ZABARSKY, LEAHEY, & SIMON
248 Washington Street
P.O. Box 4
Toms River, New Jersey 08754
732-349-1600
Attorneys for Respondent, Jackson Board of Education

S.H., ON BEHALF OF HER MINOR CHILD, L.C., **Petitioner,** **v.** **JACKSON BOARD OF EDUCATION,** **Respondent**	**BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY** **OAL DOCKET NO:** **AGENCY NO.: EDU-153-03** **CONSENT ORDER REGARDING SUPPLEMENTAL INSTRUCTION**

This matter having been opened to the Court upon consent of the parties through their attorneys, Thomas W. Sumners, Jr. Esq., attorney for the Petitioner, S.H. o/b/o her minor child, L.C., and Robert A. Greitz, Esq., attorney for Respondent, Jackson Board of Education, and both parties having consented to the entrance of this Order; and for good cause being shown:

IT IS _____ day of April 2003:

ORDERED that the supplemental instruction of L.C., which he must complete in order for him to receive credit for the first semester of the 2002-2003 school year, shall be as follows:

a. Supplemental instruction in Spanish I shall continue at its current schedule of every Tuesday, and at its current location and time,

until such time as it is completed and L.C. has met all of the requirements to receive credit for this class;

b. Supplemental instruction in Geo Science shall be suspended until the completion of the school year, and then, within seven (7) days of the last day of school, shall resume at a rate of two (2) hours per day, five (5) days per week until July 15, 2003, or until all coursework is completed. The location of this supplemental instruction shall be at convenient location agreed upon by the parties, and L.C. and his parent shall be responsible to provide any necessary transportation to and from the supplemental instruction location;

c. Supplemental instruction in AlgebraP1 shall be suspended until the completion of the school year, and then, within seven (7) days of the last day of school, shall resume at a rate of two (2) hours per day, five (5) days per week until July 15, 2003, or until all coursework is completed. The location of this supplemental instruction shall be at convenient location agreed upon by the parties, and L.C. and his parent shall be responsible to provide any necessary transportation to and from the supplemental instruction location;

d. In order for L.C. to be entitled to credit for Spanish I, Geo Science, and AlgebraP1 the classes in which he is receiving the supplemental instruction, L.C. must complete all work and regular

attend classes. L.C. shall not receive credit for Spanish I, Geo Science, and/or AlgebraP1 if he ceases to regularly attend such class(es) prior to the completion of the necessary and required coursework in such class(es).

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all counsel of record within seven (7) days of the date hereof.

ANTHONY T. BRUNO, A.L.J.

The undersigned hereby consent
to the form and entry of this Order.

CITTA, HOLZAPFEL, ZABARSKY, LEAHEY, & SIMON

ROBERT A. GREITZ, ESQ.
Attorneys for Respondent, Jackson
Board of Education

SUMNERS GEORGE

THOMAS W. SUMNERS, JR., ESQ.
Attorneys for Petitioner,
S.H. o/b/o Her Minor Child, L.C.

OAL DKT. NO. EDU 153-03
AGENCY DKT. NO. 7-1/03

S.H., on behalf of minor child, L.C,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 17, 2003

Date of Mailing: July 17, 2003

337-03

337-03

TRUDY SERVEDIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

July 17, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5304-00
Agency Dkt. No. 154-5/00

TRUDY SERVEDIO,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT, CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch,, Porwich and Feintuch, attorneys)

Charlotte Kitler, Esq., General Counsel, for respondent

Record Closed: June 2, 2003 Decided: June 20, 2003

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

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on June 5, 2000 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a letter withdrawing this matter, which is attached and fully incorporated herein.

I have reviewed the record and the correspondence and **FIND**:

1. The parties have voluntarily agreed to withdraw this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

June 20, 2003
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

June 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 26 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

TRUDY SERVEDIO, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 154-5/00 OAL Dkt. No. EDUOA 05304-00 STIPULATION OF SETTLEMENT

This Agreement is entered into as a resolution of the within matter regarding petitioner's claim for restoration of certain sick days pursuant to N.J.S.A. 18A:30-2.1 for absences from work from February 10, 2000 through March 17, 2000, alleged to be due to work-related injuries. The petitioner and respondent hereby agree to an amicable resolution of the within matter as follows:

1. The parties agree that this Stipulation of Settlement represents the compromise of disputed claims and is not an admission of liability or wrongdoing by either party.

2. The petitioner withdraws her petition in the within matter.

3. The respondent Jersey City School District has restored eight sick days to petitioner's sick bank as being due to injury on the job (namely, February 11, February 14, March 8, March 13, March 14, March 15, March 16 and March 17, 2000), and agrees to

to restore an additional day (March 7, 2000) to petitioner's sick bank as due to injury on the job.

4. It is understood that this Stipulation will take effect upon its approval by the Administrative Law Judge and by the Commissioner of Education.

Trudy Servedio
TRUDY SERVEDIO

DATED: 5/22/03

ALAN S. PORWICH, Esq.
Attorney for Petitioner

DATED: 5/28/03

CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 6/2/03

OAL DKT. NO. EDU 5304-00
AGENCY DKT. NO. 154-5/00

TRUDY SERVEDIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 17, 2003

Date of Mailing: July 18, 2003

338-03

338-03R

IN THE MATTER OF THE TENURE	:	
HEARING OF PAMELA ZIMIC, SCHOOL	:	
DISTRICT OF THE TOWNSHIP OF	:	COMMISSIONER OF EDUCATION
CRANFORD, UNION COUNTY.	:	DECISION ON REMAND
	:	

July 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11164-02

(EDU 9039-02 – Remanded)

AGENCY DKT. NO. 264-8/02

IN THE MATTER OF THE TENURE HEARING OF PAMELA ZIMIC, SCHOOL DISTRICT OF THE TOWNSHIP OF CRANFORD, UNION COUNTY

Anthony P. Scarillo, Esq., for petitioner
(Lindabury, McCormick & Estabrook, attorneys)

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

Record Closed: June 19, 2003 Decided: June 19, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

This is a remand of a tenure settlement for development of a more complete record. Originally, on August 26, 2002, the Cranford Board of Education ("Board") certified tenure charges against Pamela Zimic, a music teacher in the district, alleging, among other charges, that she is mentally incapable of performing her duties, that she engaged in conduct unbecoming a teacher and that she was excessively absent. On September 10, 2002, the Commissioner of Education ("Commissioner") referred this

matter to the Office of Administrative Law ("OAL") for hearing. Prior to the holding of any hearing, on October 17, 2002, the Board sought to withdraw the tenure charges as moot since Ms. Zimic had been approved for a disability retirement. By order entered on December 24, 2002, the Commissioner rejected the withdrawal and remanded the matter to the OAL for expansion of the record. In particular, the Commissioner directed that the parties address the standards for settlement of tenure cases established by the State Board of Education in the matter entitled *In Re Cardonic*, 190 *S.L.D.* 842, 846.

Pursuant to the order of remand, the parties have prepared the attached stipulation of settlement applying the *Cardonic* standards to the particular facts of this case. On May 29, 2003, the OAL held a public hearing on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Ms. Zimic testified that she fully understood and voluntarily agreed to the terms of settlement.

Based on my review of the proposed settlement terms, I **CONCLUDE** that the proposed settlement fully comports with the Cardonic standards and that acceptance of this settlement is in the public interest. Therefore, it is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

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

June 19, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

June 25, 2003
DATE

M. Kathleen Quinn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 26 2003
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RESOLUTION

RESOLVED, that the Cranford Board of Education, upon the recommendation of the Superintendent, approves the attached Withdrawal Agreement *In the Matter of the Tenure Hearing of Pamela Zimic, OAL Docket No. EDU 9039-02,* and approval of Ms. Zimic's receipt of her retirement benefits as of May 29, 2003.

Robert J. Carfagno, Board Secretary

DATED: June 9, 2003

LINDABURY, MCCORMICK & ESTABROOK
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for the Cranford Board of Education

IN THE MATTER OF THE TENURE HEARING OF PAMELA ZIMIC, SCHOOL DISTRICT OF THE TOWNSHIP OF CRANFORD, UNION COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DKT. NO. EDU 9039-02 AGENCY DKT. NO. 264-8/02 **WITHDRAWAL AGREEMENT**

This Withdrawal Agreement (hereinafter "Agreement") is made this ~~30th~~ day of May, 2003, between the Cranford Board of Education (hereinafter known as the "Board") and Pamela Zimic (hereinafter known as "Ms. Zimic").

Whereas, on or about May 23, 2002, the Board filed for disability retirement on behalf of Ms. Zimic; ~~A true and accurate copy of the documentation evidencing such application is attached hereto as Exhibit A;~~ PZ 5/29/03 ARC

Whereas, Ms. Zimic initially did not consent to the application for her disability retirement;

Whereas, on or about August 20, 2002, the Board certified tenure charges against Ms. Zimic; ~~A true and accurate copy of the documents setting forth the nature of the tenure charges are attached hereto as Exhibit B;~~ PZ 5/29/03 ARC

Whereas, there are currently tenure charges pending before the Commissioner of Education, State of New Jersey;

Whereas, Ms. Zimic determined not to contest the disability retirement, was approved for disability retirement on September 5, 2002 and ~~began receiving her re~~retirement benefits ~~as of October~~ 1, 2002; and PJ 5/29/03 ORC

Whereas, there are a significant number of cases holding for the proposition that a disability retirement renders tenure charges moot. (*See* Ramsey Board of Education v. O'Toole, 85 S.L.D. 385 (February 6, 1985), *aff'd* St. Bd. w/opinion 85 S.L.D. 400, *aff'd in part, rev'd in part and remanded* 212 N.J. Super 624 (App. Div. 1986), *cert. den.* 107 N.J. 123 (1987), St. Bd. on remand 86:3115 (disability retirement renders tenure charges moot); Wallace, 89: February 7 (settlement approved in light of disability retirement); Mosley, 99: April 27 (tenure charges dismissed in light of disability retirement, however, board may file additional charges if in the future TPAF determines teacher should return to duty because disability diminished); and Quadrini, 01: July 9 (tenure charges dismissed as moot where teacher retired).

Whereas, the parties after a consideration of all of the circumstances surrounding this matter agree that it is in the best interests of all parties to the withdrawal of the tenure charges filed against Ms. Zimic as these changes are moot in light of Ms. Zimic's disability retirement;

Now, therefore, the parties seek the approval of the Commissioner of Education, State of New Jersey pursuant to N.J.A.C. 6A;3-5.6(a) and the standards established in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 S.L.D. 842), to withdraw the tenure charges for the following reasons:

1. Ms. Zimic ~~hereby represents and provides documentation, a true and accurate copy is attached hereto as Exhibit C, that she~~ was approved for disability retirement on September 5, 2002 and is currently retired; PJ 5/29/03 ORC

2. Ms. Zimic ~~hereby represents and provides documentation, a true and accurate copy is attached hereto as Exhibit D, that she~~ has been receiving her retirement benefits ~~since October 1, 2002;~~ PJ 5/29/03 ORC

3. Ms. Zimic's disability retirement renders the tenure charges moot. *See* Ramsey Board of Education v. O'Toole, 85 S.L.D. 385 (February 6, 1985), *aff'd* St. Bd. w/opinion 85 S.L.D. 400, *aff'd in part, rev'd in part and remanded* 212 N.J. Super 624 (App. Div. 1986), *cert. den.* 107 N.J. 123 (1987), St. Bd. on remand 86:3115 (disability retirement renders tenure charges moot); Wallace, 89: February 7 (settlement approved in light of disability retirement); Mosley, 99: April 27 (tenure charges dismissed in light of disability retirement, however, board may file additional charges if in the future TPAF determines teacher should return to duty because disability diminished); and Quadrini, 01: July 9 (tenure charges dismissed as moot where teacher retired).

4. The Board's concern that Ms. Zimic is not fit to teach due to her mental incapacity and unbecoming conduct, such as, excessive absenteeism, is alleviated by documentation proving her retirement;

5. The Board reserves the right to file additional tenure charges if in the future the Teachers' Pension and Annuity Fund ("TPAF") determines Ms. Zimic can return to duty because her disability is diminished;

6. It is in the public interest to withdraw this matter due to Ms. Zimic's retirement. The result of Ms. Zimic's disability retirement, removing her from employment with the Board, is the same result that would be achieved if the Commissioner of Education and Administrative Law Judge determine that the tenure charges are sufficient. Thus, to require the parties to continue to pursue this matter would be an unnecessary expenditure of public funds;

7. The parties recognize that each has been represented by legal counsel of their own choosing and that they sign this Agreement as their own voluntary act and deed, and that they fully understand his or her rights;

8. Ms. Zimic, a former teaching staff member of the Board, represents that she has been advised by her counsel that the Commissioner of Education has a duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate;

9. This Agreement shall be subject to the ratification of the Cranford Board of Education;

10. This Agreement shall be subject to the laws of the State of New Jersey; and

11. All terms of this Agreement are deemed material. This document may not be altered, amended or modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Cranford Board of Education

By: Mary Venditti
Board President: MARY VENDITTI
Dated: JUNE 9, 2003

STATE OF NEW JERSEY)
COUNTY OF [redacted] UNION)SS.:

I CERTIFY that on JUNE 9, 2003, MARY VENDITTI personally came before me and stated under oath to my satisfaction that:
(a) this person was the subscribing witness to the signing of the attached instrument;
(b) this instrument was signed by MARY VENDITTI, who is the President of the Cranford Board of Education, the entity named in this instrument, and was fully authorized to and did execute this instrument on its behalf: and,
(c) the subscribing witness signed this proof under oath to attest to the truth of these facts.

Signed and sworn to before me on
JUNE 9, 2003.
Robert J. Calfagno
(Print name & title below signature)
ROBERT J. CALFAGNO, SBA/BS

Pamela Zimic
Pamela Zimic
Dated: May 29, 2003

STATE OF NEW JERSEY)
COUNTY OF ESSEX)SS.:

I certify that on May 29, 2003, Pamela Zimic, personally came before me and acknowledged under oath, to my satisfaction, that she is named in and personally signed this document.

Signed and sworn to before me on
May 29, 2003

(Print name & title below signature)
Mary I Oxfeld, Esq.

OAL DKT. NOS. EDU 11164-02 AND EDU 9039-02 (Remanded)
AGENCY DKT. NO. 264-8/02

IN THE MATTER OF THE TENURE	:	
HEARING OF PAMELA ZIMIC, SCHOOL	:	
DISTRICT OF THE TOWNSHIP OF	:	COMMISSIONER OF EDUCATION
CRANFORD, UNION COUNTY.	:	DECISION ON REMAND
	:	

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

Upon review, the Commissioner approves the parties' settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7|18|03

Date of Mailing: 7|18|03

355-03

355-03

Z.A., ON BEHALF OF MINOR CHILDREN, A.K. AND J.K.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent claimed children were entitled to attend school in the district based on her own domicile there (the children are actually living with a relative in a different district), but contended that she should be excused from providing her physical address because the Board would improperly reveal her whereabouts, thereby placing her and her children in danger.

ALJ found that petitioner provided no evidence whatsoever that would establish domicile within the district subsequent to June 2001, and further discounted petitioner's contention that she should be relieved from statutory requirements. ALJ did not award tuition because the Board had not filed a counterclaim.

Commissioner adopted ALJ's decision, but modified it to award tuition to the Board, noting that a counterclaim was not a necessary precondition for such award where the petitioner failed to demonstrate entitlement to free public education in the district pursuant to *N.J.S.A.* 18A:38-1.

July 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1030-03
AGENCY DKT. NO. 349-11/02

Z.A. ON BEHALF OF MINOR CHILDREN
A.K. AND J.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE VILLAGE
OF RIDGEWOOD, BERGEN COUNTY,
Respondent.

Z.A., parent of A.K. and J.K., petitioner, *pro se*

Lester Aron, Esq., for respondent (Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Record Closed: June 2, 2003 Decided: June 11, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Z.A. challenges the residency determination made by the Ridgewood Board of Education ("Board").

The matter was transmitted to the Office of Administrative Law (OAL) on January 7, 2003, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was held on June 2, 2003, at the OAL in Newark, New Jersey. At the conclusion of petitioner's case the Board moved to dismiss the petition. The record was closed on that date.

FACTUAL DISCUSSION

Based upon the undisputed facts presented at the hearing, I **FIND** the following **FACTS** in this case.

Petitioner has two children who have been attending Ridgewood schools, A.K., age sixteen and completing the eleventh grade, and J.K., age thirteen and completing the seventh grade. It is undisputed that the children reside in Hawthorne, New Jersey, and not within the Ridgewood school district.

Petitioner and her children resided at 625 Witthill Road in Ridgewood, New Jersey, from November 1999 until June 2001. Petitioner then moved to another location and has declined to provide her address to the Ridgewood school district. Petitioner would not reveal her physical address at the hearing. Petitioner maintains a post office box in Ridgewood. Petitioner testified that the Board is "not trustworthy" in maintaining the confidentiality of her physical address, which she believes it has provided to "unauthorized parties." Petitioner also testified that she believes individuals have hacked into the school computer to obtain her office address, and, further, that the district provided her prior physical address to J.R., the son of a former landlord, who she believes subsequently tampered with her vehicle.

After moving out of the Witthill Road address petitioner rented an apartment in Ridgewood. Petitioner provided no lease, utility bills or other documentation to indicate her current physical address, citing a concern for her safety. Petitioner believes that her ex-husband, P.K., father of A.K. and J.K., poses a physical threat to her. Petitioner and P.K. divorced on July 5, 1990, and petitioner has no idea where P.K. currently resides, but believes he may live in New Jersey. Petitioner indicated that a restraining order is in

place against P.K., but she did not provide a copy of the order. P.K. pays child support to petitioner by sending money orders to her post office box address. Petitioner indicated that police reports were made concerning domestic violence when she and P.K. resided in Upper Saddle River, New Jersey. Petitioner provided no such police reports. Petitioner indicated that there had been no acts of violence since the divorce in 1990.

Petitioner made a partial tuition payment to the district following an agreement reached in October 2002 whereby she agreed to pay tuition in order to keep her children in the Ridgewood school system. An $800 check paid to the district for tuition was drawn against the bank account of petitioner's employer, which petitioner indicates was authorized.

Petitioner testified that there had been no lawsuits against her other than one filed by J.R., who she claimed tampered with her vehicle. However, upon cross-examination petitioner acknowledged that there were numerous judgments against her, including some as recent as 2001. Petitioner indicated that she needed to "address" these judgments and acknowledged that most of them were for credit card debt and other debt. Petitioner testified that having a great many creditors had nothing to do with her need to maintain a post office box address. Petitioner indicated that the relief she is seeking is from the requirement that she reveal where she resides. Petitioner also seeks the return of the $800 she paid for tuition.

LEGAL DISCUSSION AND CONCLUSION

The Board has asserted that A.K. and J.K. were not domiciled within the district during the 2001-2002 and the 2002-2003 school years and, consequently, are not entitled to a free public education in Ridgewood.

N.J.S.A. 18A:38-1 provides that the public schools of a district are free to persons domiciled within the district who are over five and under twenty years of age. Domicile is the place of a person's abode, where he or she has the present intention of remaining and to which, if absent, he or she intends to return. *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd*, 58 *N.J.* 112 (1971). A person may have more

than one residence but only one domicile, which is that place that the person regards as his or her true and permanent home. *Board of Educ. of Middle Township, Cape May County v. K.K.*, 93 *N.J.A.R.*2d (EDU) 461.

In a proceeding such as this, the parent has the burden of proving by a preponderance of the evidence that the children meet the eligibility requirements. Here, there is no dispute that A.K. and J.K. are not domiciled in Ridgewood. Petitioner offered nothing more than an unsupported assertion that she is domiciled in Ridgewood, and that therefore her children are entitled to a free public education in the district. She provided no documentary evidence to indicate residency, rather she suggested that she is the subject of potential violence and therefore has no requirement to provide such proofs. Indeed, petitioner testified, "I can't prove I live in town." The fact that petitioner "needs the relief" is not a sufficient basis for entitlement to a free public education in the Ridgewood school district for A.K. and J.K.[1]

Based upon the undisputed facts and circumstances, I **FIND** that A.K. and J.K. are not domiciled within the district, and have not been since June 2001, and therefore do not meet the requirements set forth in *N.J.S.A.* 18A:38-1(a). I therefore **CONCLUDE** that A.K. and J.K. are not entitled to a free public education in the Ridgewood school district. As the Answer filed by respondent did not contain a counterclaim for tuition, no calculation of tuition costs is set forth herein.

For the foregoing reasons, the Board's motion to dismiss the petition of appeal is **GRANTED** and petitioner's appeal is **DISMISSED**.

ORDER

It is hereby **ORDERED** that petitioner's appeal of respondent's determination is **DISMISSED**. It is further **ORDERED** that A.K. and J.K. are ineligible for attendance in respondent's school district.

[1] Petitioner cites to *N.J.S.A.* 47:4-6 and to *N.J.A.C.* 6A:3-1.6, neither of which have application in this matter.

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

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

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

June 11, 2003
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

6-13-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 16 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

da

OAL DKT. NO. EDU 1030-03
AGENCY DKT. NO. 349-11/02

Z.A., ON BEHALF OF MINOR CHILDREN, A.K. AND J.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Administrative Law Judge (ALJ), and the transcript of proceedings at the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner, as were replies and cross-exceptions by the Board. Because the Board's cross-exceptions included, as a result of particular circumstances set forth below, the first calculation of tuition presented in this matter, petitioner was afforded an opportunity to respond to the Board's submission.

In her exceptions, petitioner reiterates her primary contention that she is, in fact, domiciled in the respondent's school district so as to entitle her children to continue attending school there, but that she must be "relieved" from proving such domicile because doing so would "endanger the welfare of her children as well as put herself in harm[']s way." Petitioner again opines that the respondent Board "is not trustworthy," and "has aligned itself against petitioner***by joining with a very dangerous and unscrupulous family, thereby endangering the lives" of her and her children, so that "giving them my physical address poses a real and present threat to my physical safety." (Petitioner's Exceptions, quotations at 3-4) In support of her

contention in this regard, petitioner includes with her exceptions two documents referenced by her during proceedings before the ALJ, but never entered into evidence.

In reply, the Board urges adoption of the ALJ's conclusion that petitioner has completely failed to meet her burden of demonstrating that A.K. and J.K. are entitled to attend school in the district, or that they were so entitled at any time subsequent to June 2001. (Board's Reply and Cross-Exceptions at 1-2) However, the Board excepts to the ALJ's suggestion that the Board waived its right to seek tuition from petitioner for the 2001-02 and 2002-03 school years. Rather, the Board explains, at the hearing conducted in this matter on June 2, 2003, "in the interests of efficiency and preserving the Court's time, and out of kindness to Petitioner, the Board stipulated on the record that it would only seek tuition if exceptions were filed by the Petitioner, at which point the Board would submit information regarding the outstanding tuition due." Since petitioner did file exceptions, the Board now seeks tuition and submits a certification as to the amount of tuition due, a total of $40,126 for both students. (*Id.* at 3-4)[1]

In response to the Board's cross-exceptions, petitioner revisits her prior argument that the Board's alleged revelation of her address to an unauthorized party "nullifies" any statutory obligation she would otherwise have had to provide her address to the Board. (Petitioner's Reply to Cross-Exceptions at 1-4) Petitioner responds to the Board's demand for, and calculation of, tuition as set forth in its cross-exceptions, by reiterating that she owes *nothing* because she is domiciled in Ridgewood and because the Board has made it impossible for her to prove that contention, so that its demand for tuition is tantamount to "a perpetrator seeking money compensation from his victim." (*Id.* at 4-5, quotation at 4)

[1] For 2001-02, petitioner had one child in middle school ($9,920) and one child in high school ($10,105), and for 2002-03, one child in middle school ($10,465) and one child in high school ($10,456). These amounts (a total of $40,946) are offset by an $800 payment previously made by petitioner.

Upon careful and independent review of this matter, the Commissioner must concur with the ALJ that petitioner cannot prevail on the present record. Petitioner claims that her children are entitled to attend school in the district based on her domicile there, yet she offers nothing more than her own assertion in support of that contention; indeed, as noted by the ALJ at hearing (T 29)[2], petitioner has provided not "a scintilla of evidence," direct or indirect, linking her to a domicile anywhere within the Village of Ridgewood subsequent to leaving her prior residence on June 30, 2001. To the contrary, petitioner's entire appeal is based on the premise that she should not have to provide any such evidence, either to the Board or to the ALJ, because the Board's own unlawful actions have nullified the requirement that she do so.[3] However, even accepting, *arguendo,* that a legitimate fear for her own and her children's safety might in some way mitigate petitioner's obligation to provide a specific physical address as she attempts to demonstrate domicile in the district, petitioner has offered nothing substantial in support of even that claim. Although petitioner asserted at hearing that the referenced threat came from her former husband, it was quickly established on record that any threat of that nature had long since ceased (T 12-19), whereupon petitioner pressed her unsupported belief that the only way a particular person could have gotten her former address (the address in Ridgewood from which she subsequently moved) was by hacking into the school computer system (T 5-7, 17-18, 23). Finally, petitioner repeatedly accuses the Board of being in ongoing collusion with a dangerous and unsavory family from whom petitioner formerly rented a residence, and that the Board previously provided her office address to a member of this family, who subsequently tampered with her vehicle. Although petitioner claims she can prove this latter allegation, no dispositive

[2] The designation "T" indicates the transcript of proceedings before the ALJ on June 2, 2003, followed by the page number referenced.

[3] Petitioner invokes the standards for grant of emergent relief, *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and the School Ethics Act, *N.J.S.A.* 18A:12-24.1, in support of this contention; however, as noted by the Board and the ALJ, neither of these authorities has any applicability herein. Petitioner also errs in her contention (see, for example, Petitioner's Reply to Cross-Exceptions at 5) that it is the Board's burden to prove that she does *not* live in Ridgewood.

evidence in support of it was brought to the record,[4] and, indeed, even if the Board had improperly released information about petitioner, the appropriate remedy would not be permitting her children's continued enrollment in the district without sufficient proof of domicile. Were the Commissioner to accept petitioner's wholly unsubstantiated assertions for this purpose, he would be setting a dangerous and unmanageable precedent in any effort to determine a student's right to free public education in a district pursuant to *N.J.S.A.* 18A:38-1.

Under the circumstances, therefore, petitioner has left the Board, the ALJ and the Commissioner with no alternative but to conclude that she has not demonstrated her children's entitlement to attend school in the Ridgewood district pursuant to *N.J.S.A.* 18A:38-1 subsequent to June 30, 2001, and the Commissioner adopts the ALJ's decision so finding. However, the Commissioner also observes that, contrary to the suggestion of the ALJ (Initial Decision at 4), in order for a board to be entitled to collect tuition in a residency matter where the petitioner has failed to prevail on appeal to the Commissioner and a tuition calculation for the period of ineligible attendance exists on record, it is not necessary for the board to have actually filed a counterclaim with its Answer to the Petition of Appeal. *N.J.S.A.* 18A:38-1, *N.J.A.C.* 6A:3-8.1(d), *N.J.A.C.* 6A:28-2.10(b). That being so, and the hearing transcript (T 25-31) supporting the Board's representation on cross-exception as to how it indicated it would proceed with respect to the collection of tuition,[5] the Commissioner holds that the Board is entitled to collect tuition in this matter. Nonetheless, because the record clearly demonstrates that petitioner's

[4] In her exceptions, petitioner includes a December 2, 2002 letter from the Board's Director of Human Resources stating that "the school district has not given your work address to any unauthorized person," one page of a transcript from a March 7, 2003 Superior Court proceeding between petitioner and the family in question where an incomplete statement at the top of the page appears to suggest that the complainant's attorney (a family member himself and the person petitioner accuses of tampering with her vehicle) may have obtained petitioner's work address from the Board of Education, and a copy of a police report based on petitioner's allegation of vehicle tampering. However, even if these documents had been entered as evidence, which it appears that petitioner herself may have elected not to do (T 17), and even if the Commissioner were not now precluded from considering them pursuant to *N.J.A.C.* 1:1-18.4(c), they would not alter the Commissioner's determination herein.

[5] At hearing, the Board refers to petitioner filing "appeals," but its references to the matter ending "with this court" in order for tuition to be forgiven clarify its actual intent.

residency was not raised as an issue by the Board until just before the start of the 2002-03 school year (T 25), the Commissioner declines to order payment of tuition for both 2001-02 and 2002-03, and instead directs that petitioner remit to the Board a total of $20,121 in payment for the 2002-03 school year ($10,465 + $10,456 less petitioner's $800 payment; see note 1 above). *N.J.A.C.* 6A:28-2.10(c)

Accordingly, the Initial Decision of the Office of Administrative Law, as modified above with respect to payment of tuition, is adopted as the final decision in this matter. A.K. and J.K. are found ineligible for a free public education in the Ridgewood School District absent a subsequent demonstration by Z.A. that they are, in fact, domiciled there,[6] and Z.A. is directed to remit to the Board $20,121 for the students' attendance during the 2002-03 school year.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 7|23|03

Date of Mailing: 7|24|03

[6] Petitioner is reminded of her obligation under the compulsory education law to ensure that her children attend a public or private school, or receive equivalent instruction elsewhere. *N.J.S.A.* 18A:38-25 *et seq.*

Additionally, the Board is reminded that, should petitioner subsequently provide information establishing a domicile in the district, address information is a pupil record that may only be accessed in accordance with *N.J.A.C.* 6:3-6.1 *et seq.* and other applicable law, including *N.J.S.A.* 47:1A-1 *et seq.* The Commissioner here concurs with the Board and the ALJ that *N.J.S.A.* 47:4-1 *et seq.*, cited by petitioner in support of her allegation that the Board improperly revealed her office address, has no applicability in this matter.

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

361-03

361-03

BUSINESS AUTOMATION TECHNOLOGIES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that its bid to provide internet services was improperly rejected by the Board. The Board contended it revised the specifications and rebid the project.

The ALJ found that petitioner, who offered "brand name equivalent" services, had demonstrated that the Board's actions in rejecting all initial bids and rebidding the contract with even more restrictive specifications were arbitrary, capricious and improper. The ALJ determined that the requirement that potential bidders be Tier 1 or national ISPs discouraged open competitive bidding since the qualification could be met by only one bidder, Sprint. The ALJ found that petitioner should have been awarded the contract. Thus, the ALJ ordered that the contract to provide T1 connections for uninterrupted access to the Internet be awarded to petitioner.

The Commissioner concurred with the ALJ that petitioner, whose services were equivalent to a Tier 1 ISP and whose bid was the lowest opened on December 20, 2002, should have been awarded the contract. The Commissioner emphasized that the second set of specifications did not contain substantial changes and that the decision to reject the three initial bids and rebid the contract was arbitrary and capricious.

July 24, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 832-03

AGENCY DKT. NO. 83-3/03

BUSINESS AUTOMATION TECHNOLOGIES,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY

Respondent.

Bernard M. Reilly, Esq., for petitioner (Dowd & Reilly, attorneys)

James F. Schwerin, Esq., for respondent (Parker, McKay & Criscuolo, P.A., attorneys)

Record Closed: May 21, 2003 Decided: June 18, 2003

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns allegations made by Business Automation Technologies (BAT) that its bid to provide Internet services to the Board of Education of the Township of Montgomery (Board) was improperly rejected. BAT's Petition for Emergent Relief was filed with the

Commissioner of Education on March 12, 2003, transmitted to the Office of Administrative Law on March 13, 2003, and scheduled for oral argument on March 14, 2003.

Following oral argument, the parties agreed to convert the Petition for Emergent Relief to a request for hearing as a contested case. The parties further agreed that the Board would be precluded from awarding a contract to any of the providers responding to the second request for bids until such time as the court decided the matter on cross-motions for summary decision or, in the alternative, issued a decision on the merits after conducting a hearing, which was scheduled to be held on March 25, 2003. This hearing date was adjourned due to conflicts on the part of counsel and rescheduled for May 1, 2003, in order to afford this Administrative Law Judge sufficient time to decide the cross-motions for summary decision. The parties' respective motions were denied by Order dated April 3, 2003, and the hearing was conducted on May 1, 2003.

FACTUAL DISCUSSION

In or about November 2002, the Board sought bids for a contract to provide T1 connections for uninterrupted access to the Internet. E-rate application #745750000437332 called for the Internet Service Provider (ISP) to be a Tier 1 or Tier 1A provider. The ISP was to provide a single T1 connection for 2003-2004 and add a second connection for 2004-2005. Among other requirements, the ISP had to guarantee less than three percent downtime per month. In the event service was down for a period of twenty-four hours or more, the monthly bill was to be prorated.

Gail Palumbo, the District's Director of Technology, testified that she conducted preparatory research into Internet access and Internet Service Providers (ISPs) before the District requested sealed bids for the contract. For the most part, this research consisted of reading articles in technical journals or magazines and having conversations with vendors. The primary article upon which she relied was an abstract from *Getting from Here to There*, IDG Books (1998), that provided an overview of dial-up lines, ISDN, using packet-switched networks within a WAN, and designing a network with leased lines. It was this abstract, which she downloaded from www.windowsitlibrary.com, that prompted Ms. Palumbo to focus on Tier 1 ISPs.

The abstract (Exhibit R-1) described a Tier 1 ISP as follows:

> At the top of [the] Internet provider hierarchy, Tier 1 providers connect to each other. Tier 1 providers own the networks that make up what is called the Internet backbone. The backbone of the Internet provides functions similar to interstate highways. While very few people live directly off an interstate highway, many of us use the highway when traveling great distances. Similarly, very few Internet service providers are connected directly to the backbone, but most traffic must traverse it.
>
> It takes a lot of money to be a Tier 1 Internet provider. It takes so much money, in fact, that you'll probably recognize most of the names as some of the largest companies in the world. These are organizations such as Sprint, GTE Internetworking, and MCI. Not coincidentally, many of these companies also provide conventional long-distance and local phone services.
>
> Tier 1 providers connect to each other to exchange Internet data. They connect at several specific points throughout the United States called NAPs, or network access points. ISPs connect their routers together at a NAP, allowing data to be exchanged between providers.

In comparison, an ISP's designation as a Tier 2 or Tier 3 provider was explained in the following way:

> If Tier 1 ISPs are so big and wonderful, why don't most of us dial into them? Probably because they're not all that interested in the home dial-up market. Most people in the United States get their Internet access from smaller ISPs. These ISPs, in turn, get their Internet access from the Tier 1 ISPs.
>
> You can think of tier-2 ISPs as being the smaller roads off a highway. While not as large or as fast as the interstate highways, the smaller roads do more than take you to a particular town or city. They take you to your workplace, a store, or your home.
>
> . . . Unfortunately, the matter doesn't end with tier-2 ISPs. Tier-3 ISPs lease bandwidth from tier-2 ISPs. Tier-3 ISPs tend to be small, local, "mom and pop" type shops. Many people use tier-3 ISPs for dial-up access and for hosting personal home pages on the Web. Additionally, ISPs set up peering relationships with each other.

In other words, Tier 1 ISPs connect to each other; Tier 2 ISPs connect to Tier 1 ISPs; and Tier 3 ISPs connect to Tier 2 ISPs. Given this interconnectivity, if a Tier 1 ISP experiences a problem, the Tier 2 and Tier 3 ISPs down the line will also experience those problems.

Ms. Palumbo stated that as she understood it, the service provided by Tier 2 and Tier 3 ISPs "might" be as good as that provided by a Tier 1. However, because Tier 1 ISPs actually own the Internet backbone, their service will "most likely" be better than that received from the lower tier providers. By way of example, Ms. Palumbo explained that since Tier 1 providers own their backbones, they would, in the event of a problem, make the necessary repairs themselves. A Tier 2 ISP, on the other hand, would have to ask the Tier 1 ISP that owns the backbone, to make any repairs it might require. "It is only logical to expect that the Tier 1 will give priority to its own direct customers ahead of those going through a Tier 2."

Based upon her research, Ms. Palumbo determined that the specifications for the contract under bid should call for a Tier 1 provider. However, "[d]ue to a misunderstanding on my part, I approved the specifications allowing for a category I mistakenly thought existed, that being Tier 1A." None of the potential bidders expressed confusion over the Tier 1A category or objected to the Tier 1/Tier 1A restriction.

The bids were opened on or about December 20, 2002, and BAT was deemed the low bidder. Sprint, the district's existing ISP and the only Tier 1 provider to bid on the contract, submitted a bid $294.20 per month higher than BAT for the first year, and $588 per month higher than BAT for the second year. However, even though none of the bidders had expressed confusion or concern over the Tier 1A category, Ms. Palumbo concluded that the inclusion of a Tier 1A category of ISP was problematic. Therefore, on January 7, 2003, the bidders were asked to provide information regarding their status as a Tier 1 or Tier 1A service provider. As requested, BAT submitted a copy of its contract with Sprint as a supplement to the literature it had attached to its bid. This literature described the facilities and services BAT obtained through its contract with Sprint.

By memorandum dated January 8, 2003, Ms. Palumbo recommended that the Board "go with the lowest bidder that meets the requirement of being a Tier 1 or Tier 1A ISP. Sprint is the bidder that meets these requirements." However, with lingering concerns that there was "a serious question as to whether or not there was a Tier 1A category," she consulted counsel and was advised that the "fairest thing to do in light of the ambiguity created by inclusion of that dubious category was to reject all bids, correct the specifications, and re-bid the project." Respondent's Motion Brief, pg. 2.

The matter was then brought before the Board of Education and item 3.11 on the Board's January 28, 2003 Business Meeting agenda bore the following information:

> Resolution/Rejection of Bids – ISP and T1 Line – Pursuant to advice from Board Counsel, it is recommended the Board of Education reject all bids received; pursuant to N.J.S. 18A:18A-22:
>
> d. The Board of Education wants to substantially revise the specifications for the provision of services.

The Board voted to revise the specifications and re-bid the project.

Beyond the elimination of the Tier 1A category, the specifications set forth in the new request, E-rate application #469830000452893, stated that "[t]he ISP must be a Tier 1 **national** company, defined as one of the primary carriers of Internet traffic in the United States, or a **national** provider with qualified peering relationships with more than one Tier 1 Internet Service Providers (*sic*)." It also included the following modified provisions:

> If the successful bidder resells the services of another ISP, the bidder will be responsible to the school district for any network outage or other interruption of service problems. The ISP must guarantee less than 3% downtime per month. If the downtime exceeds 3% in any given month, Montgomery Township School District will receive one free month of service credit for that month. If service is down for a period of 24 hours or more, the bill will be prorated.

Ms. Palumbo also drafted the new specifications limiting the bidding to Tier 1 ISPs because she was convinced that a Tier 1 provider could best deliver "burstable" service that

would provide the district with consistent access to the Internet. As she understood it, a Tier 2 ISP purchases or leases only a certain amount of bandwidth from a Tier 1 provider. Therefore, the bandwidth it makes available to its clients may be "bottlenecked" by the bandwidth available from the Tier 1 entity. By obtaining service directly from a Tier 1 provider, the risk of a bottleneck is significantly reduced. To her, the most important considerations were capacity and customer service, and she believed a national Tier 1 company would be better able to provide them than a Tier 2 or Tier 3 provider.

Isaac Fajerman, petitioner's president, testified that BAT provides Internet access services and computer networking to schools, governments, and corporate entities in New Jersey, New York, Pennsylvania and Delaware. The company counts among its clients fifteen school districts in this State, including some that are larger than Montgomery Township.

BAT services its clients in the Delaware Valley region under the terms of a multi-year contract with Sprint. Pursuant to this contract, BAT has access to and uses Sprint's facilities. In fact, BAT's "box" or hardware is actually located inside Sprint's facilities and controlled by that company. By virtue of this contract, BAT enjoys and in turn offers to its clients the same services provided by Sprint. These include built-in redundancies and the benefits of any peering relationships Sprint may have with other providers. In other words, BAT is the virtual equivalent of Sprint and provides the same 99.9% reliability of that company. Given its position in the hierarchy, if Sprint were to experience technical difficulties, BAT and the entire Northeast region of the United States would crash along with it. By the same token, once Sprint made the necessary repairs, BAT and the entire Northeast would join it back on line.

According to Mr. Fajerman, Tier 1 status is neither defined nor conferred upon providers by any recognized federal agency or industry association. Rather, the term is generally understood to apply or refer to a company that owns, or has access to, a large network backbone crossing many states. Most Tier 1 providers do not own all of the segments of their national or international backbones. Some of their segments are leased from or jointly owned with other large providers. Such is the case with Sprint.

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In his opinion, instead of focusing on labels, a purchaser of Internet services should look for an ISP matching its business model. For example, companies with offices or clients in multiple states would be well advised to choose a larger company, such as WorldCom, that can provide direct access to sites throughout a vast geographical area. School districts, on the other hand, which do not have offices or branches in other states or otherwise require access outside their political boundaries, need not obtain the services they require from a national Tier 1 provider.

Although it did not meet the commonly understood definition of a Tier 1 ISP, BAT submitted a bid based upon the "Brand Names, Proprietary Goods or Services, Etc." section of the Notice to Bidders. This section reads as follows:

> These specifications for the provision or performance of goods or services have been drafted in a manner to encourage free, open and competitive bidding. The specifications are written to serve as a guide to the bidder as to what the Board of Education wants and in no way intended to exclude bidders.
>
> Whenever a "brand name" is stated in all cases "brand name or equivalent" is implied except that if the goods or services to be provided or performed are proprietary, such goods or services may be purchased stipulating the proprietary goods or services in the bid specification when the special need for such copyrighted proprietary goods or services is directly related to the performance, completion or undertaking of the purpose for which the contract is to be awarded (N.J.S. 18A:18A-15).

Mr. Fajerman added that a close reading of the specifications disclosed that providers other than Tier 1 ISPs could meet them. In this regard, he pointed out that Verizon, which does not qualify as a Tier 1 ISP, currently holds contracts with 75% of the school districts in the State, including some that are larger and have greater needs than Montgomery. Moreover, the State itself obtains its Internet services from FastNet, a regional ISP that would not qualify as a Tier 1 provider.

Following publication of the new specifications, BAT, Sprint and Verizon, as well as Intac, Pan United and Agil Axis submitted bids. When the bids were opened on March 18, 2003, Intac came in with the low bid of $28,368 per year. BAT was the second lowest bidder with a bid of $28,800, an amount unchanged from its original bid. Verizon placed third with a bid of

$31,584 and Sprint followed with a bid of $34,692. According to Mr. Fajerman, Intac had an unfair advantage since it was present but late for the first round of bids and therefore had knowledge of BAT's initial proposal, enabling it to come in with a lower bid. He also stated that Intac is not a national Tier 1 provider and does not even resell the services of a Tier 1 ISP. In fact, to the best of his knowledge, Sprint was the only bidder that fit the definition of a Tier 1 ISP.

As per my Order of March 25, 2003, the Board has been enjoined from awarding a contract to the lowest responsible bidder pending the issuance of this Initial Decision.

DISCUSSION OF THE LAW

Pursuant to *N.J.S.A.* 18A:18A-4(a),

> Every contract for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the board of education to the lowest responsible bidder after public advertising for bids and bidding therefore, except as is provided otherwise in this chapter or specifically by other law.

In other words, the contract must be awarded to the bidder "whose response is most advantageous, price and other factors considered." *N.J.S.A.* 18A:18A-37. However, a Board may reject all of the bids received if it decides to substantially revise the specifications for the goods or services. *N.J.S.A.* 18A:18A-22.

Specifications must be drafted in such a way as to encourage free, open and competitive bidding. *N.J.S.A.* 18A:18A-15. Therefore, specifications may not, among other things,

> a. Require any standard, restriction, condition or limitation not directly related to the purpose, function or activity for which the contract is awarded; or
>
> . . .
>
> . . .
>
> d. Require, with regard to any contract, the furnishing of any "brand name," but may in all cases require "brand name or

> equivalent," except that if the goods or services to be provided or performed are proprietary, such goods or services may be purchased by stipulating the proprietary goods or services in the bid specification in any case in which the resolution authorizing the contract indicates, and the special need for such proprietary goods or services is directly related to the performance, completion or undertaking of the purpose for which the contract.
>
> . . .
>
> Any specification which knowingly excludes prospective bidders by reason of the impossibility of performance, bidding or qualification by any but one bidder, except as provided herein, shall be null and void and of no effect and shall be readvertised for receipt of new bids, and the original contract shall be set aside by the board of education. *Ibid.*

The initial request for bids, E-rate application #745750000437332, called for the ISP to be a Tier 1 or Tier 1A provider. Although not defined or conferred upon providers by any recognized federal agency or industry association, Tier 1 status is commonly understood to apply or refer to companies that own, or have access to, a large network backbone crossing many states. Sprint is one of a handful of national companies satisfying that informal definition. Based upon her conversations with various vendors, Ms. Palumbo knew or should have known that Sprint, a company with which the district had existing contracts and a working relationship, was the only bidder in the region that could satisfy that definition.

It would appear that the Board was so comfortable with and desirous of awarding the contract to Sprint that it ignored the spirit if not the letter of the "Brand Names, Proprietary Goods or Services, Etc." section of the Notice to Bidders. Included pursuant to *N.J.S.A.* 18A:18A-15d, this section was intended to encourage free, open and competitive bidding by allowing vendors to substitute goods or services equivalent to a stated brand name. In fact, the Notice to Bidders expressly stated that the specifications were meant to be a "guide to what the Board of Education wants and [is] in no way intended to exclude bidders." Although an informal designation lacking an official definition, one may consider the term "Tier 1" to be a brand name, at least in so far as it was used in the Notice. That being so, the bids submitted by BAT and Verizon, ISPs providing services equivalent to those offered by Tier 1 Sprint, should have been considered.

Ms. Palumbo stated she insisted upon a Tier 1 ISP because she believed that such a provider could best deliver the services the district required. Among other things, she was convinced a Tier 1 ISP could more easily provide burstable service, establish peering relationships with other ISPs and offer 24/7 tech support. Having decided that only a Tier 1 ISP would be acceptable, there was no need for her to examine BAT's architecture or infrastructure to see if it could provide the services required.

BAT is a "brand name equivalent" because it services its clients in the Delaware Valley region under the terms of a multi-year contract with Sprint. Pursuant to this contract, BAT has access to and uses Sprint's facilities. In fact, BAT's hardware is actually located inside Sprint's facilities and controlled by that company. By virtue of its contract, BAT enjoys and in turn offers to its clients the same services provided by Sprint. These include built-in redundancies and the benefits of any peering relationships Sprint may have with other providers. In other words, BAT is the virtual equivalent of Sprint and provides the same 99.9% reliability of that company. Had she fully considered the documentation BAT submitted with its bid and in response to her request for additional information, Ms. Palumbo would have seen that BAT offered an equivalent and less expensive alternative to a Tier 1 ISP.

Mr. Fajerman, who possesses Bachelor of Science and Master of Science degrees in Electrical Engineering and Computer Science from Columbia University and has twenty-eight years of experience working with computers and the Internet, testified that a careful reading of the specifications disclosed that providers other than Tier 1 ISPs could meet them. In this regard, he pointed out that Verizon, which does not qualify as a Tier 1 ISP, currently holds contracts with 75% of the school districts in the State, providing them with the very same services set forth in respondent's specifications. He also disclosed that the State of New Jersey, whose needs are substantially greater than those of respondent, obtains its Internet services from FastNet, which is a regional ISP and does not qualify as a Tier 1 provider.

It is possible that Ms. Palumbo did not fully examine BAT's architecture or infrastructure because she was, by her own admission, completely unfamiliar with the brand name equivalent section of the Notice to Bidders. As she put it, that section "was put together by the purchasing agent," and she had nothing to do with it. Rather, her "only responsibility was to put together the

specifications themselves" and, in so doing, she determined that only a Tier 1 ISP should be considered.

Once Ms. Palumbo learned that BAT was not a Tier 1 ISP, her consideration of that company ceased. Since she was the individual who was to make the ultimate recommendation to the Board on the awarding of the contract, her lack of familiarity with the brand name or equivalent provision of the Notice to Bidders, combined with her failure to adequately consider ISPs other than Tier 1 Sprint, rendered the entire bidding process suspect.

Yet, resolution of this matter is not dependent upon a determination that the term "Tier 1" is a brand name or otherwise falls within the "brand name or equivalent" section of the Act, *N.J.S.A.* 18A:18A-15d. Although *N.J.S.A.* 18A:18A-22 no longer expressly prohibits acceptance of a bid "which does not conform to the specifications therefore," the law remains clear that "where a party does not materially respond to the bid specifications he cannot be classified as a bidder at all, since the specifications are mandatory and jurisdictional." *George Harms Constr. Co., Inc. v. Borough of Lincoln Park*, 161 *N.J. Super.*367, 374 (Law Div. 1978). Therefore, it must be determined whether BAT's lack of Tier 1 status constituted a failure to materially respond to the specifications.

To be considered legally acceptable, a bid cannot materially deviate from the specifications set forth by the contracting entity. *Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, 138 *N.J.* 307, 314 (1994). While material conditions contained in bidding specifications cannot be waived, minor or inconsequential discrepancies and technical omissions can be waived. *Cf. Terminal Const. Corp. v. Atlantic County Sewerage Auth.*, 67 *N.J.* 403, 411 (1975). Consequently, the courts of this State have developed the following two-prong test for determining if a deviation is material: (1) will waiver of the deviation deprive the purchaser of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements, and (2) will such a waiver adversely affect the competitive bidding process by placing a bidder in a position of advantage over other bidders, or by otherwise undermining the necessary common standard of competition. *Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, *supra*, 138 *N.J.* at 315; *Township of River Vale v. R.J. Longo Const. Co., Inc.*, 127 *N.J. Super.* 207, 216 (Law Div. 1974).

Included among the documents BAT submitted with its bid and in response to Ms. Palumbo's request for additional information were letters of recommendation from three district boards of education. The South Brunswick, Point Pleasant and Bernards Township Boards of Education gave BAT an excellent rating in all respects. Additionally, BAT pointed out that Verizon, which does not qualify as a Tier 1 ISP, currently holds contracts with 75% of the school districts in the State, providing them with the very same services set forth in respondent's specifications. He also disclosed that the State of New Jersey, whose needs are substantially greater than those of respondent, obtains its Internet services from FastNet, which is a regional ISP and therefore does not qualify as a Tier 1 provider. I therefore **FIND** that waiver of the Tier 1 requirement would not have deprived the Board of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements.

Based upon her research and conversations with various vendors, Ms. Palumbo knew that Sprint, a company with which the district had existing contracts and a working relationship, was one of only a handful of companies in the country that qualified as a Tier 1 ISP. More than that, it was the only bidder in the region that could have satisfied the Tier 1 requirement. Realistically, there was no possibility of an open competition. Therefore, waiver of the Tier 1 requirement would not have adversely affected the competitive bidding process by placing one bidder in a position of advantage over other bidders, or by otherwise undermining the necessary common standard of competition. In fact, waiver would have "secure[d] competition and 'guard[ed] against favoritism, improvidence, extravagance and corruption,' in order to benefit the taxpayers and not the bidders," and I so **FIND.** *In re Honeywell Info. Sys., Inc.,* 145 *N.J. Super.* 187, 200-01 (App. Div. 1976), *certif. denied*, 73 *N.J.* 53 (1977), quoting *Township of Hillside v. Sternin*, 25 *N.J.* 317, 322 (1957).

Based upon the foregoing analysis of the two-prong test, I **FIND** that BAT's lack of Tier 1 status – to the extent there can be said to be such a status – did not constitute a material deviation from the specifications set forth by the Board. Therefore, I further **FIND** that BAT's bid was and should have been considered legally acceptable. *Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, *supra*, 138 *N.J.* 307.

A school board certainly has the statutory right to reject all bids. *N.J.S.A.* 18A:18A-22. This right serves an important purpose in that it provides a "strong inducement" for bidders to submit as low a bid as possible. *Cardell, Inc. v. Township of Woodbridge*, 115 *N.J. Super.* 442, 450-51 (App. Div. 1971), *certif. denied,* 60 *N.J.* 236 (1972). Although a board's decision to reject all solicited bids and rebid a project is entitled to a presumption of correctness, *Durling Farms, Inc. v. Bd. of Educ. of the Tp. of Montville,* 1975 *S.L.D.* 733, 736, that discretionary privilege is not without limit. Among other things,

> Rebidding a contract is fraught with certain dangers. While it is true that in some instances rebidding will benefit the public through achieving a lower price, the converse result of a higher contract price is also a factor to be considered. This is because the low bidder who may have given his best possible price may drop out of the bidding or other bidders by reason of insight gained through revelation of the competition's bidding strategy may see the weaknesses in their own bids. One cannot presume that rebidding will *ipso facto* bring a lower price. There is also the potential in some instances for rebidding to be demanded until the "favorite son" candidate is awarded the contract.
>
> [*Marvec Constr. Corp. v. Township of Belleville*, 254 *N.J. Super.* 282, 291 (Law Div. 1992)]

In determining whether a public entity has exceeded its authority to reject all bids, courts must first determine whether the conduct was arbitrary and capricious. *Ibid.* Here, there was no reason to reject all of the bids because Sprint's bid fully complied with the Notice to Bidders and the Board's preference was to continue the existing relationship it had with that ISP. Moreover, Sprint was the only qualified bidder and, as such, should have been awarded the contract. In fact, the question did not appear to be if but rather when Sprint would be awarded the contract. Given Sprint's position as the only bidder in the region that could have complied with the Tier 1 requirement, rejection of the remaining bids was a foregone conclusion. Therefore, there would appear to be only two possible explanations for rejecting all of the bids and rebidding the contract. One is that the Board was hopeful that Sprint, by reason of insight gained through revelation of BAT's bidding strategy, would come back with a lower price. The other is that the Board was hopeful Sprint would come back with the lowest price, thereby preempting any complaints that the specifications had been tailored to guarantee an award of the contract to its "favorite son."

The second set of specifications only served to further support BAT's contention that the Board's rejection of the bids was arbitrary and capricious. Careful examination discloses that the only material differences between the first and second set of specifications were requirements that (1) "[t]he ISP must be a Tier 1 **national** company, defined as one of the primary carriers of Internet traffic in the United States, or a **national** provider with qualified peering relationships with more than one Tier 1 Internet Service Providers (*sic*)," and (2) if the successful bidder resells the services of another ISP, the bidder will be responsible to the school district for any network outage or other interruption of service problems.

Again, Sprint was the only potential bidder that could have satisfied this even more limiting set of specifications. Meanwhile, given its contractual relationship with Sprint, BAT stood in the shoes and was the virtual equivalent of that ISP. As such, it was a virtual national company qualified and able to meet all of the requirements or otherwise provide the services set forth in the specifications, and at a substantially lower price. Therefore, other than ensuring the selection of Sprint, hopefully at a better price, the additional restricting of the bidding to Tier 1 **national** companies simply would not provide any real benefit to the district. Yet, the bids were rejected. I therefore **FIND** that the Board's actions were arbitrary and capricious.

On its face, the record supports a conclusion that the specifications were designed to discourage open competitive bidding. Certainly, the Board must have known, if not intended, that the requirement that the potential bidders be Tier 1 or national ISPs could only have resulted in the exclusion of prospective bidders by reason of the impossibility of performance, bidding or qualification by any but one bidder, Sprint, and I so **FIND**. *N.J.S.A.* 18A:18A-15.

DECISION AND ORDER

For the reasons set forth above, I **CONCLUDE** that the Board's actions in rejecting all three initial bids and rebidding the contract with even more restrictive specifications were arbitrary, capricious and improper. I further **FIND** and **CONCLUDE** that BAT should have been awarded the contract because its bid met all of the specifications set forth by the Board and was "most advantageous, price and other factors considered." *N.J.S.A.* 18A:18A-37.

Accordingly, it is **ORDERED** that the Board's actions in rejecting all three initial bids and rebidding the contract be and are hereby **REVERSED**. It is further **ORDERED** that the contract to provide T1 connections for uninterrupted access to the Internet be and is hereby **AWARDED** to Business Automation Technologies.

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

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

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

6/18/03
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

6/24/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 27 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/lam

APPENDIX

WITNESSES

For Petitioner:

Isaac Fajerman

For Respondent:

Gail Palumbo

EXHIBITS

For Petitioner:

P-1 Packet of Documents (49 pages) submitted with initial Petition for Emergent Relief

For Respondent:

R-1 Abstract, *Getting from Here to There*

BUSINESS AUTOMATION TECHNOLOGIES, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY, RESPONDENT.	:	DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.[1]

In its exceptions, the Board initially charges that the ALJ disregarded its argument that because petitioner failed to object to the Tier 1 condition *before* the bids were opened in December 2002, it waived any right to contest this specification thereafter. (Board's Exceptions at 4) The law in this regard is clear, the Board asserts, "[i]n order to challenge a specification, a bidder must bring that challenge before the bid opening." (*Id.* at 5) Petitioner, however, concedes that he did not do so.

Additionally, the Board underscores that it may decide the level of service it desires, which is not tantamount to calling for a brand name. (*Id.* at 6) Specifically, the Board affirms that it was permitted to ask for Tier 1 providers, as long as this requirement was not

[1] In addition to its exceptions, the Board filed, within 13 days of the date of the ALJ's Initial Decision, correspondence that offered new evidence. However, pursuant to *N.J.A.C.* 1:1-18.4(c), "Evidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions." Such information, therefore, cannot be considered by the Commissioner.

intended to preclude disfavored bidders. *Citing Michael T. Gavan, Inc. v. Board of Education of the Township of Lakewood*, 94 *N.J.A.R.* 2d (EDU) 307, the Board asserts:

> If one board may insist on qualification statements going beyond what the State of New Jersey requires, certainly this Board can decide it wants the peace of mind of dealing with a Tier 1 provider. This is especially true where the technical literature relied upon by Ms. Palumbo indicated that while service from less than a Tier 1 "might" be as good as that from a Tier 1, there is at least some room for doubt. The Montgomery Board was not arbitrary and capricious in trying to eliminate that doubt, in addition to being more confident of prompt repair service. (*Id.* at 7)

The Board further claims that the ALJ improperly incorporates into his decision a discussion on non-material deviations from specifications. The Board avers that the cases discussing such deviations "all arose in the context of a public entity being challenged for its own decision to waive a requirement. Not one of them," the Board points out, "even posits a duty on a public entity to actively take the initiative to seek if it can rescue a low bidder from non-material compliance by reaching out to declare a condition non-material, a brand new duty this ALJ seeks to create out of whole cloth." (*Id.* at 7-8)

Lastly, the Board contends that the ALJ engaged in an improper analysis by expressing his disagreement with the Board's decision to seek a Tier 1 ISP, rather than just review the legality of the Board's actions. (*Id.* at 11) In this regard, the Board asserts that the Commissioner's sole concern should be whether Ms. Palumbo acted in good faith, and there is no proof on this record that she did not. (*Id.* at 13)

In reply, petitioner stresses that there is no question that it was, and is, fully qualified to bid on and perform the ISP contract at issue. Notwithstanding that the Internet Service Provider (ISP) was to be "a Tier 1 or Tier 1A service provider," petitioner argues that as modified and clarified by the general specifications, "this provision is a 'guide to what the Board

of Education wants and [is] in no way intended to exclude bidders.'" (Petitioner's Reply at 2) Petitioner continues:

> As established beyond any real dispute and as found by the ALJ, the petitioner [Business Automation Technologies, Inc.] BAT provides the functional equivalent of Tier 1 service. Its facility and connection is located in a Tier 1 facility, through a lease with Sprint.
>
> It was further established that actual Tier 1 providers *** are limited to a relative handful of large companies; the only one of which would be interested in and bid on this relatively small contract was Sprint because Montgomery Township is located in a territory serviced by its facility. (*Id.* at 3)

Petitioner maintains that the Board's stated reason for rejecting all bids and deciding to rebid the project is "ludicrous." (*Id.* at 4) "The second bid," petitioner asserts, "was simply an unconscionable and transparent effort to reach a 'favorite son' bidder, and avoid the bid laws. This device is clearly improper. ***" (*Id.*) Petitioner, therefore, urges that the ALJ's decision be adopted by the Commissioner.

Upon careful and independent review of the record in this matter, and mindful that the ALJ's credibility determinations are entitled to the Commissioner's deference, *N.J.S.A.* 52:14B-10(c), the Commissioner determines to adopt the Initial Decision.

Notwithstanding the Board's repeated efforts to portray this matter as a delayed attempt to challenge bid specifications, the Commissioner does not view the issues herein so narrowly. Rather, the Commissioner finds that although the Petition of Appeal indeed takes issue with the Board's Tier 1 condition, it is clear that petitioner was *primarily* challenging the Board's decision to reject the December 2002 bids and rebid the contract.[2]

---

[2] In so doing, petitioner therein alleges that the Board did not substantially revise the specifications for the second bid (Petition of Appeal at paragraphs 22, 25) and requests that:

> The rejection of the lowest responsible bidder BAT in the January 28, 2003 resolution [be] rescinded and the award of the Internet contract B06-36 opened

In this connection, the Commissioner concurs with the ALJ that, under these circumstances, petitioner has demonstrated that the Board's decision to reject all bids resulting from the initial round of bidding was arbitrary and capricious. In so finding, the Commissioner is not persuaded by the Board's claim that its rejection of the initial bids was allowable under *N.J.S.A.* 18A:18A-22(d), that provision of the public bidding statute which permits a Board to reject all bids when it "wants to substantially revise the specifications for the goods or services." (Board's Post-Hearing Brief at 4) Indeed, not only did the second set of specifications contain changes that would *not* be characterized as "substantial," but the Board's proffered purpose for the rebid, to eliminate the Tier 1A category so as to remove the "definite ambiguity" (Board's Exceptions at 11), rings hollow, where "[n]one of the potential bidders expressed confusion over the Tier 1A category or objected to the Tier 1/Tier 1A restriction." (Initial Decision at 4)

Having determined that the decision to reject all three initial bids and rebid the contract was arbitrary and capricious, the Commissioner concurs with the ALJ, for the reasons set forth in the Initial Decision, that petitioner, whose services were equivalent to a Tier 1 ISP (Initial Decision at 10) and whose bid was the lowest opened on December 20, 2002, should have been awarded the contract, because that bid "met all the specifications set forth by the

---

on December 20, 200[2] be made to the lowest responsible bidder BAT who has the financial ability, equipment and personnel to perform the contract.

WHEREFORE, the re-bid to be opened on March 18, 2003 be cancelled.

IN THE ALTERNATIVE, if the Commissioner decides not to award the December 20, 200[2] bid to BAT, then the March 18, 2003 bid should be voided due to improper and non-competitive restrictions and be re-written to encourage free, open and competitive bidding by permitting companies that are not National that provide Internet Access in accordance with the industry standards for similarly sized schools [sic] districts in New Jersey [to bid]. (Petition of Appeal at paragraphs 26-28)

Board and its response was 'most advantageous, price and other factors considered.' *N.J.S.A.* 18A:18A-37" (Initial Decision at 14)[3]

Accordingly, the Initial Decision of the ALJ is adopted as amplified above.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2003

Date of Mailing: July 25, 2003

[3] Given the foregoing conclusion, to the extent a discussion on waiver is necessary to resolution of this matter, the Commissioner is not persuaded that the ALJ's discussion at pages 11 and 12 of the Initial Decision imposes a *duty* on a public entity to attempt to "rescue a low bidder from non-compliance by reaching out to declare a condition non-material," as argued by the Board. (Board's Exceptions at 7-8)

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

362-03

MARK BOGDANY, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY, :

RESPONDENT. :

:

COMMISSIONER OF EDUCATION

DECISION

July 24, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 211-00
AGENCY DKT. NO. 377-12/99

MARK BOGDANY,

Petitioner,

v.

BOARD OF EDUCATION, CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Rosenberg, attorneys)

George F. Hendricks, Esq. for respondent (Hendricks and Hendricks, attorneys)

Record Closed: June 23, 2003 Decided: June 24, 2003

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 19, 2000, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

June 24, 2003
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

6-26-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

tmp

KLAUSNER & HUNTER, ESQS.
63 East High Street
P.O. Box 1012
Somerville, New Jersey 08876
Attorneys For Petitioner, Mark Bogdany

MARK BOGDANY, Petitioner, vs. NEW BRUNSWICK BOARD OF EDUCATION, MIDDLESEX COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO.: EDU 211-00 AGENCY DOCKET NO.: 377-12/99 STIPULATION OF SETTLEMENT

The matter being opened to the Court and the Commissioner of Education by Klausner and Hunter, Esqs., Stephen E. Klausner, of counsel, attorney for Petitioner, Mark Bogdany and Respondent, New Brunswick Board of Education, appearing by its attorneys, Hendricks and Hendricks, Esq., George Hendricks of counsel, in the presence of Ronald Larkin, Superintendent of Schools and the parties, after conferring with the Court, advised the Court that the matter had been amicably resolved on the following terms:

1. Respondent shall remit $6,000.00 to Petitioner for medical insurance that Petitioner paid out of his own pocket between September 1, 1999 and August 31, 2001.

2. Respondent shall remit $31,000.00 as back pay to Petitioner for school year 1999-2000less all lawful deductions including payments to Teachers Pension and Annuity Fund and shall request TPAF to credit Petitioner for that school year.

3. Respondent shall remit $34,682.00 as back pay to Petitioner for school year 2000-2001 less all lawful deductions including payments to Teachers Pension and Annuity Fund and shall request TPAF to credit Petitioner for that school year.

4. Respondent shall restore twenty-six (26) sick days for school years 1999-2000 and 2000-2001 to Plaintiff's accumulated sick leave bank.

4. This settlement is subject to Board approval. A vote will be taken by the New Brunswick Board of Education on January 21, 2003.

Stephen E. Klausner, Esq.
Attorney for Petitioner

Dated:

George Hendricks, Esq.
Attorney for Respondents

Dated:

SO ORDERED:

Honorable Robert S. Miller, A.L.J.

OAL DKT. NO. EDU 211-00
AGENCY DKT. NO. 377-12/99

MARK BOGDANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2003

Date of Mailing: July 25, 2003

* It is noted that Term 4 on page two of the Settlement Agreement specifies that such agreement is conditioned upon the approval of the Board of Education. Because agency approval renders this settlement a final decision pursuant to *N.J.A.C.* 1:1-19.1(c)2, accord to its terms by all necessary parties must be accomplished prior to the Commissioner's approval. In that the record of this matter includes a resolution indicating that the Board approved the agreement at its meeting on February 25, 2003, the Commissioner finds that approval of the settlement may be granted.

36503

#365-03

D.S., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

July 23, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5464-03
Agency Dkt. No. 179-6/03

D.S. o/b/o minor child, R.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,

Respondent.

D.S., *pro se*

Robert M. Jacobs, Esq., for respondent

Record Closed: June 12, 2003 Decided: June 20, 2003

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on June 6, 2003 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have submitted a letter, which is attached and fully incorporated herein.

I have reviewed the record and the correspondence and **FIND**:

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

June 20, 2003
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

June 25, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 26 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

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DOREEN E. WINN+
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FRANK J. FRANZINO, JR.+
RENATA D. LOWENBRAUN+
ELIZABETH EILENDER+*
STEPHEN A. HERMAN
COUNSEL TO THE FIRM

WALTER G. WINNE (1889-1972)
HORACE F. BANTA (1895-1966)
BRUCE F. BANTA (1932-1983)

•CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CIVIL TRIAL ATTORNEY
+MEMBER NEW YORK BAR ALSO
*MEMBER CONNECTICUT BAR ALSO
*MEMBER PENNSYLVANIA BAR ALSO
▲CPA (NJ)

VIA FACSIMILE

June 12, 2003

Honorable Edith Klinger
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

rjacobs@winnebantalaw.com

Re: **D.S. v. Board of Education of Ramsey, Bergen County**
OAL Docket No. EDU5464-03N

Dear Judge Klinger:

This letter will serve to confirm my telephone discussion this morning with Your Honor's Chambers in connection with the above-captioned matter. I indicated that I represent the Ramsey Board of Education. I was advised yesterday by telephone that a hearing has been scheduled in this matter for next Tuesday, June 17, 2003 at 1:30 p.m. This morning, I was advised by the Superintendent of Schools that he spoke this morning with a member of the Petitioner's family by phone (the Petitioner is apparently away) and advised her that the Ramsey Board of Education has approved the student's participation in the 2003 Ramsey High School Graduation Ceremony. In this regard, I am enclosing a copy of the Superintendent's letter to the Petitioner confirming this decision. Based upon the foregoing, it would appear that there will not be any need for this hearing next Tuesday. I respectfully request that Your Honor advise me as to how Your Honor wishes us to proceed at this time.

Respectfully submitted,

Robert M. Jacobs

/ft
cc: Denise Smith
S:\Ramsey Bd of Ed\Kluz\Judge Klinger 6-12-03.wpd

OAL DKT. NO. EDU 5464-03
AGENCY DKT. NO. 179-6/03

D.S., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge (ALJ) in her Initial Decision. The Commissioner determines that, inasmuch as he did not receive the ALJ's Initial Decision until June 25, 2003 and the Board has granted the relief sought in this matter, *i.e.*, it allowed D.S.'s participation in the 2003 Ramsey High School Graduation Ceremony* (see Letter of June 12, 2003 to the ALJ, appended to the Initial Decision) and given that no settlement terms were brought to the record, this matter is more appropriately dismissed as moot.

Accordingly, the Commissioner hereby dismisses this case.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: July 23,2003

Date of Mailing: July 25, 2003

* Said ceremony was scheduled for June 20, 2003.

#374-03

374-03

MARGARET MENTRASTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

July 24, 2003

OAL DKT. NO. EDU 07610-00
AGENCY DKT. NO. 275-7/00

MARGARET MENTRASTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2003

Date of Mailing: July 30, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07610-00

AGENCY DKT. NO. 275-7/00

MARGARET MENTRASTI,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch, Porwich and Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent
(General Counsel, State-Operated School District of Jersey City)

Record Closed: June 16, 2003 Decided: June 24, 2003

BEFORE **THOMAS E. CLANCY**, ALAJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 24, 2000, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, I **FIND**: (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

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

6/24/03
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

6-27-03
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

FEINTUCH, PORWICH & FEINTUCH
721 Newark Avenue
(201) 656-8600
Attorneys for Petitioner

MARGARET MENTRASTI, Petitioner	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
vs.	OAL DKT NO. EDU 07610-00 Agency Ref. No. 275-7/00
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent	STIPULATION OF SETTLEMENT

THIS MATTER having been brought before the office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with Charlotte Kitler, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the Division of Workers' Compensation's ruling on the length of petitioner's temporary disability in Margaret Mentrasti vs. Jersey City Board of Education, C.P. No. 2000-24317, and for good cause being shown,

IT IS on this 16th day of June, 2003,

STIPULATED AND AGREED that Respondent shall restore to Petitioner's sick leave bank all days which Respondent deducted for Petitioner's absences on from April 25, 2000 through June 6, 2000, inclusive.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: 5/30/03

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: 1/27/03

#387-03

5871-03

GRETCHEN M. EVIGAN,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

July 24, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 330-02

AGENCY DKT. NO. 386-9/01

GRETCHEN M. EVIGAN,

Petitioner,

v.

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

Respondent.

Wayne J. Oppito, Esq., for petitioner

David Rubin, Jr., Esq., for respondent

Record Closed: May 5, 2003 Decided: June 26, 2003

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

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –13 on June 30, 2002. This matter was scheduled for a hearing on January 29, 2003. Because of ongoing settlement discussions, a joint request for an adjournment was granted and the matter was rescheduled for March 12, 2003, if

necessary. Prior to March 12, 2003, the parties indicated they had reached a settlement and I consented to another adjournment in order to allow the parties time to finalize their settlement discussion and reduce it to writing. The parties have agreed to a settlement and prepared a written agreement indicating the times thereof, which is attached and fully incorporated herein. (J-1)

I have reviewed the record and the terms of the settlement and I find:

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

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

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

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

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

June 26, 2003
DATE

Ana C Viscomi
ANA C. VISCOMI, ALJ

Receipt Acknowledged:

June 30, 2003
DATE

MK Duncan (JB)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/jck

EXHIBITS

Jointly Submitted

J-1 Stipulation of Settlement

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

GRETCHEN M. EVIGAN,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	Agency Docket No. 386-9/01
vs.	:	STIPULATION OF SETTLEMENT
BOARD OF EDUCATION, TOWNSHIP OF PISCTAWAY, MIDDLESEX COUNTY,	:	
Respondent.	:	

The within matter having been amicably resolved by the parties, the petition of appeal herein is withdrawn with prejudice, on the following terms:

1. Respondent will pay to petitioner a lump sum of $3,000, in full satisfaction of all claims which were or could have been asserted by petitioner in this matter.

2. The moneys referred to in the preceding paragraph shall deemed in the nature of a longevity payment, and not considered an increase in petitioner's annual salary for purposes of computing any future salary increases.

3. This settlement does not constitute an admission of wrongdoing on the part of respondent, and is entered into solely to avoid the expense and inconvenience of continued litigation.

WAYNE J. OPPITO, ESQ.
Attorney for Petitioner

DAVID B. RUBIN, ESQ.
Attorney for Respondent

Dated:

OAL DKT. NO. EDU 330-02
AGENCY DKT. NO. 386-9/01

GRETCHEN M. EVIGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2003

Date of Mailing: August 1, 2003

#386-03

386-03

P.P.M., on behalf of minor child, S.S., :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, :

DECISION

RESPONDENT. :

SYNOPSIS

Petitioning uncle challenged the Board's residency determination that his niece, S.S., was not entitled to a free public education in the District.

The ALJ concluded that S.S. resided in the District with her uncle solely for the purpose of receiving a free public education there. Petitioner failed to demonstrate that S.S.'s parents, who relocated to Florida, were not capable of supporting or caring for her due to family or economic hardship. The mother provided medical coverage and the father still claimed S.S. as a dependent. Moreover, the parents have another child living with them and they indicated that S.S. would be moving in with them during the summer. The ALJ ordered the petition denied and ordered petitioner to reimburse the Board $7,611.87 in tuition for the period of S.S.'s ineligible attendance in the District.

Based on the record and the ALJ's credibility assessments (no transcript was provided), the Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner directed that petitioner reimburse the Board the tuition owed.

July 31, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1839-03
AGENCY DKT. NO. 365-11/02

P.P.M. ON BEHALF OF THE MINOR CHILD, S.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

P.P.M., *pro se*, petitioner

Joanne L. Butler, Esq., for respondent (Schenck, Price Smith & King, attorneys)

Record closed: June 16, 2003 Decided: June 26, 2003

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, P.P.M., appealed the determination by respondent, Board of Education of the South Orange-Maplewood District (District), that his minor niece, S.S., was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(b).

Respondent answered that the application had not shown family or economic hardship or otherwise satisfied the requirements of *N.J.S.A.* 18A:38-1b(1). On October 31, 2002, the District denied petitioner's application to have his niece, S.S., admitted to school in the District. On November 5, 2002, petitioner filed a petition pursuant to *N.J.S.A.* 18A:38-1 concerning this residency dispute. S.S. was permitted to attend school in the District during the pendency of the appeal, commencing November 11, 2002. On January 13, 2003, the District filed an answer denying the allegations in the petition, with a counterclaim for tuition. On March 4, 2003, the Department of Education transmitted the matter to the Office of Administrative Law for a hearing as a contested case. A hearing was held on May 20, 2003. The record was left opened in order for the District to submit documentation. On June 5, 2003, the District submitted the affidavit of tuition charges. Thereafter, no opposition was received from petitioner by June 17, 2003, and the record closed on that date.

FACTUAL DISCUSSION

Testimony

Tiffani Barnes

Tiffany Barnes testified for respondent. She has been employed by respondent as District Registrar since December 2002. Before that she was a confidential secretary responsible for the duties of the registrar since April 2002. She is responsible for the processing of documentation related to students seeking to attend school in the district. Among the documentation are birth certificates, custody papers and affidavits submitted in support of applications. She is responsible for the investigation of residency related to such applications. She also handles the matters of withdrawals of students from the district.

The witness reports to the Director of Planning and Assessment, Dr. Patricia Barker. She also is under the supervision of the Superintendent of Schools. Dr. Barker oversees the residency process. She also assists the witness with the processing of the affidavit applications.

The witness is familiar with the facts and circumstances of this matter. The registration form was submitted as part of the application packet (R-1). The witness reviewed this registration form. Several things on the registration stood out in the mind of the witness. She noticed the home address of the parents as Coral Springs, Florida. The mother is currently on leave from her job. The father is a self-employed musician. The petitioner is not identified as the legal guardian. As part of the application process, the affidavit of the parents was submitted (R-2). The present address of the parents is in Coral Springs, Florida. They have another child residing with them and attending school in Coral Springs Elementary school. The parents indicated that they relocated to Florida and would take a while to settle down. It is in the child's best interest to stay with her uncle. On page 4 of the affidavit, the mother circled "will" at number 7. At page 4, the mother indicated, "care for daughter". At page 5, the mother indicated she would provide medical insurance for the child. At page 6, the mother indicated that the child would move out of the district resident's home in the summer of 2003. At G-1, there was an indication that the father will continue to claim the child as a dependent. At page 7, I-4 indicates that the child will live with the parents during the summer. The witness referred to a handwritten statement from petitioner (R-4). This is an affidavit of resident that was submitted by petitioner. Exhibit R-1 reflects the parents' residence as Coral Springs, Florida. Exhibit R-3 indicates that the parents were relocating to Florida, but they stated in the affidavit that they are capable of caring for their daughter. At Exhibit R-4, petitioner indicated that the child would not be residing with him for the sole purpose of receiving a free education in the District. This is inconsistent with the parent's affidavit that stated at page 7 that the pupil will be residing with petitioner for the sole purpose of receiving a free education in the District. Petitioner stated at page 5 of his affidavit (P-4) that he would be financially responsible for the child. But it also indicates that the child will move out at the end of the school year, June 30, 2003. The affidavit further indicates that the child will reside with the parents during the summer. Petitioner submitted a letter dated October 28, 2002 along with the affidavit (R-5). This letter indicated to the witness that the parents had personal reasons for moving to Florida.

Based on the documents reviewed, the witness had sufficient information to make a determination regarding residency. She decided to deny the application. She stated that a hardship was not proven. As a result of the determination, a letter was sent to petitioner, dated October 31, 2002. The determination was that the application does not establish either a family or economic hardship. It does not establish that petitioner will be supporting the child *gratis*. It also does not establish that the pupil will be in attendance for longer than the school year.

The witness identified the resolution of the April 15, 2002 board of education meeting that reflected the cost of tuition for grades 9-12 to be $10,001 for the 2002-2003 school year.[1]

Ms. Barnes testified that there were further communications from the petitioner after the determination. He sent a letter to the Superintendent dated November 2, 2002. There was nothing in that letter that would cause her to change her determination. There was also a response from the Superintendent to the petitioner dated November 4, 2002. This reflected that the Superintendent received the November 2, 2002 letter. The witness received a copy of the letter. There was nothing else that was provided by the petitioner to establish the basis for the child attending school in the District.

On cross-examination, the witness explained her reason for stating there were contradictions in the documents submitted. Again, she testified about the inconsistencies she saw. The father stated he would take the child as a dependent. The petitioner stated that he would take the child as a dependent during the time the child resides with him. The parent affidavit indicated that the mother would provide medical insurance. It also indicated that the child would reside with the parents during the summer.

[1] After the hearing was concluded, the Court requested an affidavit from the respondent District regarding the number of school days the child was in attendance, and the *per diem* tuition rate. Respondent submitted the affidavit of Tiffani Barnes, which is marked as Exhibit R-13 in evidence, with no objection being received from petitioner.

P.P.M.

The witness testified that this was not a matter of convenience. It was in the child's welfare to reside with him. It was not an easy decision to make. He explained that he did not seek guardianship because it was a lengthy and costly process with lawyers. The child came to South Orange for an education. The parents moved to Florida because they felt it would be better financially. He also indicated that he could not declare the child as a dependent in 2002 but he will in 2003. The mother already paid for the child's insurance. The parents moved for a better life. They could not find jobs in New York. He will provide support *gratis* for the child. At the time he took the child in, he thought it was only for the school year. But now he testified that she would stay with him until she graduates. This is not a convenience. There was no work for the father in New York after September 11. He is a musician and he lost his band. There was little work in New York. The witness stated that the mother has a part-time job in Florida. She is still looking for work. They could not live in New York. It was too expensive.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS** of **FACT**:

1. Petitioner resides in the City of South Orange, New Jersey.

2. He is the uncle of the minor child, S.S.

3. S.S. is the daughter of R.S. and R.S.

4. S.S. lived with her parents in Uniondale, New York, until about October 2002.

5. The parents moved, along with their other child, R.S., to Coral Springs, Florida. The child, R.S., attends Coral Springs Elementary School.

6. On or about October 28, 2002, the mother, R.S., submitted an affidavit of parent to the District in support of the request to register the child, S.S., as a student in the tenth grade at Columbia High School. S.S. has been attending school there since November 11, 2002.

7. The mother explained that the purpose for requesting that the child be registered in the District was to permit the parents to settle down in Florida after their move from New York.

8. The parents expect this arrangement to be temporary and expect S.S. will move in with them in Florida during the summer of 2003.

9. The father will declare S.S. as a dependent during the time she resides in the District with petitioner.

10. Petitioner also submitted an affidavit of resident dated October 28, 2002, in support of the request to register the child, S.S., in the District.

11. Petitioner acknowledged he is not the legal guardian of S.S.

12. He stated that the parents are capable of caring for S.S., but it would be in her best interest to finish the school year in a more stable environment.

13. He further stated that he would be the sole means of support for S.S.

14. The affidavit of petitioner indicated that S.S. would be moving out of his home at the end of the school year, June 30, 2003.

15. Tuition for Columbia High School for the 2002-2003 school year is $10,001.

16. The total number of school days in the District from November 11, 2002 to the end of the school year is 137 days.

LEGAL DISCUSSION

The State of New Jersey provides that "public schools shall be free to ... any child who is domiciled within the school district." *N.J.S.A.* 18A:38-1(a). The domicile of

a minor child follows that of his parents. *See V.R. on behalf of A.R. v. Bd. Of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286. The applicable statute, *N.J.S.A.* 18A:38-1(b)1, reads in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child gratis and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Therefore, the evidence must show that: (1) petitioner is domiciled within the District; (2) petitioner is supporting S.S. *gratis*; (3) S.S.'s parents are not capable of supporting or caring for her due to family or economic hardship; and (4) S.S. is not residing with petitioner solely for the purpose of receiving a free public education in the District. Petitioner has the burden of proof to demonstrate family or economic hardship.

Where no hardship exists, the law requires that the resident shall be assessed tuition prorated to the time of the student's ineligible attendance in the school district. The statute, *N.J.S.A.* 18A:38-1(b)1, further reads in pertinent part:

> Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is

the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor*, 38 *N.J. Super.* 6, 24 (App. Div. 1955). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 *L. Ed. 2d* 380 (1973).

CONCLUSIONS

There is no real dispute that S.S. currently resides with her uncle in South Orange. There is equally little doubt that through the generosity of her uncle, S.S. is staying with him *gratis*. However, beyond that, petitioner has failed to establish that there is either an economic or family hardship. There was no testimony of the parents of the child, S.S., other than the affidavit of the mother. She acknowledged that they have another child living with them in Florida. There was no explanation as to why they would have a hardship as it related to S.S., but not the other child. The affidavit merely stated that it would be in the best interest of S.S. while they settled down in Florida. Her affidavit indicated that they expected S.S. to move in with them during the summer. I **CONCLUDE** that there is no family hardship preventing S.S. from residing with her parents.

Petitioner attempted to explain the inconsistencies between the affidavit of the mother and the requirements in establishing entitlement to free admission to the school District. Although he testified that this was not a matter of convenience, the evidence compels a different conclusion. Certainly, the uncle is attempting to assist the family, and his efforts are laudable. However, it is clear that such instances of convenience are not contemplated under the statute. The evidence clearly establishes that the parents placed S.S. with her uncle temporarily while they settle down in Florida. They have all intentions of having her return as soon as possible. There was no convincing

evidence to establish that the parents have financial difficulties that create a hardship warranting that S.S. lives with her uncle. The efforts at such at the hearing are belied by the facts as asserted in the affidavits. The mother still provides medical coverage for the child. The father still claims her as a dependent. I **CONCLUDE** that there is no financial hardship rendering the parents incapable of providing support for S.S.

Finally, while there may be other unarticulated reasons for the child to reside with her uncle, no evidence was adduced other than the purported hardship. I am left to **CONCLUDE** that S.S. resides in the District solely for the purpose of receiving a free public education there. Petitioner has failed to meet the four-prong test of eligibility in the instant matter.

ORDER

For all of the foregoing reasons, it is hereby **ORDERED** that the appeal of petitioner is and shall be **DENIED**. It is further **ORDERED** that petitioner reimburse respondent in accordance with tuition rates calculated pursuant to the formula established by the New Jersey Department of Education and as set forth in the testimony and affidavit of Tiffani Barnes, annexed hereto as Exhibit R-13 in evidence, as modified in accordance with *N.J.S.A.* 18A:38-1(b)1, in the amount of $7,611.87 (137 x 55.56)[2] through the end of the school year.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

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[2] The affidavit of Tiffani Barnes utilized 183 days to calculate the *per diem* tuition. Inasmuch as the statute provides for a formula utilizing 180 days, the calculation of tuition here is based on the total number of days S.S. will attend school in the District divided by 180.

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

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

6/26/03
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6/26/03
DATE

M. Kathleen Duncan/CA

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 2 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

WITNESSES

Tiffani Barnes

P.P.M.

EXHIBITS

For Respondent:

R-1 Registration Form, October 28, 2002
R-2 Affidavit of Parent/Guardian, October 28, 2002
R-3 Letter, R.S. and R.S. to District, October 28, 2002
R-4 Affidavit of Resident, October 28, 2002
R-5 Letter, Petitioner to District, October 28, 2002
R-6 Letter, District to petitioner, October 31, 2002
R-7 District Resolution 1495, April 15, 2002
R-8 Letter, Petitioner to District, November 2, 2002
R-9 Letter, District to petitioner, November 4, 2002
R-10 Letter, Petitioner to District, November 5, 2002
R-11 Letter, Petitioner to Commissioner of Education, November 5, 2002
R-12 Letter, District to petitioner, November 5, 2002
R-13 Affidavit of Tiffani Barnes, June 2, 2003

OAL DKT. NO. EDU 1839-03
AGENCY DKT. NO. 365-11/02

P.P.M., on behalf of minor child, S.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In his exceptions, petitioner challenges the factual findings of the Administrative Law Judge (ALJ), asserting that the ALJ ignored crucial evidence that demonstrated family or economic hardship. In this connection, petitioner avers that he did not have the resources to enable S.S.'s parents to fly to New Jersey from Florida to provide testimony, that his testimony was unfairly portrayed and that the Board's affidavits and forms relied upon by the ALJ were misleading and inadequate. The assessment of tuition, petitioner therefore argues, is "unconscionable." (Petitioner's Exceptions at 4)

The Board, in reply, objects to petitioner's attempts to insert facts into the record which contradict his testimony under oath. Contrary to petitioner's assertion, the Board argues that "[i]t is apparent from pages 8 and 9 of the Initial Decision that Judge Giordano considered Petitioner's testimony, but was not persuaded by it, believing it to be tailored to address the deficiencies in the application." (Board's Reply at 2) The Board also asserts that petitioner issues "spurious allegations" with respect to it residency forms and procedures, which, the Board maintains, are consistent with case law and State regulation. (*Id.* at 2, 3) Finally, the Board argues that petitioner cannot object to the

amount of tuition ordered by the ALJ, since, "[t]he annual tuition rate is set by the Board and approved by the Department of Education." (*Id.* at 3) Moreover, as the Board points out, the method for determining the amount of tuition which is owed in such matters is set by statute. The Board, therefore, urges that the Commissioner adopt the Initial Decision in its entirety.

Upon careful and independent review of the record in this matter, and based on the ALJ's credibility assessments, *N.J.S.A.* 52:14B-10(c), the Commissioner finds no cause to disturb the factual findings and legal conclusions of the ALJ. In so doing, the Commissioner underscores that challenges to the factual findings rendered by an ALJ require the objecting party to provide the Commissioner with relevant portions of the transcript of the hearing in order to permit him to assess the merits of those exceptions. *In re Morrison*, 216 *N.J. Super.* 143, 157-158 (App. Div. 1987) Here, however, no transcript was provided.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein, and the within Petition of Appeal is dismissed. The Commissioner directs that petitioner reimburse the Board for tuition in the amount of $7,611.87 for the attendance of S.S. in the District from November 11, 2002 until the end of the 2002-2003 school year, as set forth in the Initial Decision.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/31/03

Date of Mailing: 7/31/03

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

389-05

398-03

S.G., on behalf of minor child, F.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning grandmother challenged the Board's residency determination that F.W. was not domiciled in the District.

In light of the credible presentation by petitioner that she was fully responsible for F.W. and that he lives with her in Ewing and stays with his mother for convenience when petitioner works at night, the ALJ found that F.W. lives with petitioner. S.G. has legal custody of F.W. and has claimed him as a dependent for income tax purposes since he was born. The ALJ ordered that F.W. be permitted to attend school in the District free of charge.

The Commissioner concurred with the ALJ that F.W. was domiciled in Ewing with his grandmother, S.G., and that he is entitled to attend school in the District free of charge.

August 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 737-03

AGENCY DKT. NO. 29-1/03

S.G. ON BEHALF OF MINOR CHILD, F.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

S.G., petitioner, *pro se*

Jeffrey F. Belz, Esq., for the respondent

Record Closed: May 19, 2003 Decided: June 16, 2003

BEOFRE **SOLOMON A. METZGER**, ALJ:

This matter arises out of respondent's determination that F.W. is not domiciled in Ewing Township and is therefore not eligible to attend school within the district free of charge, under *N.J.S.A.* 18A:38-1. The matter was transferred to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15. A hearing was conducted on May 19, 2003, after which the record closed.

Certain facts are undisputed. F.W. was born on June 4, 1991 to I.C., who was fourteen years old at the time. S.G. is I.C.'s mother and F.W.'s grandmother. S.G. resides on Parkway Avenue in Ewing Township a block from the Parkway School, where F.W. has attended from kindergarten forward. S.G. has claimed F.W. as a dependent on her income tax returns since he was born. When respondent raised questions about F.W.'s true home in 1999, S.G. obtained legal custody with I.C.'s consent (R-3).

The issue resurfaced in 2002. Surveillance undertaken in June and September of that year revealed a number of instances in which F.W. slept at an apartment leased to I.C. on Martin Luther King Boulevard in Trenton. He was brought to S.G.'s home early in the morning and then went to school at the Parkway School (R-7). Respondent once again entertained the question of whether F.W. was properly enrolled in the District. In her testimony before the Board, I.C. indicated that her children live with her in Trenton, but that for reasons of safety and convenience F.W. should continue at the Parkway School (R-5). The Board of Education then voted to exclude F.W. as a student entitled to a free education (R-8). Respondent now also makes a demand for tuition from June 14, 2002, the date on which it began surveillance, through the hearing date and beyond at a per day cost of $48.72.

S.G. testified that she works nights and that her husband who has two jobs also works many nights. For this reason, F.W. often sleeps over at I.C.'s apartment in Trenton. However, she has retained full responsibility for F.W. from birth. S.G. testified that her daughter I.C., has had drug and instability problems since she was a teenager and is not capable of properly caring for F.W. I.C. has a second child, W.R., who also lived with her, but is cared for now by his other grandmother, who resides in Trenton. S.G. testified that F.W. is an A student because of the stable environment that she and her husband provide. S.G. testified that she was ill in November 2000, when the Board convened on this question, and I.C. attended without consulting her. I.C., was simply cowed by the process and made inaccurate statements. This is the substance of the record.

The burden of persuasion in this matter rests with S.G. and she must show that her Parkway avenue address is F.W.'s one true home, *In re Jaffe*, 74 N.J. 86 (1977). This has been

done. S.G. has legal custody of F.W. and she has claimed him as a dependent for income tax purposes since he was born. These are significant indicia. S.G. testified that she works most nights and that her husband also often works at night. When I.C. resided with her she could baby sit, but F.W. is still too young to be left alone all night. For this reason he often sleeps over at his mother's apartment. She or her husband then pick him up in the morning, bring him home, and get him ready for school. While this arrangement raises a reasonable suspicion that the family dynamics have changed and that I.C. has now taken on a primary role as mother, it is not enough to overcome the otherwise credible presentation by S.G. to the effect that this is done as a convenience. There are no other signs in the record suggesting that the locus of F.W.'s activities, have shifted to Trenton. Although I.C. made some statements before the Board of Education that might be read as an admission, S.G. explained that I.C. did not fully understand the situation and neither party called I.C. as a witness.

Based on this record, I accept S.G.'s declaration that she is fully responsible for F.W. and that he lives with her. It is therefore **ORDERED** that F.W. be permitted to attend school in-district as a domiciliary.

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

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

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

6/16/03
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

June 17, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 25 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

S.G.

For Respondent:

David Mikalauskas

Bob Smith

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Board of Education Resolution

R-2 Investigative Report

R-3 Superior Court, Chancery Division-Family Part, Consent Order for Custody

R-4 Residency Verification/Registration Form, dated September 11, 2000

R-5 Letter of Iris Carmichael

R-6 Letter of Iris Rogers, dated April 8, 1999

R-7 Investigative Report

R-8 Board of Education Resolution

OAL DKT. NO. EDU 737-03
AGENCY DKT. NO. 29-1/03

S.G., on behalf of minor child, F.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to adopt the Initial Decision. In so determining, the Commissioner notes that S.G., F.W.'s grandmother, has legal custody of F.W.[1] and has claimed him as a dependent for income tax purposes since he was born.[2] Although the fact that F.W. sleeps at his mother's residence in Trenton while S.G. and her husband work nights, on its face, raises a reasonable question as to whether F.W. is, in fact, domiciled in Ewing,[3] S.G.'s explanation that this sleeping arrangement is for convenience is plausible in this particular instance, given the

[1]S.G. obtained legal custody of F.W. by Consent Order, Docket No. FD-11-604-00, Superior Court, Chancery Division, Family Part, on September 20, 1999.

[2] S.G. testified that F.W. has lived with her since his birth in 1991 to her daughter, I.C., who was fourteen years old at the time.

[3]This arrangement obviously means that F.W. spends a considerable amount of time with his mother in Trenton. In that regard, it is noted that I.C. indicated to the Board by way of a letter and testimony at a Board hearing that F.W. lives with her in Trenton. S.G. testified that I.C. had attended the Board meeting alone due to S.G.'s illness at the time and that I.C. didn't understand the situation.

history of F.W.'s living arrangements with his grandmother.[4] Moreover, as noted by the Administrative Law Judge, there are no other indications in the record that F.W.'s activities have shifted to Trenton.

The Commissioner, therefore, concurs that F.W. is domiciled in Ewing with his grandmother, S.G., and is entitled to attend school in the Ewing School District free of charge.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 8|01|03

Date of Mailing: 8|04|03

[4] S.G. testified that her daughter has had drug and instability problems since she was a teenager and is unable to care properly for F.W.

[5] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

399 03

#399-03

M.O., on behalf of minor child, K.J.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

July 24, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION
SETTLEMENT
OAL DKT. NO. EDU 9722-02
AGENCY DKT. NO. 273-9/02

M.O., on behalf of minor child K.J.O.,

Petitioner,

v.

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

Respondent.

M.O., petitioner, *pro se*

Joseph A. DeFuria, Esq., for respondent
(Gaccione, Pomaco & Malanga, P.C., attorneys)

Record Closed: June 25, 2003 Decided: June 26, 2003

BEFORE **ELINOR R. REINER**, ALJ:

On or about September 9, 2002, petitioner, M.O., filed a petition of appeal with the Commissioner of Education, challenging respondent's residency determination in regard to her niece, K.J.O. On October 21, 2002, respondent filed its answer seeking dismissal of the petition and counterclaiming for tuition for the period of ineligible attendance. On November 27, 2002, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law

as a contested case for hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on December 20, 2002, and a telephone prehearing conference scheduled for January 27, 2003. On that date, a discussion was held regarding legal representation for M.O., and a telephone conference was scheduled for March 4, 2003. During settlement discussions on March 4 and 5, 2003 it appeared that a probable settlement had been reached. Additional discussions were held in an effort to fully resolve this matter. As a result of settlement conferences held between the parties, a settlement was reached, and a hearing was not held.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement, indicating the terms of settlement.

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

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

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

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

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

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

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

June 26, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7-1-03
DATE

M. Kathleen Duncan /CJ
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 2 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

GACCIONE, POMACO & MALANGA
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P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
Attorneys for Respondent

M.O., on behalf of minor child, K.J.O., Petitioners, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION OAL DOCKET NO. EDUOS 9722-02 AGENCY REFERENCE NO. 273-9/02 **STIPULATION OF SETTLEMENT**

The above-referenced matter having been amicably resolved between the parties, it is hereby stipulated and agreed as follows:

1. Petitioner, M.O., on behalf of K.J.O., agrees to a dismissal with prejudice of the petition filed in the above-referenced docket number against respondent, Board of Education of the Township of Bloomfield.

2. Petitioner further agrees to pay to the Board of Education of the Township of Bloomfield the total amount of $1,600.00, in full satisfaction of respondent's counterclaim for back tuition.

3. Respondent agrees to dismissal with prejudice of the counterclaim upon receipt and satisfaction of the $1,600.00 payment.

4. The parties further agree that this agreement shall constitute the entire agreement between the parties, and completely resolves and disposes of any and all claims, rights or causes of action that were or could have been asserted in the above-referenced matter.

MARGARITA ORTIZ, Pro Se
Attorney for Petitioner

By: _____
MARGARITA ORTIZ

DATED: 6/19/03

GACCIONE, POMACO & MALANGA
Attorneys for Respondent

By: _____
JOSEPH A. DeFURIA

6/22/03

OAL DKT. NO. EDU 9722-02
AGENCY DKT. NO. 273-9/02

M.O., on behalf of minor child, K.J.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/24/03

Date of Mailing: 8/04/03

400-03

400-03

A.M.K., on behalf of minor children, S.K., L.K. AND A.K.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged the Board's residency determination that her children were not entitled to a free public education from the Board because she and her children did not reside in the District before they moved to a shelter in Mt. Laurel.

In light of petitioner's testimony, which the ALJ found credible, and the lack of satisfactory evidence from respondent (the Board did not include any extended observations), the ALJ determined that until petitioner and her children went into the shelter, they were domiciled in Burlington in petitioner's parents' home and, therefore, the Board was responsible for providing them a free public education. Petitioner's appeal was granted; the Board's claim for tuition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

August 1, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00734-03S
AGENCY DKT. NO. 18-1/03

A.M.K., ON BEHALF OF MINOR CHILDREN, S.K., L.K. AND A.K.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF BURLINGTON,
Respondent.

A.M.K., petitioner, *pro se,* on behalf of S.K., L.K. & A.K.
Thomas J. Scattergood, Esq., for respondent

Record Closed: May 14, 2003 Decided: June 12, 2003

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

The Burlington City Board of Education ("Board") determined that the children of A.M.K. were not entitled to a free public education from the Board because the children and their mother did not reside in the City of Burlington. It therefore seeks tuition payments from Ms. K.[i] Ms. K. challenges that determination, pursuant to *N.J.S.A.* 18A:38-1. The Commissioner of Education transferred the matter as a contested case for hearing before the Office of Administrative Law on March 6, 2003. This judge conducted a hearing was by on April 30, 2003, and following the hearing, additional information regarding cost per pupil was submitted at

[i] Although the Board contends that the family has not been domiciled in Burlington City since well before December 17, 2002, at hearing its counsel conceded that the Board had delayed pursuit of this claim for tuition and had not notified Ms. K. of its claim until December 17, 2002. It therefore limits its claim for reimbursement to the period starting December 17, 2002.

the judge's direction. This information was received on May 14, 2003, on which date the record closed.

A.M.K. testified that she and her children are now residing in a shelter in Mt. Laurel. Except for the years 1992-95, she lived at the home of her parents located at an address on West 6th Street in Burlington City until February 3, 2003. The home in Burlington has five bedrooms and one bathroom. Her three children lived at that address all of their lives. Her brother, mother and father each resided there. It is the address to which her mail is addressed and from which she is licensed to drive, although her license is suspended. It is also the address from which she is registered to vote and which is included in her tax records. Her parents are now selling their home and there are problems between Ms. K. and her parents.

Ms. K. explained that her son was struck by a car in July 2001 and her parents' insurance rates went up as a result. Ms. K. did not have her own insurance. She then changed her address to the home of her "best girlfriend T.M.," located on 3rd Street in Beverly, New Jersey. However, she never lived at the Beverly address, although she did on occasion stay overnight during the summertime, but she did not do so "a lot." She also stayed over " a couple of times" during the school year. She never moved out of her parents home. She had to have a Burlington address in order to register as a provider for childcare.

Ms. K. denied that she has ever lived in the City of Camden. She never lived with her ex-fiancée, D.F. However, on occasion she did stay overnight at his residence. She has never lived with the father of her boy's, L.R., who resides in Burlington. Her daughter's father, M. D., is "somewhere in Delaware." She also has never lived with him, nor have the children, although he does have visitation rights. She has never served in the military.

On those occasions when Ms. K. and her children did stay overnight in either Camden or Beverly, the children either received a ride to school or rode a bus.

G.K., the mother of A.M.K., testified that her daughter and grandchildren lived at her home on West 6th Street until February. She did sometimes stay overnight at a "friend's" house,

but she did not know if Ms. K. ever lived with him. She claimed not to know about her daughters' personal life. Both she and her daughter bought groceries at the West 6th Street home.

William Joseph Blackmon, an attendance officer at the James Lawrence School in Burlington City, testified that A.K. and L.K. attend that school. In September 2001 the children were constantly late for school. He approached them and they told him that they were coming to school from Camden. This pattern of lateness went on for months. He then spoke to Thomas Howard, Jr., the school's principal, but "nothing happened." He spoke to Leonard G. Burr, the attendance officer at the Wilbur Watts Intermediate School where S.K. was a student. Mr. Blackmon presented attendance records for the 2002-2003 school year for A.K. and L.K., detailing their frequent tardiness from October 2002 through early March 2003. He and the school secretary attempted to call Ms. K. and Mr. F., who, along with Ms. K.'s mother, was listed on the school's Emergency Medical Information form as an emergency contact. However, no one answered the phone at either Mr. F.'s or at the phone number provided for grandmother K.

Blackmon related that in conversations with the two children in October/November 2002, they told him that they had moved to Beverly and had a key to a house there. A.K. was "happy to have a key."

In September 2002 Mr. Blackmon and Mr. Burr sat at the bus stop at Broad and High Streets in Burlington City and observed the children exit the public #419 bus, which travels to Beverly. The bus travels in a different direction than the West 6th Street address. There is a different bus that goes in the direction of West 6th. After the children got off the 419 bus, they walked to school. He noted that the bus does pass the Roger Wilco store at Route 130 and Salem Road.

Leonard G. Burr, who served for twenty-five years as a police officer in Burlington City before he became a school attendance officer, testified that the Roger Wilco store is one and one-half miles from the West 6th Street address. Mr. Blackmon contacted him concerning the attendance and tardiness of the K. children on September 17, 2001. He checked the S.K. emergency records and determined that that child was from the same family as were L.K. and

A.K. S.K.'s records also indicated a significant incidence of lateness. He signs the children in to school if they are late and one day when S.K. arrived late he said, "again, why can't you get to school on time." She said that she had to ride the bus. He asked why that was and she related that she came from Camden, where "we live." He looked at the emergency record and saw that Mr. F. lived in Camden. As a result he contacted Ms. K. and asked that she produce "residency papers." He also contacted Principal Howard. Burr then received a "loud and belligerent" phone call from Mr. F., received by a secretary who asked that Burr take the call. He did so and F. continued to speak loudly, asking why Burr was harassing his stepchildren's mother. Burr advised F. that he had simply asked her for "residency papers" and invited F. to come into the school. To this day no such papers have been produced.

On October 15, 2001, Mrs. K., the children's grandmother, came to school and spoke with Mr. Burr. She asked him why he had told her daughter that she, Mrs. K., had said that her daughter was not living in Mrs. K.'s home. He denied that he had made any such statement. However, he did ask Mrs. K. if her daughter did live with her and the grandmother then replied that he would have to ask her daughter that question. When she said this she "had her head down."

Mr. Burr contacted the school nurse at the Watts school and learned that there was a note in the child's records that on February 3, the nurse had been unable to contact Ms. K. When she contacted Mrs. G. K., Mrs. K. provided her with a number for contacting her daughter. The number was Mr. F.'s. According to the note, Mr. F. denied that the children lived with him, but the note also records that the "child states that they live with D." The note also states "each time I have had to call, I start with a number listed as home number. It is grandmom's number. She always says mom is not there. I then try her work number. She has not usually arrived at work until after 12. I then call D.F.'s number and leave a message for mom. When I asked student for home #, she recites D.F.'s number. Student says she lives at F.'s house."

On October 22, 2001, Mr. Burr conducted surveillance on the West 6th Street home. He did so on many other days thereafter and maintained a log of his observations. It must be stressed that his "surveillance" did not include any lengthy stay in sight of the home, but instead involved observations made on each of the several days as he drove by the home at some time

approximately just before 7:00 a.m. or occasionally in the early evening either at 7:15 or 8:10 p.m. His notes recorded and his testimony reported that on each day at the time he made his observation he observed no car in sight at the house, and he testified that he was looking for the car that Ms. K. always was observed in when she would drop her children at school, a vehicle with the license plate number VE185E. Mr. Burr never was able to obtain a registration lookup for the vehicle, as the local police declined to conduct a lookup. One day at 7:00 a.m. he noted "no lights on." These observations were made on approximately 25 days from October 22, 2001 until November 27, 2001. The only time he did see this car at the house was on October 29 at 6:53 a.m. Mr. Burr never knocked on the door.

Mr. Burr went to the water company that supplied water to the home, which he described as a privately owned residence owned by Mr. H. and Mrs. G. K. He found that the water consumption from June to September 2001 was 17,000 gallons, which he calculated meant about 51,000 gallons over the course of a year, a figure he said did not seem appropriate if the children and their mother lived in the house because from prior court cases he was aware that the average consumption was 26,000 gallons per person per year. Thus if the house were occupied for the year by the parents, daughter and three children the consumption should have been about 156,000 gallons. However, it must be noted that the witness was never qualified as an expert regarding issues of water consumption.

Craig H. Wilkie, business administrator for the school district, testified that he met with Ms. K. in 2003 and requested that she provide certain documentation. She claimed that there was a temporary certificate of occupancy for the West 6th Street home and he told her that if she did not choose to appeal the Board's determination of non-residence she would have to produce the temporary certificate. He never received a tax bill or a phone bill or any other documentation, nor did the school principals to whom Ms. K. was directed to provide the documents.

Ms. K. testified that the car bearing the license plate identified by Mr. Burr was a borrowed vehicle owned by Mr. F., who had two cars at the time. She explained that in order to get to the Watts School from the West 6th Street address it was necessary to cross Route 130 North and South. The school district had advised Ms. K. that it was not going to provide

transportation for the children, who had to be at school at different times, and she was told by the Superintendent, Dr. Gola, that she had to get the children to school "the best way I could." She explained that it was quicker and easier to get the children to school on the #419 bus because the route went by S.K.'s school and she could then get off with the boys and no one would be late. The bus stop was "not that far away." It takes about nine minutes to walk to the stop from her parents' house. If she walked to S.K.'s school and then to James Lawrence School it takes about 25-30 minutes, as the children are young and her daughter is overweight. She denied that her children had volunteered anything, claiming that they had told her that they had been "interrogated" every day and that they never told anyone that they lived in Camden.

Ms. K. has no checking or savings account.

N.J.S.A. 18A:38-1(b)(2) states, in pertinent part:

> If the superintendent . . . of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local

> district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner. [emphasis added.]

"Domicile" is defined as " 1. A residence; a home. 2. One's legal residence." *American Heritage Dictionary* 550 (3d ed. 1996). Domicile has been described as "the place of [a person's] abode where he has the present intention of remaining and to which, if absent, he intends to return." *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd,* 58 *N.J.* 112 (1971). "A person may have several residences or places of abode. However, he can only have one domicile at one time." *Collins v. Yancey*, 55 *N.J. Super.* 514, 520 (Law Div. 1959). Between residences, factors used to identify the domicile include: (1) the physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person's mental attitude about each residence, and (5) whether, when absent, the person has an intention to return. *Mercadante, supra*, 111 *N.J. Super.* at 39-40. Acts, statements and documents may be relevant in determining domicile.

In this matter, the burden of proving where the schoolchildren were domiciled rests with Ms. K. In seeking to meet her burden, she testified unequivocally that until her parents and she had a falling out and they prepared to sell their home, thereby forcing her to enter a shelter in another town, she and her three children were domiciled in her parents' home in Burlington. The Board concedes that if the children were actually domiciled in Burlington prior to their removal to the shelter the district is legally responsible to provide them with a free public education. However, if the parent and the children were not domiciled in Burlington, as Ms. K. insists, then tuition is due for the period from December 17, 2002, when the Board gave her notice of its claim.

Ms. K. testified that on some occasions she may have stayed overnight at her girlfriend's house in Beverly, but she denied that she ever lived at that house. Similarly, she denied that she had lived at the home of her then fiancée in Camden. In its attempt to undermine Ms. K.'s testimony and demonstrate her failure to meet her burden by a preponderance of the credible

evidence, the Board presented evidence that on occasion the children were seen getting off of a bus that ran from Camden; that they were often late for school; that they said that they lived in Camden; that the use of the particular bus route in question as a means of transporting children to the two schools involved made no sense if the children did reside on West 6th Street, and that a month long "drive-by" examination of the West 6th Street home did not reveal the presence of the car that Ms. K. was seen to use to drop her children off at school. The "drive-by" examination did not include any extended observations: indeed, the witness acknowledged that in the main he merely looked to see if the car was there at the time he drove by. No surveillance of either the Beverly or the Camden address occurred. The minor children, who purportedly made statements to school personnel as to where they lived, were not called as witnesses by either party. Neither the former fiancée nor the girlfriend were produced.

The fact that a person who lives in a particular place may on occasion spend time, even may sleep overnight, in a different place does not automatically mean that the person has abandoned his or her initial place of domicile for some new domicile. As the definitions quoted above indicate, one may have several residences, but can have only one domicile. Staying at a friend's house in Beverly or even staying occasionally at a fiancee's home, does not prove that one has an intention to stay at either of those places permanently, or that one has forsaken one's normal place of domicile in her parent's home for a floating existence, moving between one and another residence with no fixed place at which one intends to remain or to return. Here, Ms. K. has denied that she uprooted her family for a new, permanently intended place where she intended to remain. The Board's evidence that she and the children might have commuted on occasion by bus on a route that seems to make little sense (at least to the Board) may indicate that the children did sometimes come to school from Camden, but by itself that tells us little about their mother's domicile. The children certainly cannot be expected to understand the legal implications of the terms "residence," "domicile" or even as far as its legal ramifications, "live at." The "surveillance," such as it was, adds little to the analysis. Certainly, if the record included some evidence of the dates and times when the children were observed in Camden (or Beverly), when Ms. K. was there, where her belongings were kept, and such, the record might more readily assist the Board in overcoming Ms. K.'s assertions.

It is true that in presenting her case, Ms. K. testified to an explanation as to the reason for her children using the bus to go to school that on the face of it seems strained. Whether an explanation about walking a distance to a bus stop in a different direction from the schools in order for the children to take the bus "back" to get to those schools makes logical sense to most people may be debatable, but a course of conduct that is not logical to most is not necessarily a course of conduct that is not true. No one ever observed the K. home long enough to see who emerged there from and at what time, or perhaps who did not emerge.

The statute places the burden of proof on the parent by a preponderance of the credible evidence, not by clear and convincing evidence. Here, a parent of three children asserts that she, and they, were domiciled in her parent's home. Perhaps she did not stay there always, perhaps her mother, whose testimony was at times vague, was not happy with her daughter's lifestyle or embarrassed by the attention placed upon her home. In the end, while the evidence here is not entirely satisfactory and might well not pass the higher burden of proof that the statute could have, but did not, impose, I **FIND** Ms. K.'s testimony is on the whole sufficiently credible and that as of and after December 17, 2002, and until she went into the shelter, Ms. K. and her children were at least domiciled in Burlington. The Board was therefore responsible for providing them with a free public education. Its attempt to obtain tuition must therefore fail. The appeal is **GRANTED** and the Board's claim is **DISMISSED**.

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

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

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

June 17, 2003
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

June 17, 2003
DATE

M. Kathleen Duncan (Ea)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 25 2003

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONERS:

None

FOR THE RESPONDENT:

R-1 Letter dated 9/20/02 from Thomas Howard, Jr., to A.K.

R-2 Letter notice of ineligibility dated 1/2/03 from Edward Gola, Jr., to E.K. with attachments

R-3 Student Detail Report for A.K. & L.K. dated 4/2/03

R-4 Printout dated 4/28/03 regarding H.K.

R-5 Package of information on S.K. & A.K.

OAL DKT. NO. EDU 00734-03S
AGENCY DKT. NO. 18-1/03

A.M.K., on behalf of minor children, S.K., L.K. AND A.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, and mindful that the Administrative Law Judge's (ALJ) credibility determinations are entitled to the Commissioner's deference, *N.J.S.A.* 52:14B-10(c),[1] the Commissioner determines to adopt the ALJ's conclusion that, notwithstanding petitioner's admission that on some occasions she and her children may have stayed overnight in Beverly and Camden, petitioner and her children were *domiciled* in Burlington City as of and after December 17, 2002, and until she and her children moved into the shelter at Mt. Laurel. It was and is, therefore, the Board's responsibility to

[1]Acknowledging that the evidence presented by petitioner in the instant matter was not entirely satisfactory, the ALJ's conclusion that petitioner and her children were domiciled in Burlington City as of and after December 17, 2002, turned on his credibility determination that petitioner's testimony was "on the whole sufficiently credible***." (Initial Decision at 9)

provide S.K., L.K. and A.K. with a free public education. *N.J.S.A.* 18A:38-1(f) and *N.J.S.A.* 18A:7B:12(c).

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED. [2]

COMMISSIONER OF EDUCATION

Date of Decision: 8|01|03

Date of Mailing: 8|04|03

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

J.B. AND D.B., ON BEHALF OF A.B., :

PETITIONERS, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

August 5, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 4399-03
AGENCY DKT. NO. /03

J.B. AND D.B. ON BEHALF OF
A.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF PINE HILL, CAMDEN
COUNTY,

Respondent.

J.B. and D.B., petitioners, *pro se*

Anthony Padovani, Esq., for the respondent (Sahli & Padovani, attorneys)

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed with the Commissioner of Education, pursuant to *N.J.S.A.* 18A: 6-9, which includes an application for emergent relief. The matter was referred to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and oral argument on the application for emergent relief was heard on July 16, 2003. The parties were given a brief opportunity to submit additional materials until July 23, 2003. A plenary hearing is scheduled for September 5, 2003.

The basic facts are undisputed. A.B. has completed his junior year at Overbrook High School and during the year applied for admission to the National Honor Society (NHS). His application was denied by the local chapter, which operates under the auspices of the high school. A faculty council appointed by the Principal established the procedures by which A.B. was considered.

Petitioners argue that the denial was arbitrary and that the matter is emergent because A.B. will not be able to attend a summer camp open to NHS members, and will be disadvantaged in the competition for scholarships and early admission to various colleges. Petitioners believe that the procedure used by the district is contrary to NHS rules for a few reasons. First, the entire faculty was asked to respond to a questionnaire regarding candidate qualifications and these responses were scored against a threshold that A.B. did not meet. Petitioners argue that NHS guidelines require an evaluation and decision by the five-member faculty council and that the questionnaire that goes to the faculty generally cannot substitute for that exercise of discretion. Second, information regarding the NHS process was not disseminated in advance during the school-year as required.

Respondent submitted a certification by Jane Windle, a teacher in the district who has been the advisor to the local NHS chapter for the past twenty-five years. Ms. Windle states that the faculty council voted to permit all students with a grade point average of 3.5, or higher to receive initial consideration. A questionnaire was then sent to the entire faculty regarding each such student and they were asked to provide ratings for the virtues promoted by the NHS - character, leadership, scholarship and service. These qualities were measured on a scale of one-to-four, based on personal knowledge of the student. The faculty council determined that a rating of 3.30 was necessary to reach the next level of evaluation and the grading system is rounded to 100^{th} of a decimal point. In the case of A.B., the weighted average of questionnaires returned was 3.276, which was rounded to 3.28. The faculty counsel then eliminated A.B. as a candidate from further review because he did not achieve this threshold score.

The school principal, Paul J. Harmelin, submitted a certification in which he acknowledged that NHS information was not adequately disseminated this past year. He

explained that respondent had been part of a regional district until last year and on becoming independent it substantially revised the student handbook. The NHS material was inadvertently omitted. Mr. Harmelin notes, however, that A.B. was not disadvantaged as he submitted an application timely and received full consideration. This is the substance of the record.

To establish entitlement to emergent relief, petitioners must show that the law is settled, that the facts are not in issue, that they are likely to prevail on the merits, and that on balance the benefits of granting relief outweigh the burdens of denying it, *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). This has not been done. Although petitioners make multiple arguments, at the core they think the NHS guideline requiring the faculty council to evaluate and vote on each candidate, was violated by the 3.30 hurdle in the application process. This is a general attack upon the procedure used by the faculty council and, if correct, may effect the results for many students. As such petitioners should be clearly right before emergent relief is granted, lest unnecessary tumult be created.

Petitioners have submitted materials from the NHS website indicating that although questionnaire's to the faculty are permitted, these should not be sole determinants and that ultimately, the faculty council must evaluate the merits of each candidate. These materials suggest that after the objective cutoff provided by GPA, the remaining task is evaluative and may not be avoided by an additional numerical cutoff. There are a few problems with this presentation thus far. Without the benefit of an affidavit from someone in authority at the NHS, it is hard to say whether this material represents current, or complete policy. Moreover, even if the District procedure deviates some from NHS policy, it is not clear whether this would be of moment to the NHS. It would be useful at a plenary hearing to have the NHS view.

Seen from the District's perspective, the 3.30 threshold established in advance by the faculty council is not appreciably different then the 3.5 GPA requirement, established as a first hurdle. Undoubtedly the high GPA requirement excluded many fine students, but that is the nature of the task and the NHS constitution gives local chapters discretion to establish procedure within certain broad guidelines. Without the specter of inconsistency with NHS policy, the procedure devised by respondent seems generally calculated to yield the most qualified candidates and would be well within its discretion. The only precedent I have found that is

factually close is not entirely useful. In *D.W. v. Pompton Lakes Board of Education*, (SLD 77:1240), the Commissioner approved a similar rating scale, but it appears that the faculty council there made the evaluation. Thus, it is not the use of a scale, but how it is used that is the rubbing point.

Petitioners are also not satisfied that the 3.30 standard and the rounding decision were arrived at fairly, nor do they know how the calculations were tabulated for their son specifically. They may seek this information in the course of preparing for the plenary hearing, but at this stage they have merely surmised that there was a problem.

Petitioners exposed a procedural flaw regarding the dissemination of information about the NHS. Mr. Harmelin explained, however, that this was an oversight and that A.B. was not disadvantaged by this omission; there is no evidence to the contrary.

Based on the foregoing, it is **ORDERED** that emergent relief be **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

7/30/03
DATE

SOLOMON A. METZGER, ALJ

/cad

OAL DKT. NO. EDU 4399-03
AGENCY DKT. NO. 172-5/03

J.B. AND D.B., ON BEHALF OF A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The recommended Order of the Administrative Law Judge (ALJ), together with the audio tape of the emergent hearing conducted at the Office of Administrative Law (OAL) on July 16, 2003 have been reviewed.

Upon such review, the Commissioner concurs that petitioners have failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) necessary to warrant the extraordinary remedy of emergent relief. Accordingly, the recommended Order of the ALJ is adopted for the reasons expressed therein. This matter shall continue at the OAL with a plenary hearing scheduled for September 5, 2003.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: August 5, 2003

Date of Mailing: August 7, 2003

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

434-03

434-03

IN THE MATTER OF THE TENURE :

HEARING OF BRENDA MAPP, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY OF : DECISION

TRENTON, MERCER COUNTY.

:

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent teacher based on criminal offenses, teacher performance infractions, and failure to follow proper procedures related to tardiness and absences. Respondent's increment was withheld for the 1999-2000 school year.

The ALJ found that respondent's conduct adversely affected the morale or efficiency of the District, violated standard of good behavior and destroys public respect for teachers. She admitted allowing drug dealers to use her residence for storing, selling and cooking cocaine and she herself received money and cocaine, which she sold. This conduct which resulted in Charges 1 and 2 was so egregious in and of itself as to justify her removal. The ALJ concluded that in the best interest of the students in the District, respondent should be removed as a teacher.

The Commissioner concurred with the findings and conclusions of the ALJ. The Commissioner stressed that ultimate disposition of the criminal matters was irrelevant; rather, the focus of the inquiry in this matter was solely concerned with respondent's fitness to teach. The Commissioner ordered respondent dismissed from her tenured teaching position as of the date of this decision and referred the matter to the State Board of Examiners for action as that body deems appropriate.

August 5, 2003

Charge One: That respondent is guilty of unbecoming conduct based on allegations that on or about July 10, 2000, respondent committed the offenses of resisting arrest, eluding police, driving on the revoked/suspended list, and careless driving.

Charge Two: That respondent is guilty of unbecoming conduct based on allegations that on or about June 6, 2001, respondent committed the following eight offenses: (1) possession of a controlled dangerous substance; (2) possession with intent to distribute; (3) possession with intent to distribute in a school zone; (4) maintaining a narcotics nuisance; (5) possession of an assault weapon while committing a narcotics offense; (6) possession of an assault weapon with a defaced serial number; (7) possession of hollow-nosed bullets; and (8) possession of a large-capacity magazine; and that from April 2001 to June 2001, respondent allowed her residence to be used for the preparation and distribution of a controlled dangerous substance for personal and compensatory gain.

Charge Three: That respondent is guilty of unbecoming conduct based on allegations that on November 22, 1999, Hill School principal Nancy Puri reprimanded respondent for a number of infractions, including falling asleep in class and failing to submit a plan book in a timely manner; that on December 14, 1999, Ms. Puri again reprimanded respondent for sleeping in class while students were unsupervised; that on January 19, 2000, Ms. Puri received correspondence from a parent, Carlene Moore, requesting that her daughter be removed from respondent's classroom, the basis for the request being that respondent had called the child a "moron" on one occasion and on another referred to her as "stupid"; and that respondent was previously disciplined for similar conduct when on August 30, 1999, the Board withheld her increment for the 1999-2000 school year for sleeping in class during instructional time, as well as other reasons.

Charge Four: That respondent is guilty of unbecoming conduct based on allegations that on October 5, 1999, Ms. Puri reprimanded respondent for failing to follow proper call-out procedures – respondent had originally stated her intention to come in for half of the school day and then failed to call in until 1:15 p.m.; that on November 3, 1999, respondent failed to follow proper call-out procedures when taking a personal illness day; that respondent was reprimanded

by Ms. Puri on November 22, 1999, for, among other infractions, failure to notify the school of her absence in a timely manner, unauthorized late arrival after time required for one-half day, frequent absences and tardiness, and failure to meet with the principal to discuss monthly attendance notice; that on November 24, 1999, respondent failed to notify the school of her tardiness in a timely manner and respondent was docked for her 10:08 a.m. arrival (she is required to report to work at 8:20 a.m.); that on November 29, 1999, respondent failed to notify the school of her tardiness in a timely manner and respondent was docked for her 9:05 a.m. arrival; that on December 23, 1999, respondent failed to notify the school of her tardiness (10:55 a.m. arrival) in a timely manner; that on January 10, 2000, respondent failed to notify the school of her tardiness (1:10 p.m. arrival) in a timely manner; that on January 12, 2000, respondent failed to report to work after indicating to the principal that she would arrive at approximately 11:00 a.m.; and that respondent was previously disciplined for similar conduct when on August 30, 1999, the Board voted to withhold respondent's 1999-2000 increment for the following reasons, among others: absent 29 days, with respondent reporting her absence too late to procure a substitute on 22 of those days; tardy 70 days; refusing to sign in – 12 days; refusing to sign out – 25 days.

ISSUES TO BE RESOLVED

The issues to be resolved in this matter are:

1. Is respondent guilty of the charges by engaging in the conduct alleged by petitioner?

2. Is the conduct specified in the Statement of Tenure Charges and alleged by petitioner to have occurred on the part of respondent unprofessional and unbecoming a tenured teaching staff member under the laws of the State of New Jersey and the Rules of the State Board of Education?

3. If respondent is guilty of one or more of the charges, what is the appropriate remedy/penalty to be imposed?

FACTUAL DISCUSSION

Summary of Testimony

The following is not intended to be a verbatim recitation of the testimony. It is intended to summarize those facts that are not in dispute and to identify relevant portions of the testimony of the witnesses and the evidence presented in this matter.

Detective Robert Cowan testified for the school district. He has been employed as a detective by the Mercer County Prosecutor's Office for thirteen years, and is assigned to the Special Investigations Unit. Among his duties are investigations of mid-level and upper-level drug dealers in Mercer County.

Detective Cowan testified to his involvement with respondent. Sometime prior to June 2001, the Special Investigations Unit conducted an investigation involving the distribution of drugs from premises located at 31 Kirkbride Avenue, Trenton, New Jersey, which was respondent's place of residence. Based on the investigation, a search warrant was issued and executed for the premises, and more than one-half ounce of cocaine and an assault weapon with a defaced serial number were seized from the premises. Based on an affidavit of probable cause prepared by Detective Cowan (P-3) and based on complaints issued by Detective Cowan against respondent (P-1; P-2), respondent was arrested on June 7, 2001.

Detective Cowan testified that following her arrest on June 7, 2001, respondent was asked to provide a statement (P-5). According to Detective Cowan, respondent acknowledged that she understood her rights and voluntarily agreed to provide the statement. She provided answers to questions asked of her, initialed her responses, and signed the document. Detective Cowan also signed the statement at that time, and respondent then swore to the statement before an assistant prosecutor.

In her statement, respondent stated that all of the cocaine and assault firearms found in

her residence belonged to Jamar Tucker, and that she allowed Jamar Tucker to use her residence for the purpose of storing and selling his cocaine. She also stated that she personally observed Jamar Tucker "cook" powdered cocaine into crack cocaine in her residence approximately fifty times and that she saw him conduct a 90-gram cocaine sale in her residence. She also stated that she allowed Eric Lacey to utilize her residence for the purpose of selling drugs. In exchange for this, she would receive money and cocaine from Jamar Tucker and Eric Lacey. She also admitted that, in the past, she had sold cocaine that Jamar Tucker had given her. Respondent stated that if she did not cooperate, he "would hit her off," or kill her. She also stated that she had been subjected to violence, they had punched her in the face and threatened to kill her, and that they were out of control.

On cross-examination, Detective Cowan testified that he had spoken to an assistant prosecutor about the status of the criminal charges against respondent the day prior to his testimony in this matter. He learned that all of the charges that he had filed against respondent had been dismissed and that she had pled guilty to a downgraded disorderly persons offense. He was not aware of the exact offense she pled guilty to. Although he had never seen the document before, he acknowledged that an Order Dismissing the Complaint against respondent was entered on June 20, 2002 (R-1), on the basis that there was insufficient evidence upon which to predicate successful prosecution of the charges, and that respondent had pled guilty to and been sentenced on other charges, and that no useful purpose would be served by further prosecution. The original criminal charges had subjected respondent to the possibility of substantial jail time. He also acknowledged that it was not unusual to dismiss criminal charges, because they must be proven beyond a reasonable doubt.

Detective Cowan acknowledged that the targets of the original investigation were Lacey and Tucker, and he questioned respondent in order to pursue charges against them rather than against respondent. At the time, he felt that respondent could provide information helpful in prosecuting Lacey and Tucker. He acknowledged that the statement signed by respondent (P-5) probably did not reflect the entire conversation between them. He acknowledged that respondent stated that she had called the Trenton Police Department a number of times. He also acknowledged that he did not check out her self-serving statements. He denied ever suggesting

any answers to respondent.

On re-direct examination, Detective Cowan testified that he identified 31 Kirkbride Avenue, Trenton, New Jersey, as respondent's residence based on letters and other items found in that location showing that she lived there.

Nancy C. Puri also testified for petitioner. Ms. Puri has been the principal at the Patton J. Hill School on East State Street in Trenton, New Jersey, since August 1999. She has been an employee of the school district for thirty-two years and has served as a teacher, assistant principal, vice principal and principal. She testified to her educational background and certifications, including certificates in elementary education, reading specialist, principal, and supervisor.

Ms. Puri testified that prior to her coming to the Patton J. Hill School, Howard Colvin was the principal. Ms. Puri first met respondent one day prior to the beginning of the 1999-2000 school year. On that occasion, she observed an exchange between respondent and Mr. Colvin and respondent was quite unpleasant toward Mr. Colvin.

Ms. Puri indicated that although there may have been earlier incidents, she first gave respondent written notice of failure to follow proper procedures on October 5, 1999 (P-6). On October 4, 1999, respondent called in to say that she had a personal matter to take care of and that she would be in work for one-half day in the afternoon. Ms. Puri explained that for a teacher, working a half day in the afternoon requires that the teacher arrive at 11:30 a.m. Respondent did not show up at 11:30 a.m., and did not call until 1:15 p.m., when she advised that she would not be in for the entire day. Because petitioner had indicated that she would be in for a half day, Ms. Puri did not arrange for a substitute teacher. Often in a situation like this, the children are divided up among the other classrooms. As a result, the continuity of the instruction of the students is hindered. Ms. Puri does not recall what was done with respondent's class on October 4, 1999. Because respondent failed to follow proper call-in procedure, Ms. Puri prepared a memo to respondent. They then spoke informally and respondent said that she would try to follow the proper procedure from that point on.

Ms. Puri testified that on November 3, 1999, respondent neglected to call the school until 8:40 a.m. to advise that she was taking a personal illness day. All teachers are required to call by 8:00 a.m., prior to the opening of the school day, and the school district then attempts to hire a substitute teacher. Failure to comply with this procedure causes chaos and confusion. She recalls giving a memo to respondent documenting this incident (P-7), but cannot recall if they had a follow-up conversation.

Ms. Puri identified a memorandum that she gave to respondent on November 22, 1999 (P-8). This memorandum lists a number of serious concerns that she had as to respondent's performance. The memorandum was the result of a conference, and during the conference Ms. Puri indicated that she was concerned whether respondent had some personal problems. Ms.-Puri suggested that respondent contact the Family Guidance Service. She also advised respondent that this memorandum was a step in progressive discipline and that the next step would be to recommend the withholding of an increment.

Ms. Puri wrote another memorandum to respondent on November 24, 1999, because respondent was again tardy for school (P-9). Respondent is required to report at 8:20 a.m., but she reported at 10:08 a.m. on that date. Ms. Puri explained that if a teacher is tardy, she must arrange to have a certified staff member cover the class until the tardy teacher arrives, or the children must be divided among other classes. In either event, the continuity of instruction is interrupted. Ms. Puri explained that no matter how good a substitute teacher is, the substitute cannot fully replace the regular classroom teacher.

Ms. Puri testified that on November 29, 1999, respondent was again tardy, arriving at 9:05 a.m. (P-10). On December 23, 1999, respondent failed to show up for work and failed to notify the school district of her absence until 10:55 a.m. Based on this, Ms. Puri notified respondent that it would be her recommendation to the school district's Human Resources office that respondent be removed from the classroom (P-11). She explained that staff members are not required to explain why they are late, but they are required to notify the school if they will be late. She testified that on January 10, 2000, respondent was again tardy when she arrived at 1:10

p.m. (P-12). She explained that students are let out at 3:00 p.m. and teachers leave at 3:05 p.m. Thus, respondent was not present for the majority of the work day.

Ms. Puri testified that she and respondent had ongoing conversations. She was concerned about respondent and her well-being, but was also concerned about the children in respondent's class and the continuity of their instruction.

Ms. Puri testified that on January 12, 2000, respondent contacted her at 9:05 a.m. and stated that she would be late because of a furnace repair, and that she would report to school in approximately two hours. However, respondent never reported for work. Ms. Puri does not recall what she arranged for class coverage on that day. As a result of this incident, she wrote the memo of January 13, 2000 (P-13).

Ms. Puri testified to an incident that occurred on December 14, 1999. She stated that she was making her rounds of the school at approximately 9:15 a.m. and entered the back of respondent's classroom. She observed respondent sitting in her chair with her back to the students, sleeping. She watched respondent for ten minutes to make sure that she was asleep, leaving the students unsupervised. Ms. Puri acknowledged that the students were sitting quietly and working on their assignments. She gave a memorandum to respondent concerning this incident on December 14, 1999 (P-14).

Ms. Puri identified a letter written to her by a parent of a student alleging that her daughter was suffering academically by being in respondent's class (P-15). The parent's letter indicated that respondent would never call the parent to advise her of any deficiencies, and that respondent called her daughter a moron and stupid in class. The parent asked that her daughter be taken out of respondent's class. Ms. Puri indicated that the student was transferred. She testified that the class size is approximately twenty-five students, and she admitted that this was the only parent who put her complaint her in writing.

Respondent was eventually removed from the classroom, but Ms. Puri did not recall the date. Ms. Puri testified that from October 1999 through January 2000, she had many

conversations with respondent. However, things did not improve over time. She testified that respondent never mentioned to her any medical reason for her inability to perform her duties.

Ms. Puri acknowledged on cross-examination that coverage problems occur on a daily basis, because there is a large staff. Her job is to provide supervision. She reiterated that the first time she felt it necessary to discuss respondent's problems with her was on October 5, 1999 (P-6). The memo was written when respondent was tardy and neglected to call in. If she had simply been tardy, but had called in appropriately, there would have been no memo written. She acknowledged conversing with respondent at the beginning of the school year, but she has no recollection of any mention by respondent of a medical condition that was affecting her conduct.

Ms. Puri acknowledged that respondent did ask that "specials" for her class be scheduled at the beginning of the day because it was hard for her to get through a whole day. However, she does not adjust schedules to accommodate staff. She also indicated that any disability or handicap accommodation is done through Human Resources, but this was never requested by respondent. It was at some point shortly after the January 19, 2000, letter from a student's parent (P-15) that Human Resources advised her that respondent would be reporting to them. Respondent was then taken out of the school. Ms. Puri acknowledged writing a memo to the teaching staff stating that they could not leave a classroom unattended to go to the bathroom.

On redirect examination, Ms. Puri testified that there is no question that she authored nine memos between October 5, 1999, and January 13, 2000, and gave them to respondent (P-6 through P-14). She first met with respondent when she was with former principal Colvin and respondent used profanities in addressing him. Ms. Puri opined that respondent had a bad relationship with Mr. Colvin.

Robert Cochran, a lieutenant with the Trenton Police Department, also testified for petitioner. Lieutenant Cochran testified that he has been a police officer for twenty-eight years. He is presently assigned as commander of the Northwest Narcotics Bureau. Prior to that, he was a lieutenant in the Patrol Division. He testified that around July 10, 2000, while he was assigned to the Patrol Division, he issued an arrest warrant for respondent for resisting arrest and eluding

police. He identified the arrest warrant (P-16), the indictment (P-17), and his investigation report (P-18).

Lieutenant Cochran testified that on July 10, 2000, just after midnight, he was stopped in traffic on Market Street in Trenton when he observed a vehicle being driven around two vehicles that were in the left lane, designated for left turns. The vehicle continued north on South Broad Street and he activated his lights and siren and stopped the vehicle near the intersection of South Broad and Market. He indicated that he initially pulled the vehicle over because of reckless driving, but the driver, the respondent, did not appear to be under the influence of anything. She gave her name and date of birth, but stated to him that she did not have her purse or her driver's license. He called into headquarters and learned that her driver's license was revoked. He advised her that a motor vehicle summons would be mailed to her residence for operating a motor vehicle with a suspended license. He also told her that she could not drive the vehicle, and she assured him that she would contact a friend and have the friend drive her home. Lieutenant Cochran testified that he advised respondent that if she did operate a vehicle, she would be placed under arrest and her car would be towed. He stated that respondent was cooperative and that he was not concerned about her safety when he left.

Lieutenant Cochran testified that approximately ten minutes later he observed respondent driving her vehicle on South Broad Street. He observed her approaching the intersection of South Broad and Front streets and he exited his vehicle and ordered her to pull over to the side of the road. He told her that she was under arrest, but she disregarded his instructions and accelerated away. He then gave chase in his police vehicle by activating his emergency lights and siren and notifying other officers. He testified that respondent went through several red traffic lights and that eventually a patrol sergeant and he blocked respondent with their vehicles so that she could not proceed any farther. The respondent refused to open the door and struggled when they attempted to handcuff her. She was placed under arrest and charged with resisting arrest and eluding the police.

Lieutenant Cochran testified that he does not recall if he spoke to the prosecutor about respondent attending pretrial intervention (PTI). The parties stipulated that the charges filed

against respondent by Lieutenant Cochran were eventually dismissed.

The parties stipulated at the hearing that on August 30, 1999, the Board voted to withhold respondent's 1999-2000 increment for sleeping in class during instructional time (Charge Three, paragraph 7), 29 days of absence, 70 days of tardiness, 12 days of refusing to sign in and 25 days of refusing to sign out (Charge Four, paragraph 16).

Respondent Brenda D. Mapp testified that she is a product of the Trenton School District. She has a degree from Trenton State College in secondary English and has teaching certificates in English, secondary education, elementary education and theater. She became a full-time teacher at the Skillman School of the Department of Corrections in September 1982. She then taught at St. Paul's Catholic School and has been teaching in the Trenton School District since 1991.

Respondent addressed the testimony of Lieutenant Cochran concerning the events of July 10, 2000. She explained that the incident occurred on a Sunday morning. She was returning home from driving someone from her home to Kingsbury Apartments. She came to the intersection of Broad Street and Market Street and stopped behind an old, beat-up, dirty car with no taillights sitting in the left-turn lane. The car sat there as the light changed twice. She believed that the car in front of her had stalled, so she pulled around the car in order to pass it on the left. Lieutenant Cochran, who was driving the car respondent had driven around, then pulled her over by flashing his headlights and a portable emergency light. When he approached her, he was in uniform. She told him her name, and after he called in her information, he told her that her license was suspended. She explained that she had gotten a speeding ticket in Virginia, but had paid it nine months before, and she attempted to tell him that her license could not be suspended. However, Lieutenant Cochran told her that he was going to be mailing her a ticket and that she should not drive her car since her license was suspended.

After Lieutenant Cochran left her, she started to walk home, but realized that it was too far. She admitted to using poor judgment and attempting to drive her car home. As soon as she started driving her car and made a right turn, she saw Lieutenant Cochran again, and she heard him say, "Stop the vehicle, you are under arrest." She admitted to driving away, but denied

going through any red lights. She admitted that the lights on Lieutenant Cochran's car were flashing. She also admitted knowing that he was a police officer. However, she thought that he overreacted to her actions. When she eventually stopped her car, she got out of the car and was brutalized by Lieutenant Cochran and another officer. She was picked up, handcuffed and thrown into the police car. She was eventually indicted. Because she had no previous record, an order of dismissal was entered as to these charges.

Respondent also addressed the testimony of Detective Cowan concerning her drug arrest. She admitted that on June 6, 2001, she resided at Kirkbride Avenue, but said that her sister owned the house. The house had been vacant for three years before respondent moved in sometime in October 1997. She did not realize it at first, but there were problems with people in the neighborhood. They came into her yard and kicked in her door once. Many times windows were broken. There were drug activities going on in the neighborhood and crap games were being held on the house's front steps. At first, she was not aware that people were coming into the house. She testified that things started getting dicey six or seven months after she moved in. She called the police two or three times a week, but the police told her that if she did not press charges they could do nothing. On one occasion, an officer told her that she must realize what the neighborhood is like and if she does not like it, she should move out.

Respondent admitted that on one occasion, the police searched the house and found drugs, drug paraphernalia, weapons and bullets. She testified that none of these belonged to her. She eventually learned that many times intruders would break into her home and they had many avenues of escape. They knew how to get in and out of her home, and they would even remove windows to get in and out.

Respondent was asked about the sworn statement she gave to Detective Cowan in June 2001. She admitted that the statement contained her signature. She recalls giving this statement, but she indicated that not all of her conversation with Detective Cowan is reflected in the statement, and that many of the responses attributed to her are inaccurate. She indicated that Detective Cowan changed at least ten or fifteen of the responses. Detective Cowan wanted her cooperation, and the objects of his criminal investigation were Tucker and Lacey.

Respondent testified that she was not home when the search warrants were executed. She had moved many of her valuables out of the home and she was planning on leaving it because of the poor neighborhood and the drug problem. She had seen Tucker and Lacey on the street, but she never invited them into her home. She testified that she was physically brutalized by Tucker and Lacey. She identified the order dismissing the criminal complaints against her (R-1). The criminal charges against her were dismissed in return for a guilty plea to a disorderly persons offense.

Respondent testified that in March 1998 she underwent a complete hysterectomy. Her incision did not heal properly and sections of it leaked. She had continuing medical problems related to this procedure during the 1999-2000 school year. Following her operation, she could not walk up steps, she could not lift any heavy objects, she could not hold her bladder, she could not sit or stand, and wearing any type of clothing caused irritation and pain. She had a great deal of difficulty lifting the teacher's editions of textbooks, and during the hearing she brought in one of the textbooks to demonstrate its weight and bulkiness. She acknowledged that an increment was withheld because of her absences. All of her absences related to the surgery. She explained that she had not had any absences for four years and had carried over a significant number of sick days. The operation was necessary because she had been hemorrhaging, and due to blood loss she had to stop working in January 1998 to build up her strength in order to have the operation in March 1998.

Respondent also testified that she returned to work prematurely, and it was very difficult for her. Howard Colvin was the principal in 1998 and 1999. Respondent was happy when Principal Puri, a female, started in July 1999. In addition, the schedule that she had for several years was very difficult for her and she needed time between classes. Ms. Puri indicated that she would see what she could do for her. When respondent received her 1999-2000 school year schedule in September 1999, she discussed it with Ms. Puri, and Ms. Puri was again really nice and said that she would try to help. However, the schedule was identical to that of the prior year. Respondent identified her schedule (R-3), which showed that she was required to be on her feet in class from the 8:20 a.m. arrival time through 1:20 p.m. Further, Ms. Puri issued a

memorandum to all teachers saying that they could not leave the classrooms during the day even to go to the bathroom. On one occasion, she was forced to have her entire class wait in the hallway outside of the bathroom while she used the bathroom. On that occasion, she was so upset she was crying and it was necessary for another staff member to calm her down in order for her to continue teaching.

In September 1999 Ms. Puri said that she would try to change respondent's schedule. However, when respondent questioned Ms. Puri about it the following week, Ms. Puri said there was nothing she could do, despite having changed the schedules of at least two other teachers. The schedule of teacher Ellen Stillitano was completely changed. Ms. Puri also changed the schedule for teacher Pat Robinson. Respondent was very upset because she had asked Ms. Puri four or five times to change her schedule, but Ms. Puri would not accommodate her.

Respondent explained that teachers have prep time during "specials," which are classes taught by other teachers, such as gym or music. In her case, her prep time is at the end of each day.

Respondent identified the memo she received on October 5, 1999 (P-6). She indicated that this was the first time that Ms. Puri had ever notified her of any kind of problem. There were no memos addressed to her prior to this one. There was also no discussion with Ms. Puri concerning this memo. She said that from September through November 1999, she was still having difficulties resulting from her surgery.

Respondent testified that on November 3, 1999, she successfully called the substitute office, which arranges for substitutes for teachers who are absent. She then attempted to call the main office of the Patton J. Hill School from 7:50 a.m. until 8:40 a.m. and could not get through. Until 8:05 a.m. the phone rang repeatedly without being answered, and the line was busy from 8:05 until 8:40. A substitute was appointed for her classroom as a result of her call to the substitute office.

Respondent testified that a couple of times in late November she either called in late or

came in late. On one day she could not call in because she had no phone, and on another day she was late because she was having electrical problems in her home and her alarm clock did not go off on time. During the same period of time she still had abdominal pain and leakage of her incision, she could not go up stairs and she had to use the bathroom frequently. She testified that she told Ms. Puri about her medical problems, but Ms. Puri's response was simply to issue a memo to her.

Respondent denied Ms. Puri's allegation that she was sleeping in class on December 14, 1999. She testified that she was sitting with her back to the students, who were quietly working. She described the classroom area as open spaces with the classes being separated by partitions. She saw Ms. Puri outside of her class, and when Ms. Puri confronted her, she told Ms. Puri that she had not been asleep. Her class was not unsupervised, because she was present and there was no disruption to the class.

Respondent testified about the parent's written complaint concerning her (P-15). The first time she ever saw this was when she received the charges, and it was never discussed with her, nor was she ever given an opportunity to dispute the parent's allegations. She denied the allegations and indicated that the student in question, S.M., was removed from her classroom in September 1999. Therefore, the incidents in question could not have happened in January 2000. She explained that she had problems with S.M. from the first day of school, when S.M. refused to stand for the flag salute. On the second day of school, the parent came in and confronted respondent and Mr. Bethea came to the classroom to calm things down. The parent removed the child from respondent's class within three weeks of the start of the school year

Respondent testified that in January 2000 she was asked to leave her teaching assignment. She responded to this request by stating that she was not physically able to continue to teach with the schedule she was required to keep. She was not aware that she was to be suspended by the school district. She denied that her inability to continue teaching was because of drug use or that she needed to attend the Employee Advisory Service.

On cross-examination, with respect to the allegation that she was sleeping in her

classroom on December 14, 1999, respondent admitted that she had her back turned to the class for six or seven minutes. However, she stated she was not sleeping and Ms. Puri's memo is not accurate. She was aware of what was occurring, and the children were quiet and cooperative. With respect to her calling in on November 3, 1999, and the line being busy, respondent said that the school has no answering service. With respect to her inability to carry heavy books or objects, she testified that she did not use a cart because she did not have one. She admitted that she did not provide medical documentation to Ms. Puri concerning her medical problems. However, she did give a copy of her letter requesting schedule changes to Ms. Puri and it should be in the files at the school. She never sought the assistance of the teachers' union as to the schedule changes. She also never took action to challenge the refusal of the school district to accommodate her disability.

Respondent testified that she had problems for one and a half years after her March 1998 surgery. She was undergoing medical treatment in September 1999 at Ewing Medical Associates with Drs. Walker and Refinski. She admitted that in her answers to interrogatories no one is listed in response to the question asking her to name any doctors she saw from July 1999 through January 2000.

With respect to the statement that she gave to Detective Cowan, respondent stated that she does not know if it was truthful and accurate. Detective Cowan wanted her to cooperate. She did not recall specific answers she gave in that statement. She called the police concerning break-ins and entries into her home about one year prior to her arrest. She never told police that anyone was cooking crack in her home prior to her statement. She indicated that when Lieutenant Cochran arrested her, she was brutalized, but she did not file a complaint.

Respondent admitted that there was a meeting on November 22, 1999, and she also admitted that there was a conference on September 23, 1999, with Ms. Puri and Mr. Bethea. However, she denied receiving a document confirming that meeting (P-23 for identification).

Respondent testified that Mr. Colvin was the principal in the school year of her hysterectomy and the year thereafter, and that she provided medical documents concerning her

condition to Mr. Colvin. She testified that there is no question that she had discussions with Ms. Puri concerning her medical condition.

On re-cross examination, respondent admitted that she did not appeal or challenge the withholding of her increment and that the union did not advise her.

Petitioner called Nancy C. Puri as a rebuttal witness. She testified that the phone system in the school in the fall of 1999 had answering machines on both lines. However, she was not sure if the answering machines would pick up a call if both lines were busy. She also identified a memo given to respondent concerning the meeting on September 23, 1999 (P-23 for identification). She denies ever issuing a memo stating that teachers could not use the bathroom. She testified that having another teacher cover the class while a teacher goes to the bathroom is permissible. However, she would never not permit a teacher to use the bathroom.

DISCUSSION OF APPLICABLE LEGAL PRINCIPLES

The Commissioner of the Department of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. The discipline of tenured school employees is authorized by *N.J.S.A.* 18A:6-10, which generally provides that no tenured school employee shall be dismissed or reduced in compensation during good behavior and efficiency except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing.

Respondent argues that petitioner produced no evidence of gross and harmful conduct on the part of respondent. In order to determine whether the petitioner met the elements of this charge, it is necessary to discuss what is intended by the term "unbecoming conduct."

There is no single definition of the term unbecoming conduct. In *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384 (1957), it was made clear that the touchstone of the charge is fitness to discharge the duties and functions of one's office or position. *See also In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 28-29 (App. Div.), *certif. denied*, 65 *N.J.* 292 (1974).

There are numerous cases in which specific conduct was found to be unbecoming conduct. For example, the use of physical force by a teacher to maintain discipline was held to be unbecoming conduct. *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). A teacher with an uncontrollable temper who verbally and physically abused students was found to have engaged in unbecoming conduct. *In re Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 741 (App. Div. 1988).

Outside the field of education, unbecoming conduct on the part of public employees is conduct which adversely affects the morale or efficiency of the agency of which the employee is a member, which has a tendency to destroy public respect for government employees and confidence in the operation of governmental services, or which violates an implicit standard of good behavior. *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960). A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but may be based primarily on a violation of an implicit standard of good behavior. *Ibid.*; *see also City of Asbury Park v. Department of Civil Serv.*, 17 *N.J.* 419, 429 (1955); *Newark v. Massey*, 93 *N.J. Super.* 317, 323 (App. Div. 1967).

In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. *See Redcay v. State Board of Educ.*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *affirmed o.b.*, 131 *N.J.L.* 326 (E. & A. 1944). In *Redcay*, a school principal was found guilty of the charges of inefficiency, incapacity, insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. *See* 128 *N.J.L.* 281, 282 (Sup. Ct. 1942). The Court stated:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.
>
> [*Redcay, supra*, 130 *N.J.L.* at 371.]

Generally, in order for the charging party in a tenure hearing to prevail, the truth of the charges must be established by a preponderance of the credible evidence. *In re Phillips*, 117 *N.J.*

567, 575 (1990); *In re Polk*, 90 *N.J.* 550, 560 (1982); *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962).

FINDINGS OF FACT

1. Respondent Brenda Mapp is a tenured teaching staff member in the school district of Trenton, Mercer County.

2. From October 1997 through June 2001 respondent resided at 31 Kirkbride Avenue, Trenton, New Jersey.

3. In June 2001 more than one-half ounce of cocaine and an assault weapon with a defaced serial number were seized from respondent's place of residence.

4. Respondent was arrested, and following her arrest she was asked to provide a statement.

5. In respondent's statement dated June 7, 2001, respondent admitted that she allowed Jamar Tucker to use her residence for the purpose of storing and selling cocaine, she personally observed him cook powdered cocaine into crack cocaine in her residence approximately fifty times, and she saw him conduct a 90-gram cocaine sale in her residence. In addition respondent admitted that she allowed Eric Lacey to utilize her residence for the purpose of selling drugs, and in exchange for this she would receive money and cocaine from both Jamar Tucker and Eric Lacey. She stated that she sold cocaine that Jamar Tucker had given to her.

6. Respondent admitted that the statement she gave to the police contains her signature, and recalls giving the statement, but asserted that she said things that were not in the statement and that many of the responses reflected in the statement are inaccurate. When she was questioned about this on cross-examination,

respondent could not recall details of her involvement in the activities in question, and did not refute the truth of the contents of the statement.[1]

7. In her statement respondent said that if she had not cooperated with Jamar Tucker and Eric Lacey she would have been killed, and that she had been subjected to violence and threatened by them.

8. The weapons and drug possession charges against respondent were dismissed as a result of an agreement where she pled guilty to a downgraded disorderly persons offense.

9. Respondent testified that she called the police two or three times each week concerning drug dealings in her neighborhood, but was told to press charges or the police could nothing. Respondent also testified that none of the drugs, drug paraphernalia, weapons or bullets found in her home belonged to her. This testimony was not disputed at the hearing.

10. On October 4, 1999, respondent called her place of employment to say she would be in work for one-half day in the afternoon, requiring her to report at 11:30 a.m.; she did not report and did not call until 1:15 p.m., when she advised that she would be out the entire day. As a result, there was no arrangement for a substitute teacher and the continuity of instruction of the students was hindered.

11. On November 3, 1999, respondent neglected to call in to advise that she was taking a personal illness day until 8:40 a.m., rather than the required call-in time of 8:00 a.m., which would have permitted the school district to hire a substitute.

[1] It should be noted that during respondent's direct examination, it appeared as if she were about to deny the truth of the contents of her statement of June 7, 2001. I advised her counsel that if this were the case, I felt obligated to warn respondent that she had the right to remain silent and that any admission by her that she had given a false sworn

12. On November 24, 1999, respondent failed to report by 8:20 a.m. as required; she reported at 10:08 a.m., resulting in the interruption of the continuity of instruction.

13. On November 29, 1999, respondent was tardy, arriving at 9:05 a.m.

14. On December 23, 1999, respondent failed to show up for work and failed to notify the school district of her absence until 10:55 a.m.

15. On January 10, 2000, respondent was tardy, arriving at 1:10 p.m.

16. On January 12, 2000, respondent called in at 9:05 a.m. and indicated that she would report to school in approximately two hours, but never reported for work that day.

17. On December 14, 2000, respondent was observed at approximately 9:15 a.m. sitting in her chair with her back to the students, inattentive to her duties as a teacher for approximately six or seven minutes. Her school principal, Ms. Puri, observed this and testified that respondent was sleeping. Respondent admitted to having her back turned to the class for approximately six or seven minutes, but denied being asleep. At the very least, the facts support a finding of inattentiveness.

18. Even if respondent's testimony concerning her severe medical problems during the 1999-2000 school year is accepted as true, her repeated tardiness and failure to follow required call-in procedures and her inattentiveness cannot be excused in view of the clearly negative impact on the continuity of instruction of the students assigned to her.

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statement to the police leading to the arrest and conviction of Jamar Tucker and Eric Lacey would be immediately forwarded to the prosecutor. Ultimately, she did not deny the contents of her statement.

19. On July 10, 2000, respondent was driving her vehicle while her driver's license was revoked, as indicated by the records of the State Division of Motor Vehicles. Respondent denied that her license had been revoked. She was stopped by a police officer, who gave her a ticket and instructed her not to operate her vehicle. Respondent disregarded this instruction after the police officer left and operated the vehicle. When she was subsequently observed by the same police officer, he directed her to pull to the side of the road and stated to her that she was under arrest. Respondent admits that she disregarded these instructions, and drove away. The police officer then gave chase in his vehicle, activating his emergency lights and siren. Respondent admits that the lights on the officer's vehicle were flashing and admitted knowing that he was a police officer. Eventually, respondent was forced to stop by another police vehicle and was placed under arrest. She was charged with resisting arrest and eluding the police, which charges were eventually dismissed.

Based on the foregoing findings of fact, I **FIND** respondent guilty of the following:

Charge One – unbecoming conduct. On or about July 10, 2000, respondent resisted arrest and attempted to elude the police.

Charge Two – unbecoming conduct. Respondent admitted on June 7, 2001, to committing the following offenses: (1) possession of a controlled dangerous substance; and (2) possession with intent to distribute. From April 2001 to June 2001, respondent allowed her residence to be used for the preparation and distribution of controlled dangerous substances for personal and compensatory gain.

Charge Three – unbecoming conduct. On December 14, 1999, respondent was inattentive to her duties in class, resulting in the students being unsupervised. It was stipulated at the hearing that respondent was previously disciplined for similar conduct when on August 30, 1999, the Board withheld her increment for the 1999-2000 school year for sleeping in class during instructional time, as well as other reasons.

Charge Four – unbecoming conduct. On October 4, 1999, respondent failed to follow proper call-out procedures – respondent had originally stated her intention to come in for a half-day and then failed to call in until 1:15 p.m.; on November 3, 1999, respondent failed to follow proper call-out procedures when taking a personal illness day; on November 24, 1999, respondent failed to notify the school of her tardiness (10:08 a.m. arrival) in a timely manner; on November 29, 1999, respondent failed to notify the school of her tardiness (9:05 a.m. arrival) in a timely manner; on December 23, 1999, respondent failed to notify the school of her tardiness (10:55 a.m. arrival) in a timely manner; on January 10, 2000, respondent failed to notify the school of her tardiness (1:10 p.m. arrival) in a timely manner; on January 12, 2000, respondent failed to report to work after indicating to the principal that she would arrive at approximately 11:00 a.m. It was stipulated at the hearing that respondent was previously disciplined for similar conduct when on August 30, 1999, the Board voted to withhold respondent's 1999-2000 increment for the following reasons, among others: absent 29 days, with respondent reporting her absence too late to procure a substitute on 22 of those days; tardy 70 days; refusing to sign in – 12 days; refusing to sign out – 25 days.

PENALTY

The appropriate remedy or penalty based on the foregoing findings of guilt must now be determined. In *In re Tenure Hearing of Elizabeth Merkooloff, School District of the Township of Washington*, 1980 *S.L.D.* 1370, 1371, the Commissioner stated:

> The Commissioner believes that these young pupils in their formative years surely deserve the best education possible with as complete continuity as can be accorded them.

In *In re Tenure Hearing of Joseph A. Maratea, Township of Riverside*, 1966 *S.L.D.* 77, 106, the Commissioner said:

> The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks or when they are unable to perform effectively because of

> conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee then, the Commissioner holds, the protection of tenure is forfeit.

In *In re Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321, the Commissioner said that

> teachers of this State . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.

It was also stated in *In re Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck*, 1971 *S.L.D.* 284, 296:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . . and must accept the consequences of his actions.
>
> . . . .
>
> The Commissioner's basic and fundamental concern must be in the welfare of the students in the Teaneck School System and, therefore, in the proper administration of that School System.

With respect to respondent's prior disciplinary record, it was stipulated that on August 30, 1999, the Board withheld respondent's 1999-2000 increment for the following reasons: sleeping in class during instructional time; absent 29 days, with respondent reporting her absence

too late to procure a substitute on 22 of those days; tardy 70 days; refusing to sign in – 12 days; and refusing to sign out – 25 days. Ms. Puri also testified that respondent was reprimanded by her on November 22, 1999, for among other infractions, failure to notify the school of her absence in a timely manner, unauthorized late arrival after time required for one-half day, frequent absences and tardiness, and failure to meet with the principal to discuss monthly attendance notice.

With respect to Charge Three, involving inattention to her duties in class resulting in the students being unsupervised, and Charge Four, involving repeated tardiness and failure to comply with call-out procedures, respondent's medical condition following surgery, if described accurately by respondent, may be a sufficient basis upon which to impose a remedy other than removal. However, the conduct and actions resulting in Charge One and Charge Two are so egregious as to justify her removal as a teacher. Respondent admitted that she allowed drug dealers to use her residence for the purpose of storing and selling cocaine. She admitted that she personally observed drug dealers cook powdered cocaine into crack cocaine in her residence approximately fifty times. She admitted that she observed a 90-gram cocaine sale in her residence. She also admitted allowing another drug dealer to use her residence for the purpose of selling drugs, in exchange for which she would receive money and cocaine, which she then sold. Notwithstanding her assertions that she was threatened with physical harm and death, respondent should have chosen some course of action other than acquiescence. I **FIND** that respondent's conduct is clearly conduct that adversely affects the morale or efficiency of the school district of which the teacher is a member, and has the tendency to destroy public respect for teachers and confidence in the operation of the school district. In addition, I **FIND** that respondent's conduct clearly violates not only an implicit, but also an explicit, standard of good behavior.

It is clear to me that it is not in the best interest of the students of the Trenton School District that respondent remain a teacher. The appropriate penalty for her unbecoming conduct is removal from her position. Therefore, I **CONCLUDE** that respondent should be removed as a teacher in the School District of the City of Trenton.

DECISION AND ORDER

Based upon the foregoing, I **FIND** respondent guilty of the charges of unbecoming conduct as stated above, and I **ORDER** her removal as a teaching staff member of the School District of the City of Trenton.

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

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

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

June 20, 2003
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

Jun 23, 2003
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 27 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

Witnesses

For petitioner:

Robert Cowan

Nancy Puri

Robert Cochran

For respondent:

Brenda D. Mapp

Exhibits

For Petitioner:

P-1 June 7, 2001, State of New Jersey vs. Brenda Mapp, Complaint W249237

P-2 June 7, 2001, State of New Jersey vs. Brenda Mapp, Complaint W249238

P-3 June 7, 2001, Affidavit of Probable Cause, Detective Robert Cowan

P-4 June 12, 2001, Mercer County Prosecutor's Office, Supplementary Investigation Report, Case No. S-01-55, Detective Robert Cowan

P-5 June 7, 2001, Statement of Brenda Mapp, Mercer County Prosecutor's Office

P-6 October 5, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-7 November 3, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-8 November 22, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-9 November 24, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-10 November 29, 1999, Patton J. Hill School Memorandum from Nancy Puri to

Brenda Mapp

P-11 December 23, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-12 January 10, 2000, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-13 January 13, 2000, Patton J. Hill School Memorandum from Nancy Puri, to Brenda Mapp

P-14 December 14, 1999, Patton J. Hill School Memorandum from Nancy Puri to Brenda Mapp

P-15 January 19, 2000, e-mail from Carlene Moore to Nancy Puri

P-16 July 10, 2000, State of New Jersey vs. Brenda Mapp, Complaint S-2000-005948-1111, Lieutenant Robert K. Cochran

P-17 November 16, 2000, State of New Jersey vs. Brenda Mapp, Indictment 00-11-1252I

P-18 July 10, 2000, City of Trenton Police Investigation Report

P-19 July 10, 2000, City of Trenton Police Arrest Docket of Brenda Mapp

P-20 July 10, 2000, City of Trenton Police Vehicle Report

P-21 July 10, 2000, City of Trenton Municipal Court Complaint vs. Brenda Mapp, Driver's License Revoked

P-22 April 10, 2002, Superior Court of New Jersey, Mercer Probation Division, Letter by Glenn Buzzi, SPO

For respondent:

R-1 Motion and Order for Dismissal of Complaint dated June 20, 2002

R-3 Brenda Mapp Class Schedule

OAL DKT. NO. EDU 8333-02
AGENCY DKT. NO. 352-11/02

IN THE MATTER OF THE TENURE	:	
HEARING OF BRENDA MAPP,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were filed in accordance with *N.J.A.C.* 1:1-18.4.

Respondent's exceptions charge that the Initial Decision failed to properly consider and weigh the criminal justice system outcome of the criminal charges forming the basis of Charges 1 and 2 of the tenure charges herein. She points out that, after a full investigation and consideration of all surrounding circumstances, the Prosecutor's Office dismissed the first charge and disposed of the second by downgrading it to a noncriminal disorderly persons offense. As such

> [e]ither because the charges themselves, when fully considered, were not determined to be serious enough to warrant a full prosecution or because the respondent, herself, demonstrated a sufficient understanding of the issue and took the appropriate steps to curb her behavior, the conduct should not form a sufficient basis for unbecoming conduct.
> (Respondent's Exceptions at 1, 2)

Although respondent acknowledges that the justice system result does not "automatically" preclude a finding of unbecoming conduct, she argues that such an outcome provides "persuasive evidence" that such charges are insufficient to warrant termination from her position. (*Id.* At 1)

With respect to Charges 3 and 4, *i.e.*, alleged inattention to her classroom duties resulting in students being unsupervised; failure to comply with call-out procedures and repeated tardiness, respondent refers to page 26 of the Initial Decision where the Administrative Law Judge (ALJ) recognized that her testimony as to complications she experienced from medical surgery could provide a sufficient basis for the imposition of a penalty less than dismissal. Consequently, respondent argues, since Charges 3 and 4 are insufficient to require removal from her position, interests of justice and fair play dictate that "the addition to those charges of a single non-criminal offense should not tip the scales in favor of removal." (*Id.* at 2)

In reply, the Board submits a copy of its post-hearing brief advanced below and urges that, for the reasons set forth in this brief and the Initial Decision, the Commissioner adopt the recommended decision terminating respondent's tenured employment.

Upon careful and independent review of the record in this matter, which it is noted does not include transcripts of the hearing below, the Commissioner agrees with the findings and conclusions of the ALJ that respondent is guilty of conduct unbecoming a teaching staff member with respect to each of the four charges against her (Initial Decision at 23-24) warranting her removal from her tenured position with the Trenton Board of Education.

In so concluding, the Commissioner rejects as meritless respondent's advancement that, as a result of the criminal court outcome of the charges underlying Counts 1 and 2 of the tenure charges here, the behavior involved should somehow be viewed as *de minimis*, therefore, incapable of rising to the level of unbecoming conduct. It is by now well-established that diversion or dismissal of criminal charges has no bearing on a finding of unbecoming conduct in a tenure matter as to the incident(s) underlying those charges or the imposition of an appropriate penalty. *In the Matter of the Tenure Hearing of Arlene Dusel*,

School District of the Borough of Sayreville, 1978 *S.L.D.* 526, supplemental decision 1979 *S.L.D.* 153, *aff'd* State Board of Education, 1979 *S.L.D.* 155; *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph*, 1980 *S.L.D.* 721, *aff'd* State Board, *1980* S.L.D. *728, aff'd* App. Div., 1981 *S.L.D.* 1537; *In the Matter of the Tenure Hearing of R. Scott McIntyre, Hunterdon-Voorhees Regional School District*, 96 *N.J.A.R.* 2d (EDU) 718, *aff'd* State Board, 96 *N.J.A.R.* 2d (EDU) 726, *aff'd* App. Div., 96 *N.J.A.R.* 2d (EDU) 726. Such holdings are reflective of a recognition of the fundamental differences in the purpose and scope of these adjudicating forums. First, the quantum of proof necessary to sustain criminal charges is significantly enhanced from that necessary in an administrative matter, *i.e.*, beyond a reasonable doubt as opposed to a preponderance of the credible evidence. More importantly, however, the interests implicated in a tenure proceeding are intrinsically different from those in a criminal matter. As found by the Commissioner in *Dusel, supra*:

> The "interests" to be protected herein are not those associated with a possible indictment or conviction in a criminal matter, but those concerned with fitness to hold a position as an instructor of school pupils. The right of these pupils to be taught by teachers who are free from the taint of patently illegal or flagrantly unbecoming acts is also at issue. (at 531)

Simply put, the focus of the inquiry in this matter is solely concerned with respondent's ability and fitness to teach public school children. Therefore, the analysis to be made is whether any of the charges herein, individually or collectively, amount to "unbecoming conduct."

The Commissioner finds and concludes that it is uncontestable that respondent's behavior and actions which formed the basis of Counts 1 and 2 of the tenure charges herein constitute conduct unbecoming a teaching staff member. He further concurs with the ALJ that the nature of the incidents is so egregious, in and of itself, as to justify respondent's removal from her tenured position. The Commissioner recognizes that "teachers carry a heavy

responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 *S.L.D.* 987 at 1003. As such, some actions are "so foreign to the expectations of the deeds and actions of a professionally certificated classroom teacher as to raise manifest doubts as to the continued performance of that person in the profession." (*Ibid.*) Taken in conjunction with the unbecoming conduct evidenced in Charges 3 and 4, respondent's unfitness as an educator is beyond question.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons well expressed therein. Respondent is hereby dismissed from her tenured teaching position in the Trenton School District as of the date of this decision. This matter is being referred to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|05|03

Date of Mailing: 8|11|03

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

435-03

435-03

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BERKLEY, SCHOOL DISTRICT OF PEMBERTON TOWNSHIP, BURLINGTON COUNTY.

And

MICHAEL BERKLEY,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 8, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. EDU 8172-02 and

EDU 661-03 (Consolidated)

AGENCY REF. NOS. 322-10/02 and

408-12/02

IN THE MATTER OF THE
TENURE HEARING OF
MICHAEL BERKLEY,
SCHOOL DISTRICT OF
PEMBERTON, BURLINGTON
COUNTY,

AND

MICHAEL BERKLEY,

Petitioner,

v.

BOARD OF EDUCATION OF
THE BOROUGH OF PEMBERTON,
BURLINGTON COUNTY,

Respondent.

Robert A. Muccilli, Esq., for Pemberton Borough Board of Education (Capehart & Scatchard, P.A., attorneys)

Jason E. Sokolowski, Esq., for Michael Berkley (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys)

Record Closed: June 17, 2003 Decided: June 18, 2003

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

This consolidated matter was transmitted to the Office of Administrative Law on November 14, 2002 and February 27, 2003, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

6/18/03
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

6/24/03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Laurel Corporate Center, Suite 300
8000 Midlantic Drive
Mount Laurel, N.J. 08054
(856) 234-6800
Attorneys for Board of Education of the Public Schools of Pemberton Township

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BERKLEY, SCHOOL DISTRICT OF PEMBERTON, BURLINGTON COUNTY,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NOS. EDU 8172-02 and EDU 661-03 AGENCY REF. NOS. 322-10/02 and 408-12/02
AND	:	
MICHAEL BERKLEY,	:	
Petitioner,	:	**SETTLEMENT AGREEMENT**
vs.	:	
BOARD OF EDUCATION OF THE BOROUGH OF PEMBERTON, BURLINGTON COUNTY,	:	
Respondent.	:	

Procedural History

THIS MATTER consists of two related docket numbers that were consolidated for hearing by Order dated March 6, 2003 and is now captioned In The Matter of the Tenure Hearing of Michael Berkley, School District of Pemberton, Burlington County, And Michael Berkley v. Board of Education of the Borough of Pemberton, Burlington County (OAL DKT. NOS. EDU 8172-02 and EDU 661-03) (AGENCY DKT. NOS. 322-10/02 and 408-12/02). In the caption the Pemberton Township Board of Education is incorrectly referred to as "School District of Pemberton, Burlington County" and "Borough of Pemberton, Burlington County." The consolidated matter was presented to the Office of Administrative Law ("OAL") for a hearing on

April 1, 2003 at which time the Pemberton Township Board of Education and Michael Berkley ("referred to together as "the Parties") met through their representatives with the administrative law judge and individually to review their positions and reached an Agreement to resolve the matter subject to the approval of the Commissioner of Education ("the Commissioner");

Background

WHEREAS, Michael Berkley has been an employee of the Board since July 1, 1985 and holds tenure pursuant to N.J.S.A. 18A:17-3, and at times pertinent to the current tenure charges was a night custodian at the Pemberton Township High School.

Commissioner's Disposition of Prior Tenure Charges

WHEREAS, by Decision dated October 18, 2000 the Commissioner approved a Settlement Agreement and Initial Decision issued by the OAL on September 16, 2000 pursuant to which Mr. Berkley was suspended from employment for 9 ½ months.

Board's Position As To The Current Tenure Charges

WHEREAS, the Board states its position with respect to the current tenure charges as follows. On April 11, 2002, a special education teacher reported that a 13 inch combination television/VCR set ("the set") was missing from a closet in her classroom. The teacher last saw the set when she left her classroom at the end of the school day on April 10, 2002. The Board alleges that Mr. Berkley, who was assigned to clean the teacher's classroom on the 3:00-11:00 P.M. shift on April 10, 2002, stole the set. The Board maintains that, shortly before Mr. Berkley left for mealtime on April 10, 2002, a video surveillance camera captured him rolling a custodial cart down a hallway moving away from the direction of the teacher's classroom with a rectangular object inside a charcoal colored plastic bag balanced on top of the cart.

Mr. Berkley was informed of the missing set on April 11, 2002 when he reported to work for the 3:00-11:00 P.M. shift. The Board alleges that Mr. Berkley returned the missing set once he learned that it was reported missing. The Board maintains that video surveillance cameras captured Mr. Berkley on April 11, 2002 returning in his car from mealtime, rolling a garbage can out to his car, reentering the building and making his way up to the vicinity of the audio visual room located within the area in which he had volunteered to work. Mr. Berkley reported to the night custodian supervisor that he had located two television sets, one of which was determined to be the missing set. Mr. Berkley stated that he located the two television sets in the audio visual room, however, the Board maintains that the audio visual room had been searched earlier on April 11 and that the set was not in the room. The Board seeks Mr. Berkley's dismissal from employment.

Michael Berkley's Position As To The Current Charges

WHEREAS, Mr. Berkley states his position with respect to the current charges as follows. Mr. Berkley denies each of the two tenure charges, and maintains that he has repeatedly denied throughout these proceedings the allegation that he stole the television set. Mr. Berkley further denies that he had anything to do with the missing set. Mr. Berkley maintains that he did not volunteer to work in the area of the audio visual room on April 11, 2002. Mr. Berkley maintains that even if the Commissioner were to find that the facts set forth in support of charges 1 and 2 by the Board of Education of the Township of Pemberton were true and would support the imposition of some form of disciplinary action, removal from his employment with the Board would not be the appropriate sanction.

Weighing of Considerations And Public Benefit of Settlement

WHEREAS, the Parties, are aware of the public's interest in the proper handling of tenure charges to insure that unqualified persons do not continue to be employed when diligence at this stage might prevent difficulties in the future. However, in considering the total circumstances, the Parties believe that it is in the best interest of the Board, Mr. Berkley and the public to resolve this matter by settlement. An evaluation of these circumstances include consideration of the details of the positions as stated by the parties herein, the time and expense in maintaining the tenure charges, questions concerning the clarity and scope of coverage of the video surveillance cameras with respect to the events of April 10 and 11, 2002, the lack of direct witnesses to the removal and return of the set, the uncertainty of the ultimate result which might be obtained and the lack of any allegation that Michael Berkley presents any threat to the children of New Jersey. The Parties believe that the settlement of this matter is appropriate and that the settlement comports with the standards for review of settlements in tenure matters in accordance with In re Cardonick, 1990 S.L.D. 842, 846, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983.

NOW, THEREFORE, IT IS agreed by and between the Parties, subject to the approval of the Commissioner:

1. Mr. Berkley will resign his employment with the Board, said resignation to be effective on the date of the Commissioner's decision approving of the Settlement Agreement and Initial Decision (should the Commissioner so approve), by signing and returning to the Board the resignation letter contained in attachment "A" within seven (7) days of the date the Commissioner mails his decision. Mr. Berkley agrees that by resigning his position, he is relinquishing all present and future rights to employment and re-employment with the Board as of the effective date of his resignation. Further, Mr. Berkley acknowledges that subsequent to the effective date of his resignation, the Board will not have any obligation to provide him with any future payments, benefits or considerations other than the payment recited in paragraph 2 below.

2. In consideration of the mutual execution of this Agreement which provides for a release given by Mr. Berkley and his resignation, the Board will within fourteen (14) days of the

effective date of Mr. Berkley's resignation pay to him $57,682.00 less the gross amount of any salary payments made to him between April 1, 2003 and the effective date of his resignation.

3. Mr. Berkley agrees that any inquiries regarding him will be directed to the Board Secretary/Business Administrator who will, upon request, provide Mr. Berkley and any other individual inquiring about him with a letter reflecting Mr. Berkley's date of hire and date of resignation. This paragraph is not intended to and should not be construed as a restriction on the Board's obligation to comply with N.J.S.A. 47:1A-1 et seq. (and in particular N.J.S.A. 47:1A-10) and/or Executive Order 11 (1974).

4. Mr. Berkley, for and in consideration of the undertakings of the Board set forth in paragraph 2 herein, and intending to be legally bound, does hereby remise, release and forever discharge the Board and its officers, members, employees and agents, and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which he ever had, now has, or hereafter may have, or which his heirs, executors or administrators hereafter may have by reason of his employment relationship and/or the termination of his employment relationship and /or affiliation with the Board and/or the claims asserted by him in In The Matter of the Tenure Hearing of Michael Berkley, School District of Pemberton, Burlington County, And Michael Berkley v. Board of Education of the Borough of Pemberton, Burlington County (OAL DKT. NOS. EDU 8172-02 and EDU 661-03) (AGENCY DKT. NOS. 322-10/02 and 408-12/02). Excepted from this release are: claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., the Public Employees Retirement System, N.J.S.A. 43:15A-1 et seq., and claims arising from breach of this Agreement. Mr. Berkley represents that he is unaware of any claims arising under these exceptions as of the date he executes this Agreement.

5. The Parties agree that this Agreement shall not be construed in any way as an admission of wrongdoing by either Party. The Parties further agree that this Agreement shall not be admissible in a hearing in this matter should the Commissioner not approve the Agreement.

6. Both Parties have read the terms of this Agreement and acknowledge that they have had an opportunity to discuss it with counsel. The Parties further acknowledge that they are executing this Agreement of their own volition, with full understanding of its terms and effects, and without any coercion.

7. **The Parties understand that this Agreement is subject to the approval of the Commissioner. This Agreement is reached based upon an evaluation of the individual considerations with respect to the Parties and issues in this matter. This Agreement is not precedent setting or binding respect to any other matter.**

Michael Berkley (Date)

James Hager
Business Administrator/Board Secretary
Pemberton Township Board of Education
P.O. Box 228
One Egbert St.
Pemberton, NJ 08068-0228

Re: Letter of Resignation

Dear Board Members:

Please be advised that effective on the date the Commissioner of Education's Decision Approving the Settlement Agreement and Initial Decision, I resigned my custodial position with the Public Schools of Pemberton Township.

_____
Michael Berkley

ATTACHMENT "A"

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BOARD OF EDUCATION OF
PEMBERTON TOWNSHIP PUBLIC SCHOOLS

By: _____ 5/13/03
James Hager, Business (Date)
Administrator/Board Secretary

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Attorneys for Michael Berkley

By: _____ 6/13/03
Jason E. Sokolowski (Date)

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Attorneys for Board of Education of the
Public Schools of Pemberton Township

By: _____ 6/11/03
Robert A. Muccilli (Date)

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OAL DKT. NOS. EDU 8172-02 AND EDU 661-03 (CONSOLIDATED)
AGENCY DKT. NOS. 322-10/02 AND 408-12/02

IN THE MATTER OF THE TENURE HEARING OF MICHAEL BERKLEY, SCHOOL DISTRICT OF PEMBERTON TOWNSHIP, BURLINGTON COUNTY.	:	
And	:	COMMISSIONER OF EDUCATION
MICHAEL BERKLEY, PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms of this consolidated matter involving a tenured custodian since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the

[1] As noted in the Settlement Agreement, these consolidated cases were incorrectly captioned. The Pemberton Township Board of Education is incorrectly referred to as "School District of Pemberton, Burlington County," and "Borough of Pemberton, Burlington County." The case caption on this decision reflects changes to correct these errors.

Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8|08|03

Date of Mailing: 8|11|03

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:2-1.1 *et seq.*

436-03

436-03

PAUL S. NATANSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, resident of Bernards Township (Basking Ridge) in Somerset, County, sought an order requiring the Pequannock Board in Morris County (Board) to make candidates for school employment pay the cost of conducting criminal background checks. He contended that the Board's practice of paying the fee itself violated state statutes.

The ALJ found that petitioner was not a resident of either Pequannock Township or Morris County; he paid no taxes to Pequannock Township; he never worked for the Board or applied to the Board for employment. Moreover, petitioner offered no actual facts to support his theory that he was being harmed indirectly "through the state tax system." The ALJ concluded that the petition should be dismissed for lack of standing.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

August 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1848-03
AGENCY DKT. NO. 19-1/03

PAUL S. NATANSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK,
Respondent.

Paul S. Natanson, *pro se*

Greg K. Vitali, , Esq., for respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: May 16, 2003 Decided: July 1, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

Petitioner Paul S. Natanson ("Natanson") seeks an order requiring the Pequannock Board of Education ("Board") to make candidates for school employment pay the cost of conducting criminal background checks. Specifically, Natanson alleges that the Board follows the practice of paying the fee itself. He asserts that this practice violates state statutes, which he interprets as requiring the job applicant to bear the cost

of the criminal background check. Presently, the matter comes before the Office of Administrative Law ("OAL") on the Board's motion to dismiss the petition for lack of standing.

Procedural History

On January 13, 2003, Natanson filed a verified petition with the Commissioner of Education ("Commissioner"). Respondent Board filed an answer on February 3, 2003, raising various affirmative defenses including lack of standing. Subsequently on March 4, 2003, the Commissioner transmitted the case to the OAL for hearing as a contested case.

Prior to hearing, the Board filed a motion to dismiss, together with supporting certification and letter brief, on April 11, 2003. Natanson filed opposing papers on April 30, 3003. The matter was submitted on May 16, 2003 for ruling on the papers.

Findings of Fact

All of the facts needed for disposition of the motion are undisputed. I **FIND:**

The Board is the governing body of a local school district situated in the Township of Pequannock in the County of Morris, New Jersey. Paul S. Natanson resides in the Township of Bernards (Basking Ridge) in the County of Somerset, New Jersey. Natanson is not a resident of either Pequannock Township or Morris County. He pays no taxes to the Township of Pequannock. Insofar as the record reflects, Natanson has never worked for the Board or applied to the Board for employment.

Several state statutes require that applicants for employment in public school jobs must undergo a criminal background check for disqualifying offenses. Each of these statutes contains language that "the applicant shall bear the cost for the criminal history record check, including all costs of administering and processing the check."[1]

[1] *N.J.S.A.* 18A:6-4.14, *N.J.S.A.* 18A:6-7.2 and *N.J.S.A.* 18A:39-19.1

In his pleadings, Natanson accuses the Board of "paying and/or reimbursing some of these fees rather than compelling all applicants . . . to pay the fees themselves as the law requires." While Natanson does not allege that he ever sought employment in the Pequannock school district, he has applied for jobs in another unnamed school district that does require payment of such fees. Rather than seeking to change the policy in this other district, Natanson complains that, "Pequannock's conduct has blocked me from changing the law that requires me to pay for my own criminal background investigation." Strict enforcement of the law, he believes, will help him "convince our legislators to change the law so that schools can have the option of paying these fees, legally[.]"

Natanson also contends that the Board's policy gives it an unfair competitive advantage in attracting better workers. Consequently, Natanson theorizes that the pool of available job candidates in his hometown might be reduced and taxpayers in Basking Ridge might be forced "to support higher wages and higher advertising costs to attract job candidates to the school system." However, Natanson offers no actual facts to support his speculation. Other than that, the only other way in which Natanson claims he is harmed by the Board's actions is indirectly "through the state tax system." Again, he offers no underlying facts to show the amount of state aid that the Board may be receiving and whether any state money is being used to pay for background checks.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the petition should be dismissed for lack of standing.

"Standing" refers to the petitioner's ability or entitlement to maintain an action before a court or administrative agency. *Stubaus v. Whitman*, 339 *N.J. Super.* 38, 47 (App. Div. 2001), *certif. den.* 171 *N.J.* 442 (2002). To possess standing, a party "must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm

in the event of an unfavorable decision." *In re Camden Cty.*, 170 *N.J.* 439, 449 (2002). New Jersey courts have adopted a generous approach toward recognition of standing in order that aggrieved parties will not be denied easy access to the legal system. *See Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98 (1971). S. Lefelt, *Administrative Law & Practice, 37 N.J. Practice Series* §7.4 (2d ed. 2003).

Nonetheless, there are accepted limits as to who may seek to vindicate rights belonging to others. Courts will not render advisory opinions or function in the abstract or entertain proceedings by parties "who are mere intermeddlers" or are "merely interlopers or strangers to the dispute." *Crescent Park, at 107.* Despite a broad standing policy, our courts require some real and direct interest be present before granting third party standing to seek judicial review of agency action. *Camden County*, at 447. Generally, two prerequisites must exist to establish standing: First, petitioner must demonstrate a sufficient stake in the outcome of the proceedings; and, second, his position must be truly adverse to the opposing party. *Home Builders League of So. Jersey, Inc. v. Berlin Twp*, 81 *N.J.* 127, 132 (1979). Sometimes the first requirement is described in terms of the "substantial likelihood of harm" to the complainant if the requested relief is not granted. *Home Builders*, at 134. Where a case is of great public interest, however, "any slight additional private interest" will be sufficient to afford standing. *Salorio v. Glaser*, 82 *N.J.* 482, 491 (1980). But courts still continue to look for some measurable amount of detrimental impact on the complaining party's personal rights.

Similar restrictions are imposed on those who would initiate administrative proceedings before the Commissioner. While *N.J.S.A.* 18A:6-9 confers upon the Commissioner jurisdiction to hear and determine "all controversies and disputes arising under the school laws," the Commissioner had adopted regulations clarifying exactly who may be considered interested persons for the purpose of such hearings. *N.J.A.C.* 6A:3-1.2 defines "interested person(s)" as someone "who will be substantially, specifically and directly affected by the outcome of a controversy before the Commissioner." Such language is consistent with the Administrative Procedure Act, which limits the definition of a contested case to proceedings where the "legal rights,

duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined." *N.J.S.A.* 52:14B-2(b).

Thus, the Commissioner has consistently declined to hear cases brought by petitioners who would not be affected by the outcome in a direct and meaningful way. *See, e.g., U.K. & G.K. o/b/o D.K. v. Clifton Bd. of Educ.*, 93 *N.J.A.R.*2d (EDU) 73 (Nov. 20, 1992) (parents objecting to discipline of someone else's child); *Kenwood v. Montclair Bd. of Educ.*, OAL Dkt. No. EDU 8858-81 (April 23, 1982), *adopted*, Comm'r (June 14, 1982), *aff'd* St. Bd. (Sept. 8, 1982) (concerned citizen seeking to rewrite school attendance policy); *Lobis v. Maple Shade Bd. of Educ.*, OAL Dkt. EDU 3630-79 (June 11, 1980), *adopted,* Comm'r (Aug. 11, 1980), *aff'd,* St. Bd. (Nov. 5, 1980) (parent whose child no longer attended school complaining about quality of education received by remaining students); *Delaney v. Woodbridge Bd. of Educ.*, OAL Dkt. EDU 382-78 (Dec. 12, 1979), *adopted*, Comm'r (June 11, 1980) (taxpayer questioning propriety of filling job vacancies); *Ricardelli v. Newark Bd. of Educ.*, OAL Dkt. EDU 1894-79 (Sept. 26, 1979), *adopted*, Comm'r (Nov. 16, 1979) (taxpayer challenging legality of school board's decision to transfer personnel); *G.G. v. New Providence Bd. of Educ.,* 1975 *S.L.D.* 502 (parent of high school graduate challenging attendance policy).

Significantly, Natanson has no identifiable connection with Pequannock or its school system. Moreover, the harm that he alleges is attenuated and hypothetical. Regardless of whether the Board pays the cost of background checks for its school personnel, Natanson retains the right to petition the Legislature for redress of his grievances. Resolution of Natanson's complaint is unlikely to influence the Legislature or have an appreciable effect on the ability of his local school board to recruit competent school staff. In short, Natanson has no real stake in the outcome of these proceedings and has not demonstrated a substantial likelihood of suffering genuine harm.

Order

It is **ORDERED** that the Board's motion to dismiss the petition is granted.

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

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

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

July 1, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7-1-03
DATE

M. Kathleen Dunscombe/ch
mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 8 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

No.	Description
P-1	Petition of Paul S. Natanson, filed on January 14, 2003
P-2	Petitioner's Reply to Answer, filed on February 6, 2003
P-3	Petitioner's Reply to Motion for Dismissal, filed on April 30, 2003
R-1	Answer and Affirmative Defenses of Pequannock Board of Education, filed on February 4, 2003
R-2	Notice of Motion to Dismiss for Lack of Standing, filed on April 11, 2003
R-3	Letter Brief of Pequannock Board of Education, filed on April 11, 2003
R-4	Certification of William Albert, filed on April 11, 2003

OAL DKT. NO. EDU 1848-03
AGENCY DKT. NO. 19-1/03

PAUL S. NATANSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon his full and independent review, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that petitioner's appeal in this matter must be dismissed for lack of standing.

Accordingly, the Initial Decision of the OAL is adopted for the reasons clearly stated therein. The instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|08|03

Date of Mailing: 8|11|03

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

437-03

437-03

JERSEY CITY COMMUNITY CHARTER SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Charter School sought payment of bus transportation costs incurred during the 2001-02 academic year from respondent local School District pursuant to *N.J.S.A.* 18A:36A-13. The District contended it met its legal obligation by offering bus tickets on public buses when it was not arranging private bus routes for petitioner's charter school students. The Charter School then entered into its own contract with a bus company due to the issue of safety. The District reversed its policy and arranged transportation for other charter schools except for petitioner because petitioner had a preexisting contract.

The ALJ found that when the District voluntarily provided all other charter schools located in Jersey City with bus routes, the District automatically triggered the statutory requirement to treat all in-district students alike. The ALJ ordered the District to pay the Hudson County Transport, Inc., the sum of $24,592 for services rendered to the Charter School from September 5 to December 5, 2001.

The Commissioner concurred with the findings and conclusions of the ALJ and ordered the District to pay the amount owed.

August 8, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5218-02
AGENCY DKT. NO. 128-4/02

JERSEY CITY COMMUNITY CHARTER SCHOOL,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

Marvin L. Comick, Esq., for petitioner
(Love & Randall, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: March 28, 2003 Decided: June 24, 2003

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is a suit by a charter school seeking payment of bus transportation costs incurred during the 2001-2002 academic year. *N.J.S.A.* 18A:36A-13 requires local school districts to furnish transportation to resident charter school students "on the same terms and conditions" as its own students. In January 2001, the State-Operated School District of the City of Jersey City ("District") notified Jersey City Community

Charter School ("Charter School") that it was ending its past practice of arranging private bus routes for charter school students. Instead, the District offered to provide bus tickets on public buses. Unwilling to allow its young students to ride unattended on public buses, the Charter School entered into its own contract with a bus company to provide private bus routes. Shortly before the start of classes in September 2001, the District informed the Charter School that it was reversing itself and reinstating private bus routes. Nevertheless, the District refused to assume financial responsibility for the existing routes arranged by the Charter School because of substantial differences in the bidding specifications.

Ultimately, the District went through its own bidding process and began providing bus routes to Charter School students in early December 2001. Petitioner seeks payment of transportation expenses totaling $24,592 incurred during the first three months until the District began providing bus service. The District defends on the grounds that it met its legal obligation by offering bus tickets and that there is no statutory authority permitting it to make payment to or contract with "an intermediary" such as a charter school.

Procedural History

On April 29, 2002, the Charter School filed a verified petition with the Commissioner of Education ("Commissioner"). Respondent District filed its answer with the Commissioner on May 20, 2002. Subsequently, on May 31, 2002, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on February 28, 2003. Witnesses and exhibits are listed in the appendix. Upon receipt of post-hearing briefs, the record closed on March 28, 2003.

Findings of Fact

Uncontested Facts

Most of the relevant facts are undisputed. Chartered in 1997, the Charter School has a student population of 275 students, drawn from Jersey City and surrounding communities. During 2001-2002, it served children in Kindergarten through grade four. Approximately one hundred in-district students attending the Charter School in 2001-2002 lived more than two miles away and thus were entitled to transportation.[1] In prior years, the District had always arranged private bus routes for remote in-district students attending charter schools located in Jersey City.

On or about January 9, 2001, the District gave written notice that "effective September 2001 the Jersey City Public Schools will be providing the same transportation services for Charter School students as it provides for students enrolled in the Jersey City Public Schools, that is, bus tickets[.]" Further, the District requested that the Charter School, "Kindly notify parents in order that they might have sufficient time to arrange for and adjust to these changes[.]"

Immediately upon receipt of this communication, Carletta Martin-Martin-Goldston, the head of the Charter School, conferred with her board of trustees and consulted with the parent-teacher organization. An experienced educator with a master's degree in elementary education, Martin-Goldston regarded it as "unsafe" for her students, all of whom were below the age of ten, to ride city buses without adult supervision. Stanley Wojik, acting transportation coordinator for the District, agreed that it is "probably not appropriate," although the District itself issues bus tickets to its own remote students of similar age. Moreover, Martin-Goldston feared that the

[1] Local school districts must provide transportation to resident elementary school students who live "more than two miles from their public school of attendance." *N.J.S.A.* 18A:39-1.

unavailability of busing might reduce enrollment and threaten the financial stability of the Charter School, since its funding "depends on the number of students."

In accordance with instructions from her board, Martin-Goldston explored the possibility of declining the District's offer of bus tickets and "securing transportation on our own." Thereafter, on July 31, 2001, the Charter School accepted a bid from the Hudson County Transport, Inc. to supply two bus routes, including a driver and aide, at the cost of $212 per day for each route. Hudson County Transport began providing bus service to the Charter School on September 5, 2001.

On August 20, 2001, just two weeks before commencement of the 2001-2002 academic year, the District sent a letter to the Charter School advising that it had "reconsidered" its policy and would "revert back" to its original arrangement of providing bus routes to charter schools. Significantly, the letter failed to specify the anticipated date when such bus transportation might start. Instead, the letter merely stated that the District's transportation coordinator had been told "to solicit bids for the Charter School routes that were in effect during the 2000-2001 school year" and that, "[o]nce he has secured these routes he will notify you directly." As discussed in the next section, the parties presented conflicting versions of when the District notified the Charter School that busing was actually available.

Ostensibly, the reason for the District's change of heart was that many parents of charter school students had not been notified of the bus ticket arrangement "until the last day of school" and had insufficient time "to make plans to have their children transported in a manner acceptable to them." Of course, that rationale did not apply to the Charter School, which had acted promptly to make its own plans to secure suitable transportation for its students. As soon as she received the District's latest letter, Martin-Goldston wrote back on August 24, 2001, informing the District of the Charter School's contract for bus transportation and requesting that "the cost of our contract with Hudson County Transport be assumed by the Jersey City Public Schools." She also obtained assurance from Hudson County Transport that the bus company had no

objection to the District assuming financial responsibility under the contract. According to Martin-Goldston, the Charter School did not try to cancel its contract with Hudson County Transport at that time because school was about to begin and she did not know when the District would be ready to provide busing.

Not having received any response to her letter of August 24th, Martin-Goldston wrote a second letter on September 28, 2001, enclosing a draft of an agreement for the District to assume the costs of its existing transportation contract with Hudson County Transport. Her letter asked that the District sign the proposed agreement and return it "no later than October 5, 2001." However, the District waited until October 12, 2001 before responding to the second letter. On that date, the District's general counsel, Charlotte Kitler, Esq., sent a letter advising that the District could not properly assume the contract because the Charter School's bid specifications were "so significantly different from our specifications and requirements, particularly in the conditions affecting performance and enforcement[.]" While Kitler's letter reiterated the District's willingness "to arrange to provide transportation services for your students," it did not mention that the District was ready and able to provide such busing immediately. Information furnished separately by the District indicated that bids for various bus routes, including transportation for Charter School students, "are due on October 23rd."

Meanwhile, however, the District had awarded an "emergency contract" to the same bus company, Hudson County Transport, to provide busing to Charter School students along the same two routes, starting on September 5, 2001. Ironically, the cost of each route under the District's emergency contract would have been $243 per day or $31 more than the daily rate under the Charter School's contract. After receipt of the October 12th letter from the District's general counsel, Martin-Goldston called the respondent's transportation coordinator, Stanley Wojik, to accept the District's offer to provide future bus routes. Hudson County Transport continued providing bus service under the Charter School's contract through December 5, 2001 and is now looking for

payment in the amount of $24,592.[2] Neither party contends that Hudson County Transport's services were unsatisfactory or that the charges are unreasonable.[3]

(2) Disputed Facts

It is unfortunate that two public officials have such different recollections of whether the District notified the Charter School of the provisions for busing under the emergency contract. Martin-Goldston testified unequivocally that, after writing her letter of August 24, 2001, she had no communication with anyone from the District until she received the response from the District's general counsel in October 2001. She never saw a copy of Wojcik's letter awarding the emergency contract to Hudson County Transport until the District produced it at the administrative hearing. Wojcik's letter corroborates Martin-Goldston's testimony, since it shows that a copy was sent to the District's school bus administrator, but not to any representative of the Charter School. Admitting that he never sent a copy of the letter to Martin-Goldston, Wojcik offered the lame excuse that the arrangements had to be made quickly so everything was "done verbally."

Convincingly, Martin-Goldston asserts that, had she known of the District's emergency contract with Hudson County Transport, she would have tried to cancel the Charter School's independent arrangements with Hudson County Transport. Certainly it is unlikely that Hudson County Transport would have refused to substitute the District's emergency contract, which contained a higher price for the same two bus routes.

Wojcik claims that he personally telephoned Martin-Goldston on one or more unspecified dates and informed her that the District would have no problem furnishing

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[2] Since December 5, 2001, the District has undertaken to provide busing routes to the Charter School under a contract with a new vendor, Laidlaw.

[3] The Office of the Hudson County Superintendent of Schools has informed the Charter School that it cannot divert programmatic funds to pay for transportation costs. Martin-Goldston said that if the school's suit is unsuccessful, it will have to raise the extra money through candy and bake sales.

bus transportation starting on September 5, 2001. But he failed to produce any substantiating documentation, such as telephone records reflecting the alleged contacts or contemporaneous notes of his conversations. While Wojcik apparently conferred with another District administrator, Ellen Zadroga, the District never called Zadroga to verify that someone had notified the Charter School about the emergency arrangements. Wojcik's discussions with Zadroga appear to have focused on whether the District could assume the Charter School's existing contract.[4]

I **FIND** that Martin-Goldston was unaware emergency busing would be available for Charter School students when school opened in September. Proofs demonstrate that the Charter School management regarded safety as the highest priority and declined the District's offer of bus tickets for its young students. Leadership of the Charter School felt so strongly about the safety issue that it acted to avoid discontinuance of the private bus routes. If the Charter School administration had been informed that the District was ready to provide free busing for remote students, there is no good reason why the Charter School would not have taken advantage of the opportunity and cancelled its substitute arrangements.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the District must compensate Hudson County Transport for the cost of providing bus service to the Charter School.

A charter school is a public school operated pursuant to a charter approved by the Commissioner of Education, which is independent of a local board of education and is managed by a board of trustees. *N.J.S.A.* 18A:36A-3. *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 *N.J.* 316, 319-320

[4] For reasons that are not entirely clear, Wojcik wrote to Hudson County Transport on September 4, 2001 canceling the District's contract to provide transportation services to the Charter School. Again, Wojcik failed to inform the Charter School of this important development.

is managed by a board of trustees. *N.J.S.A.* 18A:36A-3. *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 *N.J.* 316, 319-320 (2000). It is the public policy of the State "to encourage and facilitate the development of charter schools." *N.J.S.A.* 18A:36A-2. Charter schools have more autonomy than other public schools in staffing, curriculum and spending choices. *Englewood on the Palisades*, at 320. Despite its independent governance, however, most of the funding for a charter school derives from the local school district of residence of the charter school. *N.J.S.A.* 18A:36A-12. *Englewood on the Palisades*, at 323. *N.J.S.A.* 18A:36-13 mandates that students who reside in the school district in which the charter school is located "shall be provided transportation to the charter school on the same terms and conditions as transportation is provided to students attending the schools of the district." *N.J.S.A.* 18A:36A-13. *See also, N.J.A.C.* 6A:27-3.1(d).

First, the District argues that it satisfied its legal obligation by offering the same type of transportation provided to its own remote students, namely bus tickets. If the District's involvement had ended at that point, it might well have been absolved of further financial obligation. But that is not the factual pattern presented in this case. Here the District went beyond minimum statutory requirements and voluntarily provided all other charter schools located in Jersey City with bus routes. By doing so, the District automatically triggered the statutory requirement to treat all in-district students alike.

Second, the District contends that assuming the contractual arrangements of a charter school would exceed its statutory authority. Citing *Remedial Educ. & Diagnostic Servs. Inc. v. Essex Cty. Eduational Servs. Comm'n*, 191 *N.J. Super.* 524, 529 (App. Div. 1983), *certif. den.* 97 *N.J.* 601 (1984), the District maintains that "a power or duty delegated by statute to an administrative agency cannot be subdelegated in the absence of any indication that the Legislature so intends." In *Remedial Educ.,* the Appellate Division held that an educational services commission could not legally subcontract with a private entity to perform services that the Commission itself was obligated to supply. Local school districts, on the other hand, are fully empowered to provide bus transportation either by using their own buses or by entering into contracts with bus service providers. *N.J.S.A.* 18A:39-2. *Coaches of Eight, Inc. v. Lakehurst Bd.*

Of Educ., 1978 *S.L.D.* 416 (Comm'r 1978). In fact, the District arranged such transportation services for other charter schools and would also have done so for the Charter School, were it not for the Charter School's preexisting contract.

Legislation must be construed to avoid absurd results. *In re Expungement Application of P.A.F.*, 176 *N.J.* 218, 222 (2003). Courts presume that the Legislature intended to achieve a reasonable result. *Simpkins v. Saiani*, 356 *N.J. Super.* 26, 36 (App. Div. 2002). Fundamentally, the Legislature envisioned that local districts would pay the transportation costs of remote resident students attending charter schools. The problem here was caused by the District's last-minute change in transportation policy. When the District denied its original request for busing, the Charter School was forced to make its own alternative arrangements to bus its students. It would be absurd for the one charter school that felt strongly about the safety issue to be deprived of payment of busing costs, while the other charter schools have their busing paid for by the District. Similarly, it makes no sense for the District to take advantage of its own inefficiencies to avoid its statutory obligation, even though the District would have paid more for the same service if it had acted with appropriate dispatch. Contrary to the District's contention, the Charter School is not asking for payment to be made to an intermediary. Rather, the Charter School is merely seeking to enforce the District's statutory duty to provide bus service on the same basis as other charter schools located in Jersey City.

Order

It is **ORDERED** that the District promptly pay the sum of $24,592 to Hudson County Transport, Inc. in full payment for services rendered to the Charter School from September 5 to December 5, 2001.

APPENDIX

List of Witnesses

1. Carletta Martin-Martin-Goldston, head of school, Jersey City Community Charter School

2. Stanley Wojcik, acting transportation coordinator, State-Operated School District of Jersey City

List of Exhibits

No.	Description
P-1	Copy of memorandum to charter school administrators from Dr. Charles T. Epps, Jr., dated January 9, 2001
P-2	Copy of letter to Jersey City Charter School directors from Dr. Charles T. Epps, Jr., dated August 20, 2001
P-3	Copy of letter to Dr. Charles T. Epps, Jr. from Carletta Martin-Martin-Goldston, dated August 24, 2001
P-4	Copy of letter to Hudson Company Transport from Carletta Martin-Martin-Goldston, dated July31, 2001
P-5	Copy of letter to Dr. Charles Epps from Carlotta Martin-Martin-Goldston, dated September 28, 2001
P-6	Copy of letter to Carletta Martin-Martin-Goldston from Charlotte Kitler, Esq., dated October 12, 2001
P-7	Copy of letter to Carletta Martin-Martin-Goldston from Anthony M. Tozzi Jr., Esq., dated December 20, 2001

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

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

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

June 24, 2003
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

June 27, 2003
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 30 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

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R-1 Copy of letter to Alan Manzo from Stanley W. Wojcik, dated August 29, 2001

R-2 Copy of letter to Alan Manzo from Stanley W. Wojcik, dated September 4, 2001

R-3 Copy of Jersey City Community Charter School bidding documents, dated July 30, 2001

R-4 Copy of State-Operated School District of Jersey City bidding documents, dated October 18, 2001

OAL DKT. NO. EDU 5218-02
AGENCY DKT. NO. 128-4/02

JERSEY CITY COMMUNITY CHARTER SCHOOL, PETITIONER, V. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the State-operated School District and reply thereto of the Charter School were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and fully considered by the Commissioner in his determination herein.

The District's exceptions essentially recast and reiterate its arguments advanced below which the Commissioner finds were fully and fairly addressed by the Administrative Law Judge (ALJ) in his Initial Decision and, therefore, do not require further elaboration here. To the extent the District additionally challenges the ALJ's credibility determinations with respect to the testimony of the Charter School's Director (Carletta Martin-Goldston) vis-à-vis that of the District's Acting Transportation Coordinator (Stanley Wojcik), the Commissioner is satisfied, based on the record before him, that the ALJ appropriately measured the plausibility of the testimony content in making his credibility assessments and reaching his factual findings and conclusions. It is also noted that credibility determinations of the finder of fact, who observed

the witnesses first-hand, are to be accorded great weight in the absence of any meaningful basis on which to challenge them. This is especially true where, as here, transcripts of the proceedings were not provided to the Commissioner. *See In re Morrison*, 216 *N.J. Super.* 143, 157-158 (App Div. 1987) and *N.J.S.A.* 51:14B-10(c).

Upon his full and independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ for the reasons clearly set forth in his decision.

Accordingly, the Initial Decision of the OAL is adopted. The District is hereby ordered to pay Hudson County Transport, Inc., $24,592 for transportation services provided to Jersey City Community Charter School for the period September 5, 2001 to December 5, 2001.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|08|03

Date of Mailing: 8|12|03

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

438-03

438-03

SUNLIGHT ELECTRIC COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

August 8, 2003

OAL DKT. NO. EDU 1218-03
AGENCY DKT. NO. 5-1/03

SUNLIGHT ELECTRIC COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The within matter concerns a challenge by petitioner Sunlight Electric Company, the lowest responsive bidder in two consecutive public bids for the project of electrical/technology renovations for the Bergenfield School District, to the Board's refusal to award Sunlight Electric Company the contract for the project.

This matter was originally brought as an Order to Show Cause before the Law Division of Superior Court, Bergen County. By Order of December 13, 2002, the Court denied petitioner's request for a stay of the bid award and forwarded the matter to the Commissioner pursuant to the doctrine of primary jurisdiction. On January 15, 2003, the Commissioner transmitted this matter to the Office of Administrative Law for hearing on petitioner's application for emergent relief.

On January 28, 2003, the Administrative Law Judge (ALJ) heard oral argument on the emergent relief application and issued an Order[1] on February 2, 2003 temporarily enjoining the Board from awarding and/or entering into any contract regarding the project until after conclusion of hearing on the merits of petitioner's claim. Hearings were subsequently held on March 4 and March 20, 2003, and the record closed on May 15, 2003. The ALJ issued an Initial Decision on June 25, 2003.

[1] It is noted that the ALJ did not transmit this Emergent Relief Order for the Commissioner's review as set forth at *N.J.A.C.* 1:1-12.6(i).

Prior to the Commissioner's consideration of this matter, the parties entered into the within Settlement Agreement. Upon review of the record and the terms of the settlement, the Commissioner finds that the parties have voluntarily agreed to the settlement and that the settlement fully disposes of all issues in controversy and is consistent with law.[2]

Accordingly, the Commissioner approves the Settlement Agreement as the final decision in this matter and the matter is dismissed, subject to compliance with the terms of the settlement. In light of this determination, the Commissioner does not reach to the conclusions in the Initial Decision. However, the Commissioner strongly cautions the Bergenfield Board and all boards of education where specific projects have been funded through the Educational Facilities Construction and Financing Act, *N.J.S.A.* 18A, Chapter 7G, such as the project herein, and where the voters have approved additional tax dollars for a specified purpose and the Department has approved said project based on the board's representation that the funds will be utilized solely to fund that project, that the approved funds may not be utilized by a board of education for a new project which departs from that approved by the taxpayers and the Department.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of decision: 8|08|03

Date of mailing: 8|12|03

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[2] The Commissioner points outs that the within Settlement Agreement is signed by Sun Kim, President of Sunlight Electric Company, on behalf of petitioner, and Board President Steve Stavrou, on behalf of the Board. On August 7, 2003, Mr. Kim certified that he is a principal in Sun Electric Company, a close corporation, and, thus, authorized to sign the settlement on behalf of petitioner Sunlight Electric Company. By resolution of July 16, 2003, the Board authorized the Board President, Steve Stavrou, to execute the Settlement Agreement in this matter on behalf of the Board.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
Bergenfield Board of Education

SUNLIGHT ELECTRIC COMPANY,	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION
Petitioner,	
v.	OAL Docket No. EDU-1218-03 Agency Ref. No. 5-1/03
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD OF BERGEN COUNTY,	**SETTLEMENT AGREEMENT**
Respondent.	

The respondent, Bergenfield Board of Education (hereinafter, the "Board"), with its administrative offices located at 100 Prospect Avenue, Bergenfield, New Jersey, and the petitioner, Sunlight Electric Company, Inc. (hereinafter, "Sunlight"), with its principal place of business located at 41 Ray Avenue, Leonia, New Jersey, hereby set forth their full and complete agreement, as follows:

WHEREAS, Sunlight filed a petition challenging the Board's rejection of its bid for the electrical upgrades at the Roy W. Brown Middle School, the Jefferson Elementary School and the Hoover Elementary School; and

WHEREAS, a hearing on the matter proceeded before the Office of Administrative Law resulting in an Initial Decision adverse to the Board; and

WHEREAS, the Board disagrees with the Initial Decision; and

WHEREAS, the matter is pending before the Commissioner of Education for review; and

WHEREAS, the parties wish to resolve the above captioned matter amicably, without the further litigation expense of review and appeal;

WHEREFORE, the parties agree to the following terms and conditions in full resolution of all matters and issues raised in the above captioned matter:

(1) The Board agrees to award contracts to Sunlight for the completion of the electrical upgrades work at Roy W. Brown Middle School, Jefferson Elementary School, and Hoover Elementary School.

(2) Sunlight agrees to withdraw and/or voluntarily dismiss its petition pending before the Commissioner of Education.

(3) Sunlight hereby releases, waives and gives up any and all claims, rights and damages, which it may have against the Board, its members, its employees, and agents, including those claims which Sunlight may not be aware, arising out of or otherwise related to the above captioned petition, which were included in the petition and/or settlement discussions or resulting from anything which has happened up to now or which failed to occur, including all claims which could not have been brought in the current forum due to jurisdictional reasons.

(4) This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission, fact, law, responsibility, wrongdoing or liability on behalf of the parties.

(5) The parties acknowledge and expressly agree that the Agreement shall be subject to plain language interpretation and that no provision shall be interpreted in favor of one party over the other party.

(6) This Agreement constitutes the full and complete agreement of the parties hereto and supercedes any prior or contemporaneous representations, whether oral or written. This Agreement may not be modified or amended except by written instrument signed by all parties hereto.

(7) If any of the terms of this Agreement are found to be found illegal or void under State and Federal law, then the remainder of the Agreement not affected will remain in full effect.

(8) The Agreement is subject to the approval by the Commissioner of Education and the Bergenfield Board of Education.

SUNLIGHT ELECTRIC CO.

SUN KIM, PRESIDENT

Dated: 7/21/03

WITNESS:

Dated:

BERGENFIELD BOARD OF EDUCATION

STEVE STAVROU, BOARD PRESIDENT

Dated:

455-03

#455-03

J.K., on behalf of minor child, L.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

August 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8010-99

AGENCY DKT. NO. 265-9/99

J.K. ON BEHALF OF MINOR CHILD, L.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,

Respondent.

Stephen Latimer, Esq., for petitioner (Laughlin & Latimer, attorneys)

Gregory J. Giordano, Esq., for respondent (Lenox, Socey, Wilgus, Formidoni & Casey, attorneys)

Record Closed: June 30, 2003 Decided: July 2, 2003

BEFORE **STEPHEN C. REBACK,** ALJ:

This matter was submitted to the Office of Administrative Law on September 7, 1999 pursuant to a petition for emergent relief seeking a ruling in respect to the imposition by the respondent board of five Saturday detentions with varying additional burdens. On September 31, 1999, my office issued a ruling and order granting the request for emergent relief. That opinion was upheld by the Commissioner of Education on October 4, 1999.

Following the resolution of the emergent relief issue, I have never heard from the parties again. Accordingly, it is **ORDERED** that the appeal in the foregoing matter be and is hereby **DISMISSED** for failure of the petitioner to responsibly, vigorously and reasonably pursue the appeal.

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

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

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

7/02/03
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/2/03
DATE

Mailed to Parties:

JUL 9 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 8010-99
AGENCY DKT. NO. 265-9/99

J.K., on behalf of minor child, L.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner concurs that dismissal of this matter is warranted by petitioner's failure to pursue her claim subsequent to the Commissioner's October 4, 1999 ruling on her application for emergent relief.

Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Issue: August 11, 2003

Date of Mailing: August 13, 2003

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

456-03

#456-03

ELLEN M. STILLITANO, DENISE SMITH, VINCENT P. HAMMOND AND ROSE COPELAND,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 11, 2003

457-03

F.M., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning uncle challenged the Board's residency determination that his nephew, R.K., was not entitled to a free public education in the District. R.K.'s Palestian parents live in a refugee camp in Syria.

In light of the record and the testimony of witnesses, the ALJ concluded that petitioner satisfied the requirements of *N.J.S.A.* 18A:38-1(b) in that petitioner was domiciled within the District; that he was supporting R.K. *gratis*; that the parents were incapable of supporting R.K. in their own country due to economic hardship; and that the minor child was not residing with petitioner solely for the purposes of receiving a free public education in the District. Therefore, the ALJ concluded that R.K. met the requirements of an affidavit student and was entitled to a free public education in the District.

The Commissioner adopted the Initial Decision as his own.

August 11, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8109-01
AGENCY DKT. NO. 375-9/01

F.M., ON BEHALF OF MINOR CHILD, R.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

Richard A. Shackil, Esq., for petitioner

Anthony V. D'Elia, Esq., for respondent (Chasan, Leyner, Bariso & Lamparello, attorneys)

Record closed: June 11, 2003 Decided: July 2, 2003

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, F.M., appealed the determination by respondent, Board of Education of the City of Clifton (Board/District), that his minor nephew, R.K., was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(b). Respondent answered that

the application had not shown family or economic hardship or otherwise satisfied the requirements of *N.J.S.A.* 18A:38-1b(1). On September 5, 20001, the Board denied petitioner's application to have his nephew, R.K., admitted to school in the District. On September 25, 2001, the petitioner filed a petition pursuant to *N.J.S.A.* 18A:38-1 concerning this residency dispute. R.K. was permitted to attend school in the District during the pendency of the appeal, commencing September 26, 2001. On November 7, 2001, the Board filed an answer denying the allegations in the petition, with a counterclaim for tuition.

On November 16, 2001, the Department of Education transmitted the matter to the Office of Administrative Law for a hearing as a contested case. A hearing was scheduled for August 8, 2002. At the hearing, petitioner advised he would be seeking legal guardianship of the minor child, R.K. The matter was adjourned to October 17, 2002. Petitioner requested an adjournment. Another scheduled hearing for December 10, 2002 was also adjourned to February 27, 2003. Petitioner requested another adjournment so that he could follow up on the guardianship application. Thereafter, petitioner retained the services of an attorney and the matter was set down for hearing on May 30, 2003. The record remained open for the submission of posthearing briefs and additional documentation.[1] On June 5, 2003, the District submitted the affidavit of tuition charges. Posthearing submissions were received by June 11, 2003 and the record was closed.

STIPULATED FACTS

The parties agreed to the following stipulated facts:

1. The student is R.K.

2. R.K. was born on January 1, 1985 in Damascus, Syria.

[1] Respondent submitted the affidavit of Karen Perkins, Business Administrator, on June 5, 2003. The affidavit is marked as Exhibit R-1.

3. Since September 2001, R.K. has lived in the United States with his maternal uncle, F.M., in Clifton, New Jersey.

4. F.M. filed an application by a Clifton resident for R.K.'s admission to the Clifton Public Schools (J-1) on September 4, 2001.

5. The Board advised F.M. of its decision to deny the application for R.K.'s admission to the Clifton Public Schools by letter dated September 5, 2001 (J-2).

6. F.M. filed an appeal of the denial on September 25, 2001.

FACTUAL DISCUSSION

Testimony

F.M.

F.M. testified first. He was born in Damascus, Syria. He came to the United States when he was twenty-one years old on January 28, 1978. He became a United States citizen fourteen years ago. He resides in a home owned by him in the City of Clifton. He lives there with his three daughters, ages six, eight and thirteen. They all attend the Clifton Public Schools. Also living with him is his nephew, R.K., age eighteen.

The witness testified that he has been back to Damascus nine or ten times since moving here. He was last there in July 2002. He visits his sister, the mother of R.K. She and her husband live there with three other children, two daughters, ages 22 and 17, and a son, age 8. F.M. has known his brother-in-law since they were children in Syria. He testified that the family is considered by the government to be Palestinian.

F.M. identified a document as a transcript from the Civil Status Record (P-1), translated from Syrian to English, as R.K.'s birth certificate. He obtained this document from his sister. The document identifies R.K. as a Palestinian citizen residing in the Syrian Arab Republic since birth.

The witness testified that Palestinians living in Syria reside in refugee camps. There are few jobs and poor housing. His sister and brother-in-law live with their family in a refugee camp. The brother-in-law is a plumber. There is little or no work for him because he is Palestinian. Being a Christian also makes things difficult for them. F.M. explained that his sister's family lives on the equivalent of $100 per month. They have no car.

R.K.'s family live in a one-room apartment in Syria. There is one bathroom shared by three families. His brother-in-law cannot support the family. He sent R.K. to live with the witness. F.M. testified that he provides all the support for R.K. He feeds him and clothes him. F.M. explained that R.K. came on a visitor's visa. He has no legal status in the United States.

The witness testified that he tried to obtain legal guardianship of R.K. He was unable to explain the steps he took to do so, but he indicated that he did not or could not follow up on that matter. He never went back to finalize efforts to obtain guardianship.

R.K.

The student lives with his uncle, F.M. He came to the United States in 2001, during the summer before school started. His father could not take care of him. He told R.K. that he would ask his uncle to take care of him. The witness testified that his family of six lived together in one room. His father was a plumber helper. It is hard to earn money in Syria. The work is not steady there.

R.K. testified that the other students in Syria treated him differently, because he is Palestinian. They made fun of him. Here, in the United States, he is a good student. His grade average is about an 85 percent. He will be a senior next year at Clifton High School. His uncle is his only relative in the United States.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS** of **FACT**:

1. The parents of R.K. live in a refugee camp in Damascus, Syria, with their three other children.

2. They live in a one-room apartment. Three families share the bathroom.

3. R.K.'s father, a plumber by trade, has little work, earning approximately $100 per week. He has difficulty supporting his family in Syria.

4. The family has no car.

5. R.K.'s parents cannot adequately support or provide care for R.K. due to economic hardship.

6. F.M. is a citizen of the United States and a legal resident of the City of Clifton.

7. Since living with his uncle, F.M., in September 2001, R.K. has not been back to Syria.

8. F.M. receives no remuneration for caring for R.K. and provides support and care for him *gratis.*

9. R.K. does not intend to return to Syria.

10. R.K. has attended school in the District since September 26, 2001 to the present.

11. The annual per pupil cost for the students at Clifton High School for 2001-2002 was $7,727.09. R.K. attended school in the district for 167 days in 2001-2002, for a *per diem* cost of $46.27 for the 2001-2002 school year.

12. The annual cost for the students at Clifton High School for 2002-2003 was $6,925.52. Based on 180 days for the entire school year, the *per diem* cost for the 2002-2003 school year is $41.72.

LEGAL DISCUSSION

The State of New Jersey provides that "public schools shall be free to ... any child who is domiciled within the school district." *N.J.S.A.* 18A:38-1(a). The domicile of a minor child follows that of his parents. *See V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286. The applicable statute, *N.J.S.A.* 18A:38-1(b)1, reads in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the District, if so required by the board, a sworn statement that he is domiciled in the District and is supporting the child gratis and will assume all personal obligation for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Therefore, the evidence must show that: (1) petitioner is domiciled within the District; (2) petitioner is supporting R.K. *gratis*; (3) R.K.'s parents are not capable of supporting or caring for her due to family or economic hardship; and (4) R.K. is not residing with petitioner solely for the purpose of receiving a free public education in the District. Petitioner has the burden of proof to demonstrate family or economic hardship.

The position of the Board is that F.M. has not established that the parents have shown that they were incapable of supporting or providing care for their children due to a family or economic hardship. In *J.B. v Bd. of Educ. of Tp. of Ocean*, 96 *N.J.A.R. 2d* (EDU), *rev'd, Comm'r of Educ.* (March 25, 1996), *rev'd, State Bd. of Educ.* (Oct. 2, 1996), *on remand, Comm'r of Educ.* (Feb. 11, 1997), the Commissioner found that family strife had a detrimental affect on the student suggesting that the "parents, sadly, are incapable of meeting his emotional, social, and developmental needs." Having determined by prior decision that these unique and compelling circumstances constitute family hardship, the Commissioner clarified on remand that for the above reasons, J.B.'s parents were not presently capable of providing care for him due to such family hardship pursuant to *N.J.S.A.* 18A:38-1(b)(1). *Id.*

Where no hardship exists, the law requires that the resident shall be assessed tuition prorated to the time of the student's ineligible attendance in the school district. The statute, *N.J.S.A.* 18A:38-1(b)1, further reads in pertinent part:

> Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. *Carbo v. United States*, 314 *F.2d* 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor*, 38 *N.J. Super.* 6, 24 (App. Div. 1955). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 *L. Ed. 2d* 380 (1973).

CONCLUSIONS

In the instant matter, the Board maintained that no family hardship was shown. The undisputed facts indicate that the situation is to the contrary. The family hardship here is that the parents were unable to provide sufficiently for R.K. to the extent that he came to a foreign country to live with an uncle so that he would have enough to eat and a decent place to live. There is no evidence that R.K. moved for the sole purpose of attending school in the District. Indeed, R.K. moved there primarily because the uncle lived there, not to avoid attending school in another district in the State. Moreover, there is no other district in the State where this child is eligible to attend school under *N.J.S.A.* 18A:38-1. I **CONCLUDE** that the compelling circumstances in this case rise to a level of family and economic hardship that meets the standard of the statute. "To hold otherwise harms a party the Legislature never meant to penalize ... and overlooks the substantial state interest in ensuring the education of all its children ... ." *Gundersen v Bd of Educ of the City of Brigantine*, 95 *N.J.A.R. 2d* (EDU) 39, 42. In finding hardship in a child's reaction to marital conflict, the Commissioner quoted his previous decision with approval. "In interpreting a statute, the Commissioner must look to the fundamental purpose for which the legislation was enacted, and where a literal reading will not accord with that purpose, the spirit of the law will control over its letter. Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy."

The amendments to *N.J.S.A.* 18A:38-1

> ... were intended to ease the burden on local boards of education attempting to remove illegally enrolled students, specifically those living with a parent or guardian who claims to be, but is not, domiciled within the district, and those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile ... . The intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme ... .
>
> [*R.H. v Ocean Co Bd of Educ.*, 96 *N.J.A.R. 2d* (EDU) 628, *citing Gundersen, supra.*]

The undisputed evidence showed that petitioner has taken his nephew into his home indefinitely to provide him with the necessities of life that the minor student's parents were not able to provide him in Syria. Hence, there was no goal of the family to move from one school district in New Jersey to another, which was a major reason for the stringent amendments to the law. *See N.J.S.A.* 18A:38-1, Legislative Statement. There was no evidence that this arrangement was entered into fraudulently for the purposes of obtaining a free public education in the District.

Based on the above I **CONCLUDE** that petitioner has satisfied the requirements of *N.J.S.A.* 18A:38-1(b) in that petitioner is domiciled within the District, is supporting his nephew *gratis*, the parents are incapable of supporting him in their own country due to economic hardship, and that the minor child is not residing with petitioner solely for the purposes of receiving a free public education in the District. Therefore, I **CONCLUDE** that R.K. meets the requirements of an affidavit student pursuant to *N.J.S.A.* 18A:38-1(b) and is therefore entitled to a free public education in the District.

ORDER

For all of the foregoing reasons, it is hereby **ORDERED** that the determination of the Board of Education of the City of Clifton is and shall be **REVERSED**. The petitioner's request to allow R.K. to attend school in the respondent District is **GRANTED**. The respondent's counterclaim for tuition is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

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

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

7/2/03
DATE

ROBERT J. GIORDANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/2/03
DATE

M. Kathleen Duncan/CJ

Mailed to Parties:

JUL 10 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

WITNESSES

For Petitioner:

F.M.

R.K.

EXHIBITS

Joint:

J-I Application by Clifton Resident, September 4, 2001

J-2 Letter, Board to F.M., September 5, 2001

For Petitioner:

P-1 Transcript from Civil Status Record, March 6, 2003

For Respondent:

R-1 Affidavit of Karen Perkins, June 2, 2003

OAL DKT. NO. EDU 8109-01
AGENCY DKT. NO. 375-9/01

F.M., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, and based on the Administrative Law Judge's (ALJ) credibility assessments, *N.J.S.A.* 52:14B-10(c), the Commissioner concurs that petitioner has demonstrated that R.K. is entitled to attend school in the Board's district, free of charge, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/11/03

Date of Mailing: 8/14/03

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

474-03

#474-03

TOWNSHIP OF MARLBORO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND JAMES WASSER, SUPERINTENDENT,	:	
RESPONDENTS.	:	
R.W., on behalf of minor child, M.W.,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND MICHAEL MADDALUNA, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS,	:	
RESPONDENTS.	:	
AND	:	
J.D. AND J.D., on behalf of minor child, S.D.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	SYNOPSIS

In consolidated matter petitioning Board and parents alleged respondents' redistricting plan was an improper exercise of the Board's discretionary authority and was arbitrary, capricious and unreasonable.

The ALJ found that petitioners did not meet their burden of proving that the Board acted improperly in its consideration of and action approving the Student Attendance Plan for school years 2003-04 through 2006-07. The ALJ ordered the consolidated petitions dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

August 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 659-03

AGENCY REF. NO. 400-12/02

TOWNSHIP OF MARLBORO,

Petitioner,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND JAMES WASSER, SUPERINTENDENT,

Respondent.

OAL DKT. NO EDU 660-03

AGENCY REF. NO. 402-12/02

R.W., O/B/O M.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND MICHAEL MADDALUNA, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS,

Respondent.

OAL DKT. NO. EDU 2933-03
AGENCY REF. NO. 147-5/03

J.D. AND J.D., O/B/O S.D.,

Petitioners,

v.

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

Respondent.

Lance J. Kalik, Esq., for petitioner, Township of Marlboro (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Allan Weinberg, Esq., for petitioner, R.W.

J.D. and J.D., petitioners, *pro se*

Nathanya G. Simon, Esq., for respondents, Board of Education of the Freehold Regional High School District and James Wasser, Superintendent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Sarah G. Crowley, Deputy Attorney General, for respondent Michael Maddaluna (Peter G. Harvey, Attorney General of New Jersey)

Record Closed: July 1, 2003 Decided: July 3, 2003

BEFORE **ANTHONY T. BRUNO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners request the Commissioner of Education to nullify respondent's redistricting plan scheduled for implementation for the 2003-2004 school year through 2006-2007 school years. The petitions and answers were transmittal to the Office of Administrative Law on February 27 and May 29 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The cases were consolidated for all purposes by Order Consolidating

Cases entered June 9, 2003. On motion made on behalf of respondent Michael Maddaluna for summary decision, and with the consent of counsel for R.W., claims against respondent Michael Maddaluna were dismissed.

A telephone pre-hearing conference was conducted on April 25, at which time June 13, 20, 23, 24, 27, 30 and July 1, 2, and 3 were fixed as hearing dates. A subsequent in-person prehearing conference was held on June 6, at which time claims against Michael Maddaluna were dismissed. In addition, respondent, Township of Marlboro requested that R.W.'s matter be dismissed as moot because M.W. was scheduled to attend the specialized Business Administration program conducted at the Marlboro High School Learning Center. Respondent's motion was denied.

Because discovery was not completed the June 13 hearing was adjourned. Counsel for the Township of Marlboro issued subpoenas to Board of Education members, Bonnie Sue Rosenwald, Bunny Hummer and Patricia Horwath, requiring their attendance to testify on behalf of the Township of Marlboro. Counsel for respondent move to quash the subpoenas as an inquiry into the deliberative processes of the Board of Education. Counsel's motion to quash the subpoenas was granted.

The hearing commenced on June 20 and continued June 23 and 24. At the conclusion of petitioners' case on June 24, respondent requested the opportunity to furnish legal memorandum in support of a motion for involuntary dismissal. Memoranda were submitted by the parties and oral argument was received on July 1. At the conclusion of the argument, respondents' motion was granted.

Witnesses who testified and exhibits admitted into evidence are listed in the Appendix. The hearing record closed upon the issuance of the oral order of involuntary dismissal on July 1, 2003.

FACTUAL CONSIDERATIONS

For the purposes of considering a motion for involuntary dismissal all of the evidence submitted by the party opposing the motion, together with the legitimate inferences there from, must be accepted as true. Accordingly, for the purposes of this initial decision, the following is accepted as fact:

Councilman Barry Denkensohn testified that he was a member of the Township Council of the Township of Marlboro, serving in his second four-year term. Before joining the Council Denkensohn was a member of the Marlboro Township K-8 Board of Education.

In 2002 the Township Council adopted a Resolution "Re-Establishing the Advisory Committee on Education (ACE)" and appointed Denkensohn, Mayor Matthew Scannapieco, and 11 other concerned and knowledgeable residents as its members (Exhibit PM-1). Denkensohn stated Marlboro officials and residents became aware of the discussions among the Freehold Regional High School Board of Education ("Board") to redistrict the placement of pupils among the 6 high schools of the regional district.

A public forum was called in January 2002, with hundreds of parents converging at the Township Hall, to discuss the redistricting situation. ACE was a result of the public forum. One of the major areas of public outcry was the sentiment that Marlboro voters had been led in 1999 to believe that passage of the Board's December 14, 1999 Referendum and the ensuing enlargement of Marlboro High School would negate the redistricting of any Marlboro resident-student to another high school in the regional district. In particular, Denkensohn noted that the brochure published by the Board (Exhibit PM-2) explained that the project included for Marlboro High School, "add capacity by expanding the school with additional classrooms and labs to meet the growing student involvement." The referendum passed the 8-municipality vote by 26 votes; Marlboro voters approved the new construction by 391 votes. Before construction began on Marlboro High School, redistricting was again in the public discussion.

ACE met at least once a month during 2002. On May 20, 2002, ACE issued a Public Forum Report including 8 short-term recommendations and 4 long-term recommendations

(Exhibit PM-3). ACE found no immediate overcapacity in Marlboro High School. Should "attendance reassignment" occur, the reassignments should be voluntary among all of students of the regional district. The Learning Centers should be expanded throughout regional district, both in depth of curriculum and into full-time programs. Further demographic studies should be undertaken.

Denkensohn presented the confidential 1998 Redistricting Study for the Freehold Regional High School District (Exhibit PM-4). The confidential Redistricting Study was not adopted by the Board. But it discussed 5 separate redistricting options. By way of comparison, the Final Recommendation on Student Attendance Plan for school years 2003-04 through 2006-07 (Exhibit PM-5) ("Plan") contained only 1 option – mandatory redistricting. At the meeting of the Board on September 9, 2002 the demographer spoke only of population statistics based on enrollment data. The likelihood of the student entering a non-public high school was not explored. Denkensohn spoke with Carol Fox and Bonnie Rosenwald, the 2 Marlboro-resident members on the Board's Student Attendance Advisory Committee. Fox told Denkensohn that she was "disturbed" with the process used by the Committee, that the Committee did not respect Fox's ideas, disregarded those ideas, and members told Fox to rely on faith. Fox's cover letter to the Student Attendance Committee (though not admitted into evidence because of the lack of identify of person handwriting marginal notes and corrections, is transmitted for a completed record) is Exhibit PM-6.

Denkensohn received numerous phone calls from Marlboro residents objecting to the Plan. The primary complaint was the omission of voluntarily redistricting from the Board's considerations. A petition was circulated throughout Marlboro (Exhibit PM-7) citing opposition to involuntary redistricting while Marlboro High School while current capacity existed in the high school, support of changing the regional high school tax assessment formula, and support of a re-examination of the Board Vote Appointment in accordance with Census 2000 results. Two thousand five hundred signatures are affixed to the petitions.

Lastly, Denkensohn discussed the adverse impact the redistricting will have on the Marlboro community. Because Marlboro has no downtown business district the high school is the focal point of Marlboro. The Plan divides the community.

On redirect, Denkensohn pointed to an approved senior citizen housing development and a master plan designed to slow growth to question the accuracy of the suggested school population figures.

Jerome Liebers and Susan Shakked are 2 Marlboro residents who live on streets affected by the Plan. (Exhibit PM-5, addendum #17). Liebers's older children graduated from Marlboro High School. His youngest son is most upset because he cannot follow in the footsteps of his siblings. Liebers believes the Board did not consider the Plan's impact or in-coming students. Shakked's daughter cannot understand the Board's decision to affect only a small number of children. Only a "handful" of the graduating class of 727 from the Middle School are going to Colts Neck High School. Shakked's daughter is a member of a 14-girl dance team; all but 2 of the girls are going to Marlboro High School. In order to keep his family in Marlboro schools, Shakked's husband commutes to Brewster, New York for work. The Shakked family had been active in all of the activities at Marlboro High School, especially during their older daughter's years in the school. Shakked's daughter has been "miserable" realizing her friends are going to Marlboro High and she has to go to Colts Neck. Colts Neck does not abut the area affected by the Plan. At the time the Plan was considered, it was thought that 114 students would be moved; but, considering the children going to the Learning Center and private/parochial schools, Shakked believes the number of students going to Colts Neck High School will be 40.

Lauren and Scott Preiss described the portion of Marlboro being assigned to Colts Neck High School as a "sliver." They left Brooklyn after careful study to locate a beautiful place to live and an exceptional school system. Their daughter who just graduated from the Middle School is "very, very upset." They believe the Board was arbitrary in its decision; all options were not explored, Ryan Road is not the area of Marlboro nearest to Colts Neck High School, and it is unfair to send students into another school where all of the other students already know each other. Scott Preiss rejected a job transfer to Chicago in order to keep his family in Marlboro's schools. Lauren Preiss thought the Board was not listening to the comments of parents and children made at Board meetings. Preiss indicated the areas of Marlboro affected by the planned redistricting of high school freshman to Colts Neck High School on an enlarged map of northern Monmouth County (Exhibit PM-8). Scott Preiss thought the addition to Marlboro

High School approved in the referendum provided sufficient space to avoid any involuntary redistricting. The recommendations of ACE were not even mentioned in the Board's final plan. The Board would have better served the student had it provided for more students to attend Colts Neck High School. Had the graduating class of one of Marlboro's middle schools been sent to Colts Neck the result would have been more "palatable."

Mayor Matthew Scannapieco testified as a 24-year resident and 12 year Mayor of Marlboro. Marlboro High School is the focal point of the Township. Both the Township and the independent soccer program changed their official colors to the blue and gold of the high school. Scannapieco recalled that redistricting of Marlboro was first raised approximately 5 years ago. In 1998 a decision to not involuntarily redistrict was made. Redistricting discussions with the Board continued in 1999 when the Board's representatives explained proposed expansions of its high schools. Scannapieco had a "sense" that the expansions were to provide additional cafeteria space.

The Marlboro governing body supported the referendum. Allowing for a student population of 2400 was to provide enough space to avoid redistricting. In June 2001 the redistricting issue was raised by the Board. During the 2001 discussions, residents raised their concerns with the Mayor and Council. ACE was formed to meet with the residents and attend meetings of the Board. In January 2002 the Board's Student Attendance Advisory Committee reported to the Board its recommendations for student attendance at the regional district's high schools. After Marlboro received the report ACE members met with Superintendent Wasser and Board President Horvath, and continued meeting on a regular basis.

On June 10, 2002, Wasser presented a draft proposal Student Attendance Plan for school years 2003-04 through 2006-07 (Exhibit PM-10) with an accompanying message (Exhibit PM-9). The draft proposal noted that the recommendations were first made in January 2002 for implementation by September 2002, but implementation was delayed for a year upon Wasser's recommendation. Scannapieco continued to meet with Wasser and Horwath delaying the Board's final action until September 2002.

Scannapieco described ACE, its subcommittees for demographics, statistics and community involvement, and the May 2002 report to the Board (Exhibit PM-3). The "short term" recommendations of ACE were: 1) redistricting should not begin in 2003 because no immediate overcapacity was shown, the number relied upon by the Board were inaccurate and did not account for students going to non-public schools; 2) voluntary redistricting through expansion of the Learning Centers should have been considered, 1/3 of the population of the regional district's Learning Centers are Marlboro students; 3) Learning Centers programs should be lengthened into full-day programs to save on classrooms use; 4) a "sibling rule" should be applied to keep siblings in the same high school; 5) a full-time Grants Acquisition Consultant should be hired to seek funding for the regional district; 6.) Centralized Registration is questioned as to its cost effectiveness, impact upon real estate values, and legality; 7) meetings with the governing bodies of the member municipalities at least semi-annually; and 8) cost apportionment among the member municipalities should be reexamined.

Scannapieco and Denkensohn as Co-Chairpersons of ACE addressed a memorandum to the Board members (Exhibit PM-11) as a cover letter to the ACE report (Exhibit PM-3). They requested further study and evaluation of alternative proposals before putting the Plan into effect. The "far reaching tentacles" of the Board's measures are the destruction of Marlboro's sense of community and pride in identification with Marlboro High School.

The actual enrollment figures used at Addendum #15 of the Board's Final Student Attendance Plan (Exhibit PM-5) was disputed by Scannapieco. Because the effect of the sibling rule, Learning Centers, and enrollments in non-public schools, Scannepieco believed the figure for 2003-04 school year should be 50 or 60, rather than 114.

Scannepieco believed that members of the Board had "ulterior motives" for voting in favor of the Plan. The Board members from Marlboro and Colts Neck voted against the Plan. Two other members who had indicated their disfavor with the Plan changed their minds after a September 6 visit to Marlboro High School. They then had concerns about "safety" and "overcrowding" of the cafeteria. The Board members spoke publicly of "parity" but comments were made that it was now "Marlboro's turn." If Marlboro was not redistricted other communities wanted all of their resident-students returned to their high schools.

Scannepieco also noted that Dr. Harber in his June 3, 2002 letter to the Board (Exhibit PM-5, attachment #3) made no reference to overcrowding at Marlboro until 2006.

Petitioners next sought to have Dr. Carol R. Conger testify as an expert on the educational impact of changes of placement of students. I did not accept Dr. Conger as an expert on that topic. Counsel made a proffer into the record that had Conger been permitted to give an opinion that should the 86 students who are now slated to attend Colts Neck High School go to Marlboro High School there would be no impact upon Marlboro High School. Having visited both high school and spoken with the administration of each Conger would testify that sending the Marlboro students to Colts Neck would not improve or change to educational opportunities at either school. Conger did not observe an overcrowding at Marlboro High School. She believed there was a more sensible way to change the dynamic of the high school, and overcrowding was not a reasonable approach to the current situation. Conger would also question the lack of an in-depth analysis of enrollment projections. Conger's CV was admitted as Exhibit PM-12.

Ilisa Diamond, Dawn Censoplano, Sandor Epstein, Beth Goldberg Meyer, Jed Steinberg, and Janet Doro, all residents of the area of Marlboro affected by the Plan, and all parents of children whose plans to attend Marlboro High Schools were dashed by the Plan, testified to their child's disappointment. Diamond's daughter is an accomplished gymnast who expected to compete on Marlboro's outstanding gymnastic team. Colts Neck does not have a gymnastic team. Censoplano described her daughter's efforts to renew her social life after the illness and death of her father. The realization that all of her friends were going to Marlboro High School and she would not, gave her daughter an anxiety attack. Epstein's child grew up with siblings who participated in sports at Marlboro, graduated and moved on to attend quality colleges. Although Epstein's child will attend the Learning Center at Marlboro he thought the redistricting a small part of the town was segregation. Meyer described her son's reaction to being forced to attend Colts Neck as "extremely frantic." He was a Junior Mustang wrestler who fully expected to be a Marlboro Mustang wrestler. Now he feels "isolated" and punished.

Steinberg's older daughter just graduated from Marlboro High School where she played soccer, was president or vice-president of several clubs, and participated in fund raising, sporting,

and social events. His younger daughter looked forwarded to following her sister. She was a Marlboro Pop Warner cheerleader who looked forward to competing to become a Marlboro High School cheerleader. She does not know when cheerleader trials were or will be held at Colts Neck. Steinberg said his daughter will not discuss redistricting because she is no upset; "devastated" into quietude with the expectation of having to go to Colts Neck.

Dono is a petitioner in the matter of *J.D. and J.D., o/b/o S.D. v. Board of Education of the Freehold Regional High School District.* Dono is a Registered Nurse, certified to work as a Psychiatric Mental Health Nurse. Because she did not include herself as an expert witness in her response to discover she was precluded from offering an expert opinion. Nevertheless, Dono testified to her observations of her son who had attended Colts Neck High School for a special program during his junior high school years. When her son realized he had to return to Colts Neck his grades deteriorated to a point where graduation became marginal. He resents the fact that he cannot follow his sister at Marlboro; his sister graduated in June. He cannot comprehend why 2 of his neighbors on the block can go to Marlboro under the sibling rule but he cannot.

ANALYSIS AND CONCLUSION

In any case, upon the completion of the case by the party bearing the burden of proof, the opposing party "may move for dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief . . . . [s]uch motion shall be denied if the evidence, together with legitimate inferences there from, could sustain a judgment in [favor of the party with the burden of proof]." R.4:37-2(b). The judicial function on a motion for an involuntary dismissal "is quite a mechanical one." *Dolson v. Anastasia,* 55 *N.J.*2, 5-6 (1969). "The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. *Ibid.* The aforementioned Rule applies in this matter by operation of *N.J.A.C.* 1:1-1.3(a).

Petitioners' burden in this matter is the demonstration that the Board acted arbitrarily, capriciously and unreasonably in its consideration of and action approving the Student Attendance Plan for school years 2003-04 through 2006-07 (Exhibit PM-5). I Find as a matter of

Fact and I **CONCLUDE** as a matter of Law that petitioner have not met that burden in the hearing record.

Petitioners respond to respondents' motion for dismissal with argument that they have shown the Board did not consider alternative options to its course of conduct, relied upon faulty statistical information refusing to conduct a full demographic study, did not need to redistrict Marlboro students for 2003-04 school year, and failed to consider the dramatic impact of redistricting upon the affected students. The hearing record contains the March 2, 1998 "Confidential" Redistricting Study for the Freehold Regional High School District (Exhibit PM-4). The Report analyzed 5 redistricting options including the voluntary redistricting suggest by petitioners. The Report recognized that in 1998 voluntary redistricting would continue the *status quo* except for Colts Neck students and allows delay of reassignment until necessary new school construction is completed. I cannot infer that the Board did have access to this Report as it deliberated in 2002. As I mentioned during my oral opinion, the recitation of the 5 options in the September 9, 2002 Plan would have been tantamount to erecting "straw men" for destruction.

The hearing record does not contain the statistical data within the control of Marlboro Township, such as building permits, numbers of approved residential and non-residential housing, and voters records, to justify the Mayor's comment of "gross errors" in the housing reports relied upon by the Board. Likewise no credible evidence was presented upon which one could infer the number of students from Marlboro who will attend Marlboro High School and Colts Neck High School in September. Reviewing the enrollment projections contained in Appendix C of the 1998 Redistricting Study (Exhibit PM-4) with the figures in 2002 Plan (Exhibit PM-5) one sees that demographics is not an exact science; it is a tool for planning.

Discussing "need" for redistricting based upon a school physical capacity is an encroachment into the discretion of a board of education. I cannot infer that by not maximizing school population to the limit a board acted arbitrarily, unreasonably or capriciously. To the contrary one may more properly hold that filling the school to its maximum capacity is arbitrary, unreasonable and capricious.

Lastly, "dramatic impact" upon the redistricting student is alleged as a circumstance disregarded by the Board. No one seriously disagrees with the testimony of each parent at the hearing. Certainly each Marlboro child bused to Colts Neck has and will continue to have fears, anxieties and apprehensions over the new environment and classmates. I commented in my oral opinion that the Freehold Regional High School District administration has a lot of work in the next few months to unite all of the students at Colts Neck High School (and the other affected high schools) into community. I cannot infer that the Board ignored the problems of the adolescent nor that Superintendent Wasser will sidestep those problems. Might the expert testimony of Dr. Conger have established proffered premise that the change in the placement of a student adversely affects the education of that student? Without test results on that hypothesis the reliability of the premise is too questionable to be material. The expert's test to be accepted must be replicated, an error rate established, and the methods published in peer-reviewed journals.

"Arbitrary," "unreasonable," and capricious" are almost interchangeable terms, defined in *Black's Law Dictionary* as applying to actions which are determined to be "without fair, and substantial cause; that is without cause based on law," "irrational, foolish, unwise, absurd, senseless," and "willful, deliberate disregard of apparently trustworthy data." I may disagree with the Board's conclusion, but I cannot conclude its conclusion was erroneous.

Petitioners' counsel requested reconsideration of my Order quashing the subpoenas issued to Board members Bonnie Sue Rosewald, Bunny Hummer and Patricia Horwath. I deny the requested reconsideration. My reasons for quashing the subpoenas were respondents' imposition of the deliberative process privilege and the public access to all meetings of boards of education under the Open Public Meetings Act (*N.J.S.A.* 10:4-6 to –21).

Notwithstanding the admonition of U.S. Circuit Court of Appeals Judge J.L. Edmundson at the outset of the Elion Gonzalez hearing, "It is entirely possible that a judge may make a statement or ask a question that is the exact opposite of what he or she is thinking, because he or she may want to see how the lawyers respond," comment exchanged by members of a public body before the finalization of the resolution may be viewed as statements or questions of

absolute fact. To later question those statement is unfair to the speaker. Board members must have the ability to fully and frankly discuss all matters on the Board agenda.

Secondly, with minutes of all public meetings a requirement under the Open Public Meetings Act and the availability of those minutes to eventually public scrutiny, counsel could have obtained the official record of Board deliberations.

I emphasize that my discussion is based entirely upon the hearing record and with any input from the respondents except for petitioners' exhibits.

ORDER

Accordingly, for all of the foregoing reasons, I **ORDER** that respondents' motion for involuntary dismissal of the three consolidated matters herein by **GRANTED.** I further **ORDER** that the petitions of Township of Marlboro, R.W., o/b/o M.W., and J.D. and J.D., o/b/o S.D., are **DISMISSED.**

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

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

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

7/3/03 — Anthony T. Bruno by Miller, ALJ

DATE — **ANTHONY T. BRUNO**, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/3/2003

DATE

Mailed to Parties:

JUL 8 2003

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

tmp

APPENDIX

WITNESSES

For Petitioners:

Barry D. Denkensohn

Jerome M. Liebers

Susan Shakked

Lauren Preiss

Scott J. Preiss

Matthew Scannapieco

Carol R. Conger

Ilisa Diamond

Donna Censoplano

Sandor Epstein

Beth Goldberg Meyer

Jed Steinberg

Janet Steinberg

Janet Dono

EXHIBITS

For petitioners:

PM-1 Resolution (No. 2002-81) Reestablishing the Advisory Committee on Education (ACE) and Appointing Its Members

PM-2 Mailing/brochure of Freehold Regional High School District (3/2/98)

PM-3 Action Committee on Education Public Forum Report (5/20/02)

PM-4 Confidential Redistricting Study, Freehold Regional High School District (3/2/98)

PM-5 Final Recommendation on Student Attendance Plan for School Years 2003-2004 through 2006-2007 (9/9/02)

PM-6 Letter from Carol Fox to Superintendent Wasser (4/19/02) (attached dissenting opinion not admitted because of failure of identification of author of harnd-written notes)

PM-7 Signed petitions collected by ACE

PM-8 Street map of northern Monmouth County (returned to counsel for Township of Marlboro)

PM-9 Message from the Superintendent (6/10/02)

PM-10 Draft-Proposed Student Attendance Plan for school years 2003-2003 through 2006-2007 (5/13/02)

PM-11 Memornadum from co-chairpersons of ACE to Board (5/24/02)

PM-12 Curriculum Vitae of Carol R. Conger, Ed.D.

PM-13 Letter from Superintendent Wasser to Ilisa Diamond (5/6/02)

PW-1 Affidavit of Dr. Suzanne Koegler (5/12/03)

Respondents exhibits admitted into evidence but not considered for the purpose of this Initial Decision:

R-1 Letter from Donna L. Censoplano to Dr. Patricia Emmerman (1/14/03)

R-2 Letter from Patricia Emmerman, Ed.D. to Donna Censoplano (1/15/03)

TOWNSHIP OF MARLBORO, PETITIONER, V. BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND JAMES WASSER, SUPERINTENDENT, RESPONDENTS. R.W., on behalf of minor child, M.W., PETITIONER, V. BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AND MICHAEL MADDALUNA, MONMOUTH COUNTY SUPERINTENDENT OF SCHOOLS, RESPONDENTS AND J.D. AND J.D., on behalf of minor child, S.D., PETITIONERS, V. BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, RESPONDENT.	COMMISSIONER OF EDUCATION DECISION

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that petitioners have failed to sustain their burden of establishing that the Board's consideration and approval of the Student Attendance Plan for school years 2003-04 through 2006-07 were arbitrary, capricious or unreasonable and, therefore, the Board's actions in this regard must be upheld.

Accordingly, the Initial Decision of the OAL is adopted and the within consolidated Petitions of Appeal are hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

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

475-03

#475-03SEC

IN THE MATTER OF JULIA HANKERSON, :

WOODBINE BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

CAPE MAY COUNTY. : DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member committed numerous violations of the School Ethics Act, *i.e.*, *N.J.S.A.* 18A:12-24.1(c), (d), (e), (g) and (h), many of which occurred even after her Board member training. The Commission found her behavior so egregious that it recommended respondent be removed from her position on the Board.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent removed from the Board as of the date of this decision.

August 14, 2003

IN THE MATTER	:	**BEFORE THE** 03 JUL -2 A 8:55
	:	**SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C36-02**
JULIA HANKERSON,	:	
WOODBINE BOARD OF EDUCATION	:	**DECISION ON VIOLATION**
CAPE MAY COUNTY	:	
	:	

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The above-captioned matter arises from a complaint that was filed on September 10, 2002 by former Woodbine Superintendent Bruce Kinter. Therein, he alleged that that Woodbine Board of Education member, Julia Hankerson, violated the Code of Ethics for School Board Members in the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. by: 1) initiating actions contrary to the report of the Fiscal and Education Intervention Team (FEIT); 2) directing employees without consulting the superintendent, but with the consultation of the Mayor of Woodbine; 3) proposing the termination of two employees without consulting the superintendent; 4) hiring new employees without the recommendation of the superintendent; 5) calling meetings regarding the budget for 2002-2003 without knowledge of the superintendent; 6) sending *Rice* notices to employees without recommendation by the superintendent; 7) restructuring staff without the consultation of the superintendent; 8) removing the superintendent from the agenda of the first day of school teacher in-service and directing him to conduct interviews; 9) advising the President of the WEA and an administrator that the contract of the superintendent would not be renewed in violation of N.J.S.A. 18A:12-24.1(g); 10) creating a position of behavior specialist without consulting the superintendent in violation of N.J.S.A. 18A:12-24.1(g); 11) ignoring the recommendation of the superintendent and recommending her own candidate to the Board to be business administrator/board secretary in violation of N.J.S.A. 18A:12-24.1(d) and (h); 12) rejecting the recommendation of the superintendent and the interview committee and recommending that the board hire a technology person in violation of N.J.S.A. 18A:12-24.1(h); 13) recommending the discharge of an employee because she was not a resident of Woodbine in violation of N.J.S.A. 18A:12-24.1(i); attending a class without signing in and interrupting the teacher which resulted in a teacher grievance in violation of N.J.S.A. 18A:12-24.1(j); and 14) directing staff members to drop everything and do as Ms. Hankerson directed.

Dr. Kinter presented evidence of other violations of N.J.S.A. 18A:12-24.1 during the hearing of this matter, including the firing of math in-service consultants, the proposed firing of a custodian and the purchase of computers, but the Commission dismissed these allegations as they were not part of his complaint.

Ms. Hankerson denied every allegation in her answer of November 4, 2002. She set forth in her answer that she discussed each matter with Complainant prior to her taking

action and that Dr. Kinter was aware of almost every action before it was taken, and if he was unaware, it was because he was not available to be informed.

The parties were invited to appear and present testimony at the Commission's meeting of December 17, 2002. Both parties appeared and both were represented by counsel. Each presented testimony and witnesses to aid in the Commission's investigation.

At its meeting of December 17, 2002, the School Ethics Commission tabled the matter. At its meeting of January 28, 2003, the Commission found probable cause to credit the allegations in the complaint that Ms. Hankerson violated the Code of Ethics of the School Ethics Act. Respondent's attorney requested that the Commission clarify the issues upon which it found probable cause because the complaint was so voluminous. On February 25, 2003, the Commission determined that probable cause was found on each allegation of the complaint. Further, because Ms. Hankerson denied each allegation, the Commission determined that the material facts were in dispute. Therefore, in light of the requirement that Code of Ethics cases be heard within 90 days, the Commission decided to hold a full hearing at a public meeting to determine whether Ms. Hankerson violated the Act.

After numerous proposed dates were recommended and rejected by the parties, their attorneys or members of the Commission, the Commission scheduled a full hearing for June 3, 2003 and so advised the parties in a letter dated March 31, 2003. By letter of May 12, 2003, Ms. Hankerson's attorney advised that Ms. Hankerson requested that he withdraw his appearance on her behalf because she did not want to incur any additional expense to the District. On May 27, 2003, the Commission received a letter from Ms. Hankerson requesting an adjournment due to a conflict that she had with the date of June 3, 2003. When Commission staff called to inform her that the adjournment could not be granted, she informed the Commission that she needed additional time to prepare her case because she was now representing herself. The Commission denied Ms. Hankerson's request. The Commission believed that it would be patently unfair to the complainant to adjourn the matter so close to the hearing date when he had prepared for the June 3, 2003 date that all parties were informed of since the Commission's letter of March 31, 2003.

On June 3, 2003, Dr. Kinter appeared with his attorney, Robert Schwartz, Esq. and his witnesses, Ronald Sahli, Esq., Sharon Popper, Lynda Blank and Stephen Hensil. Ms. Hankerson appeared with Board member Gregory Palm as a witness, but he did not testify. Ms. Hankerson began by stating that she was representing herself because she could not ask the Woodbine School District to continue to pay for her representation. Although the Commission found probable cause to credit each of the allegations in the complaint, at the hearing of June 3, 2003, the complainant did not present evidence on each allegation.

The Commission voted at its public meeting of June 3, 2003 to find that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g) and (h), set forth in the Code of Ethics of the School Ethics Act and recommended that the Commissioner of Education

impose a penalty of removal from her position as a Board member for these violations. The Commission adopted this decision with amendments at its meeting of June 24, 2003.

FINDINGS OF FACT

Based on the pleadings, the documents submitted and the testimony presented, the Commission finds the following facts to be undisputed. Julia Hankerson was elected to the Woodbine Borough Board of Education (Board) in April 2002. Due to dissatisfaction with the budget, only three incumbent board members remained after the election. Ms. Hankerson became part of a new board majority and was elected Board President at the 2002 reorganization meeting. She attended new board member training class in June 2002. Complainant Dr. Bruce Kinter has been the Superintendent since March 2000. Prior to that time, he was Assistant Superintendent. At the time of the hearing of this matter, Dr. Kinter was still being paid pursuant to his contract but he was not working in the District.

The remaining facts were determined by Commission after having heard the testimony of the witnesses and reviewed the documents submitted. They are presented in a loose chronological order.

I. Meetings after Budget Defeat

On May 7, 2002, the Fiscal Educational Improvement Team (FEIT) issued its report on the Woodbine School District. The FEIT report listed numerous deficiencies in the District and directed at page 43, among other things, that the superintendent should be more involved in the budget process. (C-1 in evidence) The Administration put together a budget for 2002-2003 that included a $.19 tax increase. The tax increase became an issue in the Board elections, as set forth above, many incumbents were defeated in the April 2002 elections. The Board and the municipality had to discuss the tax increase. Dr. Kinter alleges that Ms. Hankerson held meetings on this subject without inviting him. He became informed when specific people told him that such meetings were taking place. He discussed this matter with Ms. Hankerson in late spring and early summer, but with no results. He alleges that he was not involved until the budget was completed. As superintendent, he is required to sign the Statement of Assurances that the budget meets the educational needs of the District, but he called the county business administrator and asked what he should do because the budget was not the one he proposed. He eventually signed it on June 20, 2002 noting, "Signed with serious reservations (ex. FEIT, special education, surplus)" (C-2 in evidence). The revised budget called for only a $.04 increase. Dr. Kinter was opposed to specific cuts in the budget and he was told, not consulted, about the cuts that were made.

Dr. Kinter admitted that he had no direct knowledge of who arranged the budget meetings or whether Ms. Hankerson attended them.

Ms. Hankerson testified that she attended one budget meeting that she thought was scheduled and arranged by Dr. Kinter. She denied making any unilateral decisions. She

said that the Board discussed the issues and made decisions. She said that she is not the Board. She denied any knowledge of how the Board reached a $.04 tax increase from the $.19 increase recommended by the superintendent.

II. Hiring of Business Administrator

Regarding the hiring of a business administrator, the District's business administrator resigned in February 2002 in the middle of the FEIT inquiry. Dr. Kinter, after conducting interviews, recommended that the Board appoint applicant J.S. Dr. Kinter sent J.S. a letter on April 30, 2002 congratulating him and stating that he will begin working on May 6, 2002 upon approval of the Board. At the May 2, 2002 Board meeting, at which the recommendation was to be discussed, Ms. Hankerson commented that the Board was going to hire people from the community and sent Dr. Kinter back to review resumes. She said that the hiring should reflect the racial makeup of the school. Applicant Judson Moore was hired by the Board and given a contract, into which the superintendent had no input. Mr. Moore is the former mayor of a town not far from Woodbine.

Board Attorney Ronald Sahli testified that he drafted a contract for Mr. Moore working with him and Dr. Kinter, the term of which was from May 20, 2002 to June 30, 2003. (Exhibit C-26). However, the contract that was placed before the Board was for three years, which would automatically give Mr. Moore tenure. The contract was also changed to give Mr. Moore three substantial pay increases of 10% each year of the contract and vacation days that could be accumulated to allow him to be out long stretches of time. Mr. Sahli testified that this would cause hardship to the District. Mr. Sahli testified that he wrote Ms. Hankerson on June 17, 2002 pointing out the problems with the revised contract and noting that the contract as prepared could not be terminated during the three-year period unless mutually agreed to by the business administrator and the Board. He never received a reply from Ms. Hankerson. The revised contract was approved by the Board. Mr. Sahli's contract was terminated at the Board's last meeting in June 2002. At the direction of Ms. Hankerson, Mr. Moore asked Mr. Sahli not to attend the June meetings.

Ms. Hankerson testified that she did not put together the contract for Mr. Moore that was ultimately approved by the Board.

III. Giving Orders to District Employees and Observing Teachers without Signing-in

L.B. testified that she was employed by the Board as confidential secretary to the School Business Administrator before Mr. Moore. She testified that Ms. Hankerson began coming to the Business Office and asking her to perform certain tasks. She said that in April 2002, she came in the office and told her to drop what she was doing and make copies of a document that she had and fax it to someone. She testified that Ms. Hankerson was frequently in the office, hallway, and cafeteria talking to students and teachers and she never signed the sign-in sheet required of anyone entering the building.

Ms. Hankerson testified that she never directly gave a staff person an order to do anything. She recommends that staff go to the administration if there is a problem.

IV. Removal of Two Employees by Reduction in Force

On the evening of June 11, 2002, Dr. Kinter was advised that the School Board President scheduled a School Board Meeting for June 13, 2002, without his knowledge and instructed the Business Administrator to give a *Rice*[1] notice to non-classroom personnel that their possible termination by reduction in force would be discussed. Dr. Kinter testified that N.J. and L.B. were recommended for a reduction in force at the meeting. He testified that he had no input into their termination and in fact, was vehemently against it because it violated the recommendations in the FEIT report. Dr. Kinter wrote a memorandum to Assistant Commissioner Albert Monillas to this effect dated June 12, 2002 (Exhibit C-19), but he did not receive a response. The Board Solicitor did not attend this meeting. The employees were terminated by the Board.

V. Hiring of Technology Specialist

In July 2002, Dr. Kinter interviewed applicants for a part-time technology position. There were ten applicants, eight of whom were scheduled for interviews. The interviews were held on July 11, 2002 before a committee consisting of Dr. Kinter, Business Administrator Mr. Moore and Supervisor of Student Services, Stephen Hensil. The interviews resulted in a ranking of the six that were actually interviewed. After two rounds, the recommendation from the committee was for applicant D.S. to receive the position. Applicant A.T. was ranked third of three in the second round by Dr. Kinter and Mr. Hensil and second by Mr. Moore. (Exhibit C-4) Despite the superintendent's recommendation based upon the committee interviews, the Board agenda had applicant A.T. as the recommended person for the job, at its July 11, 2002 meeting. (Exhibit C-5) At its August 2002 meeting, Ms. Hankerson suggested that A.T. become a full-time employee without any recommendation from the superintendent.

Ms. Hankerson testified that the Board hired A.T. She said she voted for him because she wanted the best person for the job.

VI. Hiring of Behavior Specialist

Referring back to the FEIT report, Dr. Kinter noted that the report recommended that the District maintain the position of Supervisor of Students for Discipline. (Exhibit C-1, page 34) However, against his recommendation, the Board eliminated the position. The employee holding the title was laid off pursuant to a reduction in force and the position of Behavior Specialist was created. Dr. Kinter was directed to make a job description for the new position, which he did. (Exhibit C-7) He submitted it to the county office for approval. However, the Board adopted a different job description with different

[1] "Rice" refers to the case, *Rice v. Union County Regional High School Bd. of Ed.*, 155 *N.J. Super.* 64 (App. Div. 1977), *certif. den.* 76 *N.J.* 238 (1978), which held that when a board intends to discuss the termination of an employee in closed session, it must provide the employee with reasonable notice of its intention to do so in order to allow her to exercise her statutory right to request a public hearing.

qualifications. Instead of a teaching certificate, the new job description requested a certificate of school social work or school psychologist certificate. (Exhibit C-8)

Ms. Hankerson admits that she called the county office to determine the qualifications for a school psychologist, but denies that her inquiry had to do with the Behavior Specialist. She testified that the District never hired a school psychologist, but she just wanted to know. Ms. Hankerson denied that she put together a job description. The new job description was adopted by the Board and submitted to the county office.

At the August 8, 2002 meeting of the Board, the Board hired A.W. as Behavior Specialist. (Exhibit C-10) The item is listed under personnel, but does not indicate a recommendation by the superintendent. However, Dr. Kinter admitted to being present when Ms. Hankerson interviewed A.W. A.W. was the organist in the church to which Ms. Hankerson attended. He had no teaching certificate and no school psychologist certificate. On April 24, 2002, A.W. had been issued a summons in Middle Township for lewdness. He pleaded guilty to N.J.S.A. 2C:14-4A on July 16, 2002 and was sentenced to a $500.00 fine and one-year probation. (Exhibit C-12) On September 16, 2002, Dr. Kinter met with A.W. and advised him that he had to be suspended with pay. (Exhibit C-11)

Ms. Hankerson testified that the vote to hire A.W. was unanimous because he was bilingual. She testified that she only knew "of him" and that she had just started attending the church in which he played.

VII. Hiring of Teachers

At the beginning of the 2002-2003 school year, there were still vacancies for teachers in the District. Ms. Hankerson called an emergency meeting of the Board, which was held on September 2, 2002 for the purpose of discussing these vacancies. The minutes of the meeting set forth that five teachers without tenure were not notified that they were returning for the 2002-2003 school year and as a result, two of the five were not returning. The minutes go on to note that a physical education teacher also resigned and no arrangements had been made for the start of school on Tuesday, September 3, 2002. The minutes further note:

> Ms. Hankerson discussed the hiring of one teacher with Ms. Rinck, a current teacher for special education at WSD. Ms. Hankerson called this person by telephone and learned that she was bilingual. Ms. Hankerson offered Ms. Pownall, this position at step 2 as a 3rd grade teacher. (Exhibit C-13).

Dr. Kinter testified that he never spoke to Ms. Pownall or heard of her. He said he had no involvement in hiring her or setting her salary. He was planning to interview people the day after the meeting.

The minutes go on to discuss the opening for a school nurse saying:

> Ms. Hankerson discussed the nurse opening. Ms. Hankerson said that the school district has been out of compliance and that the district is illegal with just having an LPN according to the Department of Health. Ms. Hankerson said she new [sic] a nurse from a prior experience to recommend for this position. Ms. Hankerson said we cannot be illegal when hiring a nurse and informed the superintendent and business administrator to adjust salaries of the nursing position for the proper hiring of this person. (Exhibit C-13)

Dr. Kinter testified that he never interviewed this person and had no involvement in the setting of her salary. He met her when she came in and was filling out paperwork with the secretary of the office and was introduced to her as the "new nurse."

After the initial hearing before the Commission, Ms. Hankerson's attorney advised by letter of January 3, 2003 that the minutes of September 2, 2002 had been revised. He set forth, "Dr. Kinter knew or should have known that these minutes had been subsequently revised," although he gave no date that they were revised. (Exhibit J-1) The attorney attached the revised minutes which now set forth, "Ms. Hankerson interviewed candidates with Dr. Kinter." and "Ms. Hankerson discussed this with Dr. Kinter who thought this was a good recommendation." (Exhibit C-22) However, the revised minutes were not placed on the agenda for approval until January 9, 2003. (Exhibit C-24) At the January 9, 2002 Board meeting, the motion to approve the revised minutes was tabled. Other revised minutes for October 21, 2002, November 4, 2002 and November 21, 2002 were approved at the meeting. The revised minutes sent to the Commission were never approved by the Board.

Ms. Hankerson testified that she never hired anyone; the Board did. She said she talked to Dr. Kinter about Ms. Pownall, but when it was time to hire her because classrooms were not all covered at the start of the year, she could not reach Dr. Kinter. She testified that the ethics regulations say that if the administration is not performing its duty, then the Board can perform the duty. She said she had to make arrangements for an emergency meeting. Dr. Kinter was present at that meeting and endorsed the hires. She denied any knowledge about the revisions to the September 2, 2002 minutes submitted by her attorney. She testified that she does not know who asked that they be revised, who put them on the agenda to be approved or why they were tabled.

VIII. Teacher Orientation September 3, 2002

The first day of school for teachers was scheduled for September 3, 2002. The first day for students was to be September 4, 2002. Dr. Kinter prepared an agenda for the teachers' orientation on their first day of school. He was scheduled to give opening remarks, along with Ms. Hankerson, and then give a presentation on the faculty handbook and provide general information. (Exhibit C-15) However, Custodian of Records Mr. Cheesman's secretary gave Dr. Kinter an alternate orientation agenda in which Ms. Hankerson was scheduled to give opening remarks alone and Dr. Kinter was removed from the agenda altogether. (Exhibit C-16) Mr. Cheesman told him that Ms. Hankerson

put the new agenda together. Dr. Kinter said he was told by Ms. Hankerson that he was to conduct interviews during the orientation. He attended the orientation, but only to explain that Mr. Hensil would be taking over.

IX. Removal of Superintendent

Dr. Kinter testified that in June 2002 he began to hear rumors that Ms. Hankerson wanted a new superintendent. Dr. Kinter heard it from Mr. Hensil, who said that the Board was going to act at its June 6, 2002 meeting. Dr. Kinter wrote a memorandum to Assistant Commissioner Albert Monillas to ask him to have a Department of Education representative present at that night's meeting. He said that the request was made because, among other reasons, the Board Solicitor was asked not to attend. (Exhibit C-18) At that meeting, Dr. Kinter's contract was nonrenewed and he was to cease working on June 30, 2002; however, he said that he had already received a new contract in January 2002. Dr. Kinter said that did not receive a response from Mr. Monillas. On or about September 18, 2002, Dr. Kinter was suspended from his duties, although he is still being paid and is still holding the title of Superintendent. Mr. Robert Manning was appointed to serve as Interim Superintendent on September 26, 2002.

Sharon Popper, WEA President, testified that Ms. Hankerson told her on May 15, 2002 that she had the contracts for the nontenured employees, but she would not be issuing one to Dr. Kinter. Ms. Hankerson assured Ms. Popper that all the teachers would be getting such contracts. Board member, David Zweigenbaum, was present during the conversation.

Mr. Stephen Hensil, former Supervisor of Student Services, testified that on June 13, 2002, Ms. Hankerson told her that she wanted to release a certain staff member, N.J., to make it so difficult for Dr. Kinter that he would leave. She said that she wanted Dr. Kinter out by September 2002. On July 22, 2002, Ms. Hankerson told Mr. Hensil that she was going to offer Dr. Kinter a buyout and asked whether Mr. Hensil would want to be interim superintendent. Mr. Hensil told her that he would not be eligible because he is not certified to be a chief school administrator. On July 26, 2002, Mr. Hensil confirmed with the County Educational Specialist that he would not be able to be a chief school administrator without certification. On that same day, he advised the superintendent of his conversation with Ms. Hankerson. Later that day, he related his conversation with the county office to Ms. Hankerson and she said that he was not supposed to have discussed the offer with anyone. Ms. Hankerson testified that she recalled the July 22nd conversation, but did not recall any subsequent conversations.

Mr. Hensil further testified that when he was waiting outside of the Board's executive session meeting on September 26, 2002 with others, when someone in the group asked Mr. Manning, who was also waiting, who might become the next superintendent and Mr. Manning said that he had been waiting for the job since June.

Last, Mr. Hensil testified that he appeared before the Commission on December 17, 2002 and presented testimony on behalf of Dr. Kinter. Mr. Hensil testified that he was

given *Rice* notices on March 24 and 25, 2003 that his position would be discussed. At the March 27, 2003 Board meeting, his position was part of a reduction in force and he was given notice that his position would be abolished on May 1, 2003. He was reassigned to replace a long term substitute in a sixth grade class.

Ms. Hankerson testified that she did not know Mr. Manning prior to September 2002. She said that Mr. Manning submitted a resume for whatever position was available. She gave his resume to Mr. Hensil and they discussed it briefly. Mr. Manning's title was changed from Interim Superintendent to Assistant Superintendent in October 2002.

APPLICABLE LAW AND DISCUSSION

The Commission found probable cause to credit each of the allegations in the complaint. However, at the hearing of June 3, 2003, the complainant did not present evidence as to each of the allegations. The Commission will address the allegations in the order set forth above. The Commission notes at the outset that the complainant has the burden of proving factually that a violation of the Code of Ethics has occurred. N.J.S.A. 18A:12-29(b).

I. Respondent held Meetings on the Budget to Which Complainant Was Not Invited

Complainant alleges that in May 2002, Ms. Hankerson had meetings with the Board Auditor, the School Business Administrator, the Mayor of Woodbine and other Borough official. He was not included in those meetings in violation of N.J.S.A. 18A:12-24.1(a) and (c) of the Code of Ethics. The Commission determined that there were meetings between the Board and the Borough Council that occurred without the knowledge of the superintendent as he testified, resulting in the reduction of the budget tax assessment from the $.19 increase that the superintendent proposed to the $.04 cent increase that the Board eventually approved. However, the Commission is without sufficient evidence to sustain a finding that Ms. Hankerson had a role in the scheduling of such meetings or attended such meetings with the knowledge that Dr. Kinter was not invited. Therefore, the Commission must dismiss this allegation of the complaint.

II. Hiring of Business Administrator

Complainant alleges that on or about May 2, 2002, at a public meeting of the Board, Ms. Hankerson ignored and dismissed his recommendation for the appointment of a School Business Administrator/Board Secretary in violation of N.J.S.A. 18A:12-24.1(h). Complainant had already sent a letter to an applicant congratulating him and saying that he would begin work after Board approval. Complainant alleges that at the meeting following May 2, 2002, Ms. Hankerson rejected his recommendation and said that the District should hire people from the community. Judson Moore, who is the former mayor of a town not far from Woodbine, was hired by the Board.

Board Attorney Ronald Sahli, Esq. testified that the contract that he drafted for Mr. Moore was not the contract that was placed before the Board. The contract that he

drafted was for one year; the contract before the Board was for three years, which would automatically give Mr. Moore tenure. Mr. Sahli testified that the contract was also changed to give Mr. Moore three substantial pay increases of 10% each year of the contract and vacation days that could be accumulated to allow him to be out long stretches of time, which would cause hardship to the District. Mr. Sahli testified that the letter that he wrote to Ms. Hankerson on June 17, 2002 pointing out the problems with the revised contract was not acknowledged and the revised contract was approved by the Board. Mr. Sahli's legal services contract was terminated at the Board's last meeting in June 2002. He had been asked not to attend the June meetings. Mr. Moore told him that Ms. Hankerson said that he was not to attend.

The issue is whether Ms. Hankerson violated N.J.S.A. 18A:12-24.1(h) in connection with the above conduct. This section requires a board member to "vote to appoint the best qualified personnel available after consideration of the recommendation of the Chief Administrative Officer." Ms. Hankerson testified that she did not put together the contract that was ultimately approved by the Board and that she did not want Mr. Sahli to attend the meetings due to the cost to the Board.

As set forth above, there was no recommendation from Dr. Kinter to hire Judson Moore. N.J.S.A. 18A:27-4.1 makes clear that:

> A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. [N.J.S.A. 18A:27-4.1(a)]

Section (h) of the Code of Ethics allows board members to reject the recommendation of the Superintendent, but implicitly requires that the board give the Superintendent an opportunity to present another recommendation. This was not done here. Rather, Ms. Hankerson, as Board President, had Mr. Moore come up for a vote before the Board without any recommendation from the Superintendent to hire him. Ms. Hankerson bypassed the superintendent and brought the vote for Mr. Moore before the Board without a superintendent recommendation. The Commission therefore concludes that Ms. Hankerson did not vote to appoint the best qualified personnel available after consideration of the recommendation of the superintendent in violation of N.J.S.A. 18A:12-24.1(h). In so concluding, the Commission makes no determination about Mr. Moore's qualifications, but finds there was no consideration of a recommendation by the superintendent.

III. Giving Orders to District Employees and Observing Teachers without Signing in

Complainant alleges that Ms. Hankerson gave direction to employees of the District without consulting him in violation of N.J.S.A. 18A:12-24.1(c), which requires a board member to confine her board action to policy making, planning and appraisal and (d), which requires that board members carry out their responsibility not to administer the

schools, but, together with their fellow board members, see that they are well run. Lynda Blank testified that while she was confidential secretary to the School Business Administrator, Ms. Hankerson began coming to the Business Office and asking her to perform certain tasks. She said that in April 2002, Ms. Hankerson came in the office and told her to drop the work that she was doing (payroll) and immediately copy and fax documents that Ms. Hankerson handed her. She testified that Ms. Hankerson was frequently in the office, hallway and cafeteria talking to students and teachers and she never signed the sign-in sheet required of persons entering the building.

Ms. Hankerson testified that she never directly gave a staff person an order to do anything. She recommends that staff go to the administration if there is a problem.

The School Ethics Commission was given the charge of determining whether a violation of the Code of Ethics exists based on the proof submitted by the complainant. This necessarily requires that the Commission make determinations of credibility. The Commission finds the testimony of Ms. Hankerson to be less than credible. Even in the face of overwhelming evidence, her only response was denial of such conduct. The Commission finds that Ms. Hankerson spoke directly to the secretary Ms. Blank, and gave her orders without the knowledge of the complainant. The Commission also finds that she was engaged in the schools without following the protocol of signing-in upon entering the school building. The Commission finds such conduct to be in violation of N.J.S.A. 18A:12-24.1(c) and (d) as alleged.

IV. Removal of Two Employees by Reduction in Force

Complainant alleges that on June 13, 2002, Ms. Hankerson proposed the termination of two employees without consulting him in violation of N.J.S.A. 18A:12-24.1(c). Dr. Kinter testified that Ms. Hankerson scheduled a School Board Meeting for June 13, 2002 without his knowledge and instructed the Business Administrator to give a *Rice* notice to non-classroom personnel that their possible termination by reduction in force would be discussed. Noelle Jacquelyn and Lynda Blank were recommended for reduction in force at the meeting without his recommendation. Not only did Dr. Kinter have no input into their termination; he spoke against it because he believed the terminations violated the recommendations in the FEIT report.

The Commission finds that Ms. Hankerson had the positions of two employees terminated without any recommendation from the superintendent, thus greatly exceeding her authority as board president to confine her board action to policy making, planning and appraisal as required by N.J.S.A. 18A:12-24.1(c). Although Ms. Hankerson argues that the Board took the action and she did not act alone, as Board president, she is to act upon personnel matters upon the recommendation of the superintendent. In the present case, she was well aware that there was no such recommendation and even further, that the superintendent was opposed to the terminations. Therefore, the Commission concludes that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(c) in connection with the above conduct.

V. Hiring of Technology Specialist

Complainant alleges that Ms. Hankerson hired a technology specialist in violation of N.J.S.A. 18A:12-24.1(h), which requires a board member to appoint the best qualified personnel available after consideration of the recommendation of the Chief Administrative Officer. Complainant alleges that on July 9, 2002, Ms. Hankerson advised a board employee that she was going to hire a specific person to the technology position in the District. Dr. Kinter and his appointed committee Business Administrator Judson Moore and Supervisor of Student Services Mr. Hensil, interviewed and rated applicants for the part-time position. The recommendation from the committee was for applicant D.S. to receive the position. However, despite the Superintendent's recommendation, the Board agenda had applicant A.T. as the appointee at its July 11, 2002 meeting. At its August 2002 meeting, Ms. Hankerson suggested that A.T. become a full-time employee, although A.T. was rated last by the interviewing committee and was not the recommendation of the superintendent.

Although Ms. Hankerson testified that the Board, rather than she alone, hired A.T. and that she voted for him because she wanted the best person for the job, the Commission finds that the procedure for the hire was flawed. It is not appropriate for the Board to simply appoint someone without taking into consideration the superintendent's recommendation. As previously set forth, the Board may reject the superintendent's recommendation and direct him to present another recommendation for board approval under N.J.S.A. 18A:12-24.1(h). Once again, this was not done. Rather, Ms. Hankerson substituted her preference without consideration of the Superintendent's recommendation and thereby did not vote to appoint the best qualified personnel available after consideration of the chief administrative officer's recommendation in violation of N.J.S.A. 18A:12-24.1(h).

VI. Hiring of Behavior Specialist

Complainant alleges that Ms. Hankerson had the position of Supervisor of Students for Discipline eliminated contrary to the recommendations in the FEIT report in violation of N.J.S.A. 18A:12-24(a), and, without consultation or recommendation from him, created the position of Behavior Specialist in violation of N.J.S.A. 18A:12-24.1(c) and (g). The FEIT report recommended that the District maintain the position of Supervisor of Students for Discipline. (Exhibit C-1, page 34) Although Dr. Kinter had no input in the termination, the employee holding the title was laid off pursuant to a reduction in force. Dr. Kinter was told to make a job description for the new position, which he did. (Exhibit C-7) He made it and submitted it to the county office for approval. However, the Board adopted a different job description with different qualifications. (Exhibit C-8) Instead of a teaching certificate, the new job description requires a certificate of school social work or school psychologist certificate. Ms. Hankerson denied drafting the new job description, but admits to calling the county office to determine the qualifications for a school psychologist, not the behavior specialist. Dr. Kinter admits to being present when Ms. Hankerson interviewed A.W. for the position.

The Commission finds Ms. Hankerson's testimony that she called the county office regarding the qualifications for a school psychologist, when there was no employment issue pending about a school psychologist, to be lacking in credibility. Once again, Ms. Hankerson denied taking the action, but never could explain how the resultant action came about, in this instance the changed job description. She denies that she put together the new job description, which was adopted by the Board and submitted to the county office, but does not dispute that the superintendent's version of the job description was substituted with the Board's own version.

The Commission finds that the job description for Behavior Specialist and the hiring of A.W. as Behavior Specialist on August 8, 2002 should have been recommended by the superintendent. Ms. Hankerson's interview of a candidate in the presence of Dr. Kinter clearly demonstrates her overstepping her role as a board member. For the foregoing reasons, the Commission concludes that Ms. Hankerson again violated her duty to confine her action to policy making, planning and appraisal in violation of N.J.S.A. 18A:12-24.1(c). Because the FEIT report was not a law, rule or regulation of the State Board of Education or a court order, the Commission cannot conclude that the elimination of the position violated N.J.S.A. 18A:12-24.1(a). Also, although A.W. was hired by the Board after he pleaded guilty to a disqualifying criminal offense, the Commission did not hear any evidence that Ms. Hankerson knew of A.W.'s disqualification status before she recommended him such that it could find that she failed to provide accurate information in violation of N.J.S.A. 18A:12-24.1(g). The Commission cannot infer such a fact solely because A.W. was Ms. Hankerson's church organist.

VII. Hiring of Teachers

Complainant also alleges that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(d) by recommending the hiring of staff for the 2002-2003 school year. Complainant presented minutes of an emergency meeting of the Board that was held on September 2, 2002 for the purpose of discussing remaining vacancies. The minutes of the meeting note that there were vacancies at the start of the school year. Ms. Hankerson said that she had to act to fill those vacancies because Dr. Kinter was not acting. The minutes of the meeting are clear that Ms. Hankerson offered Ms. Pownall a teaching position and even determined the step at which she was to be placed. She also selected and recommended the hiring of an individual for the position of school nurse.

Even if it were true that Dr. Kinter had been less than diligent in filling all the vacancies for September 2002, the Commission would have to conclude that Ms. Hankerson overstepped her bounds as a Board member when she actually hired personnel. The Board minutes showed that she nominated, interviewed and recommended the hiring of candidates for employment. The submission to the Commission of unapproved revised minutes with changes that would be favorable to Ms. Hankerson further undermines Ms. Hankerson's credibility. The Commission therefore finds Dr. Kinter's statement that there was no emergency requiring Ms. Hankerson to take such actions to be more credible in this regard.

The Commission believes that Ms. Hankerson is well aware that she acted outside her authority on September 2, 2002 and that is why she submitted, through her attorney, unapproved revised minutes to replace the actual ones. Ms. Hankerson had attended new board member training in June 2002 and was aware of the standards set forth in the Code of Ethics. Based on the foregoing, the Commission concludes that Ms. Hankerson administered the schools in a clear attempt to subvert the superintendent in violation of N.J.S.A. 18A:12-24.1(d).

VIII. Teacher Orientation September 3, 2003

Complainant alleges that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(e) when she removed him from the agenda that he had prepared for the teachers' orientation on their first day of school. N.J.S.A. 18A:12-24.1(e) requires a board member to recognize that authority rests with the board of education and make no personal promises nor take any private action that may compromise the board. Dr. Kinter was scheduled to give opening remarks to the teachers, along with Board President Hankerson and then give a presentation on the faculty handbook and provide general information. (Exhibit C-15) However, Ms. Hankerson directed the superintendent to conduct interviews rather than attend the orientation.

Ms. Hankerson testified that Dr. Kinter was pulled from the agenda and directed to conduct interviews because of the emergency resulting from not having all positions filled at the start of the year. She noted that she did not fill in for him on the agenda, but rather had another administrator, Mr. Hensil, substitute for Dr. Kinter at the orientation.

As set forth above, Ms. Hankerson's testimony is less than credible in this regard. The Commission recognizes a clear pattern of Ms. Hankerson to discredit the superintendent at every opportunity. Pulling Dr. Kinter from the teachers' orientation clearly undermines his authority with his staff and thereby compromises his ability to serve as chief school administrator. The Commission therefore concludes that in setting her own agenda for the teachers' orientation, Ms. Hankerson took private action that may compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

IX. Removal of Superintendent

Complainant last alleges that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(g) by discussing with District employees her intent to remove him as superintendent before giving him any official notice. Prior to the June 6, 2002 meeting at which Dr. Kinter had his contract non-renewed, Ms. Hankerson informed the President of the WEA, Ms. Popper and Mr. Hensil that Dr. Kinter's contract would not be renewed. She made the unsolicited comment to Ms. Popper in May 2002 and to Mr. Hensil just prior to the meeting. Although Dr. Kinter's contract was nonrenewed at the June 6, 2002 meeting and he was to cease working on June 30, 2002, Dr. Kinter said that he had already received an extended contract in January 2002. This is the subject of litigation to which the Commission does not offer any opinion. However, it is undisputed that on or about September 18, 2002,

Dr. Kinter was suspended from his duties, although he was still being paid and was still holding the title of Superintendent. Mr. Manning was appointed to serve as Interim Superintendent on September 26, 2002.

The sole issue before the Commission concerning Dr. Kinter's removal is whether Ms. Hankerson "failed to hold confidential matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools" in violation of N.J.S.A. 18A:12-24.1(g). The Commission finds it reprehensible that Ms. Hankerson would discuss her intent to get rid of Dr. Kinter with his subordinates in the District. Personnel matters are confidential and fall within an exception to the Open Public Meetings Act, N.J.S.A. 10:4-12(b)(8), yet Ms. Hankerson casually discussed Dr. Kinter's contract with members of the staff. The Commission finds that her unsolicited comments clearly constitute a failure to hold confidential matters pertaining to the schools, which would needlessly injure Dr. Kinter and the schools.

CONCLUSIONS OF LAW

For the foregoing reasons, the School Ethics Commission hereby **CONCLUDES** that Julia Hankerson violated the Code of Ethics for School Board Members in the following ways: 1) Ms. Hankerson ignored the recommendation of the superintendent and allowed a business administrator to be hired without any recommendation in violation N.J.S.A. 18A:12-24.1(h); 2) Ms. Hankerson gave orders to a District employee to perform tasks for her in violation of N.J.S.A. 18A:12-24.1(c); 3) Ms. Hankerson had *Rice* notices sent to employees proposing the termination of two employees without consulting the superintendent in violation of N.J.S.A. 18A:12-24.1(c); 4) Ms. Hankerson hired a technology specialist contrary to the superintendent's recommendation in violation of N.J.S.A. 18A:12-24.1(h); 5) Ms. Hankerson created the position of Behavior Specialist and had a candidate appointed to the position without recommendation from the superintendent in violation of N.J.S.A. 18A:12-24.1(c); 6) Ms. Hankerson interviewed and hired a teacher and a nurse for the 2002-03 school year without the superintendent's recommendation in violation of N.J.S.A. 18A:12-24.1(d); 7) Ms. Hankerson removed the superintendent from the agenda of the teacher in-service orientation and directed him to conduct interviews in violation of N.J.S.A. 18A:12-24.1(e); and 8) Ms. Hankerson advised the President of the WEA and an administrator that the contract of the superintendent would not be renewed in violation of N.J.S.A. 18A:12-24.1(g).

The Commission further **CONCLUDES** that there is insufficient evidence that she scheduled budget meetings in violation of the N.J.S.A. 18A:12-24.1(a) and (c). Moreover, although Ms. Hankerson acted contrary to the report of the Fiscal and Education Intervention Team (FEIT) when she terminated the position of Supervisor of Students for Discipline and created the position of Behavior Specialist, the Commission **CONCLUDES** that her action did not violate the alleged provisions N.J.S.A. 18A:12-24.1(a) because no law, rule or regulation of the State Board or court order was violated or (g) since there was no evidence that she provided inaccurate information.

ORDER

ORDER

For the foregoing reasons, the Commission concludes that respondent Julia Hankerson violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g) and (h), set forth in the Code of Ethics for School Board Members of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of removal from her position as a Board member for these violations. The Commission finds that Ms. Hankerson continued to act in blatant disregard of the Code of Ethics even after she had been trained as to its provisions. Ms. Hankerson's submission of false revised minutes in order to defend herself in this action undermined her credibility. Further, the Commission heard testimony that the positions of employees who testified against her in the first hearing of this matter were terminated subsequent to the December hearing. Such retaliatory conduct makes the argument for removal even more compelling. Because the Commission finds Ms. Hankerson's conduct to be so egregious, if the Commission had the authority to do so, it would further recommend that Ms. Hankerson be barred from holding a position on a school board in the future.

This decision, having been adopted by the Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C36-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations that Ms. Hankerson violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), (f), (g), (h), (i) and (j) of the Code of Ethics for School Board Members; and

Whereas, the Commission held a full hearing to determine whether Ms. Hankerson violated the Code of Ethics for School Board Members as alleged in the complaint; and

Whereas, the Commission now finds that respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g) and (h) of the Code of Ethics and concludes that removal would be the appropriate penalty for the reasons set forth;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Julia Hankerson in violation of the Act and recommending that the Commissioner of Education impose a penalty of removal.

Paul C. Garbarini, Chairperson

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on June 24, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 231-7/03

IN THE MATTER OF JULIA HANKERSON,	:	
WOODBINE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAPE MAY COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Julia Hankerson, member of the Woodbine Board of Education, violated *N.J.S.A.* 18A:12-24.1(c), (d), (e), (g) and (h), set forth in the Code of Ethics for School Board Members of the School Ethics Act, and recommending a penalty of removal from her position as a Board member have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Respondent's comments set forth her disagreement with and defenses to the Commission's findings on each of the ethics violation charges addressed in its decision. She maintains that such findings were not founded on valid evidence but, to the contrary, were "based on misinformation, unsubstantiated and blatantly erroneous statements, unreported information and an assumption that a denial is not an appropriate response to an untrue statement or situation, and most horrifying; THAT A SUPERINTENDENT HAS MORE CREDIBILITY THAN A BOARD MEMBER." (Respondent's Comments at 7) She, additionally, argues that some of the allegations here arose during her first four months as a new Board member, with two of those months having been prior to her receiving Board Member Training. She proposes that "[i]t is unreasonable to believe that a new Board Member and President of a troubled school would have a working knowledge of all School Board processes and procedures immediately."

(*Id.* at 2) Respondent, therefore, urges that if any "penalty" is to be imposed, removal is entirely too harsh.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act **is not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record and full consideration of respondent's comments, the Commissioner concurs with the Commission that respondent's blatant disregard of the Code of Ethics evidenced herein warrants no less a penalty than removal from her position as a Board member. The Commissioner is unpersuaded by respondent's attribution of her offenses here to her newness as a Board member. Rather, he concurs with the Commission, respondent repeatedly acted outside her authority and "in blatant disregard of the Code of Ethics even after she had been trained as to its provisions." (Commission's Decision at 16)

Accordingly, IT IS HEREBY ORDERED that Julia Hankerson is removed from the Board of Education of Woodbine as of the date of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

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

476-03

#476-03

K.R.C. AND N.L.C., on behalf of minor child, L.M.U.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, WILLIAM ADAMS AND JOHN CLIFFORD,	:	
RESPONDENTS.	:	

August 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITAL DECISION

OAL DKT. NO. EDU 4202-03

AGENCY DKT. NO. 213-6/03

K.R.C. & L.L.C. o/b/o L.M.U.,

Petitioners,

v.

BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL TECHNICAL SCHOOLS, WILLIAM ADAMS, AND JOHN CLIFFORD,

Respondents.

K.R.R. & L.M.C., parents of **L.M.U.**, for petitioners pro se

Robert A. Muccilli, Esq., for respondents (Capehart & Scatchard, attorneys)

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

Record Closed: July 9, 2003 Decided: July 9, 2003

STATEMENT OF THE CASE

Respondent Board of Education of the Salem County Vocational Technical Schools (BOE) operates two high schools: the Salem County Career and Technical High School and the Salem County Arts, Science and Technology High School, in which there are 5 academies,

including the Academy of Biological and Environmental Sciences (ABES). Petitioners K.R.C. and L.M.C. and petitioner L.M.U., their daughter, who recently graduated from the ABES program, claim that respondents should have named L.M.U. a "distinguished student speaker" for the ABES graduation. Respondents submit that L.M.U. did not meet all of the criteria for that distinction, particularly because she was not a student in the ABES program for all 4 of her high school years. Respondents also submit that, because L.M.U. has now graduated, petitioners' claim should be dismissed as moot.

PROCEDURAL HISTORY

On June 12, 2003, the petition was filed with the Department of Education. N.J.S.A. 18A:6-9. The Department transmitted the contested to the Office of Administrative Law (OAL), where it was filed on June 13, 2003 and scheduled for a hearing on June 16, 2003. N.J.S.A. 52:14B-2(b). (The petition names as respondents only William Adams, Ed.D., Superintendent of the BOE's school system and John Clifford, Ed.D., principal of the BOE's Career and Technical High School. However, the case's caption, as transmitted by the Department, showed the BOE as a respondent.) On June 16, 2003, respondents' answer and exhibits were filed in the OAL, testimony was taken, the request for emergent relief was argued on a taped record, and I issued an order denying the request. The letter transmitting the order notified the parties that the case was scheduled for a plenary hearing on July 9, 2003 and respondents' attorney represented that, on July 8, 2003, by way of a telephone message, he reminded petitioners of the hearing. By 9:30 am on July 9, 2003, petitioners had not appeared, the OAL had no message from them, and respondents' attorney moved for dismissal.

FINDINGS OF FACT

The BOE operates two high schools: the Salem County Career and Technical High School and the Salem County Arts, Science and Technology High School.

The Salem County Career and Technical High School primarily prepares students to directly enter specific fields of vocational or employment. The Salem County Arts, Science and

Technology High School (on campuses other than its own) operates 5 educationally rigorous academies, including the ABES.

On December 17, 1996, the BOE approved establishment of a Law Enforcement and Public Safety Program at the "Career Center" and provided that it "may become full-time and an academy program." R-C. On July 15, 1997, the Law Enforcement and Public Safety Program's "Vo Tech Career Center Curriculum" was presented and the BOE approved implementation of that program during the 1997-98 school year. R-C. On August 26, 1998, the BOE again approved the Law Enforcement and Public Safety Program as part of the "Career Center." R-G.

On August 3, 1999, the BOE approved courses for the 1999-2000 school year for the ABES program and the Law Enforcement and Public Safety Program. The ABES program's courses, e.g., "Algebra I," "Honors English I" and "Honors History II," were more rigorous than the Law Enforcement and Public Safety Program's courses, e.g., "Pre Algebra," "Algebra," "English 9" and "US History II – 20th Century America." R-E.

Substantial differences among the BOE's schools and programs make it difficult if not impossible to reconcile the weights and values of grades in the various courses. Therefore, the BOE has not recognized a valedictorian or salutatorian. Instead, Dr. Adams, the Superintendent of the BOE's school system, has determined an academy's "distinguished student speaker" on the following criteria: (1) at the time of graduation, the academy must have been in operation for a minimum of 4 years, (2) to be eligible a student must have participated in the same academy's program for a minimum of 4 years, (3) the student must have the highest grade point average (GPA) of eligible students, and (4) the student must be of good character. R-1, R-A

In past years, Dr. Adams determined who would be the "distinguished student speaker" and reported the student's name to the BOE. The criteria were not written or formally adopted by the BOE in a policy, etc.

During the 1999-2000 school year, L.M.U. was a freshman in the BOE's school system's Law Enforcement and Public Safety Program, so that she took Law Enforcement and Public Safety Program courses and not the more rigorous ABES program courses. R-F.

During the 2000-01 school year, L.M.U. was a sophomore in the BOE's school system's Law Enforcement and Public Safety Program, so that she again took Law Enforcement and Public Safety Program courses and not the more rigorous ABES program courses. R-F.

During the 2001-02 school year, L.M.U. was a junior in the BOE's school system, she transferred from the Law Enforcement and Public Safety Program to the ABES program and took that program's courses. R-D.

On July 23, 2002, the BOE approved "Career and Technical Programs", including the Law Enforcement and Public Safety Program as a full-time program option. R-C. The BOE thereby reiterated that the Law Enforcement and Public Safety Program is not an academy program.

During the 2002-03 school year, L.M.U. was a senior in the ABES program.

Dr. Adams, a credible witness, applied the above-described criteria and determined that I.R. would be the ABES program class of 2003 graduation "distinguished student speaker."

Petitioners contended that L.M.U. had attained the highest average in her class, so that she should be named the "distinguished student speaker." However, since L.M.U. had not been a student in the more rigorous ABES program for all 4 of her high school years, Dr. Adams, determined that she was not eligible for that distinction.

On June 18, 2003, the Salem County Arts, Science and Technology High School graduation ceremony was held.

L.M.U. will be entering college for the 2003-04 school year.

CONCLUSIONS OF LAW

Generally, in administrative adjudication, the claimant bears the burden of persuasion (proof), by the preponderance (greater weight) of the competent and credible evidence of facts essential to his or her claim. See N.J.S.A. 52:14B-10(c); see also N.J.S.A. 2A:84A-1 et seq.; N.J.R.E. 101(b)(1); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); Snyder v. I. Jay Realty Co., 53 N.J. Super. 336, 347 (App. Div. 1958), rev'd in part on other grounds, 30 N.J. 303 (1959); Collins Realty Co. v. Sale, 104 N.J. Eq. 138, 142 (E. & A. 1929).

The above-described criteria for determination of what graduate will be the "distinguished student speaker" appear reasonable. More particularly, given the difference of educational rigor between the ABES program and the Law Enforcement and Public Safety Program, the second criterion for eligibility, requiring that a student must have participated in the same program for a minimum of 4 years, appears to subject all students to equal standards. Further, although it would be preferable for the BOE to adopt written criteria, from the past years, the BOE appears well aware of and essentially ratified the criteria. (Petitioners have cited no law requiring the BOE to, e.g., adopt a written policy setting forth criteria.)

For all four high school years, I.R. took the more rigorous ABES program courses However, for her first two high school years, L.M.U. took the less rigorous Law Enforcement and Public Safety Program's courses. As applied, the criteria subject L.M.U. to no inequity. That is to say, petitioners have not shown that respondents should be ordered to designate L.M.U. as a "distinguished student speaker" for the graduation.

In support of respondents' motion for dismissal, they also cite Oxfeld v. New Jersey State Board of Education, 68 N.J. 301 (1975), wherein since petitioners had graduated and were no longer students in a school, their constitutional challenge to a school regulation were dismissed as moot. Respondents also distinguish this case from the circumstances noted in Justice Clifford's Oxfeld dissent wherein he points out that the Oxfeld petitioners brought a constitutional challenge to a school regulation governing distribution of pamphlets and leaflets on school grounds.

Respondents submit that they have acted reasonably; but they also point out the following: since L.M.U. has graduated and is no longer a BOE student, the claim that she should be a "distinguished student speaker" cannot be granted; petitioners have not claimed that respondents should be ordered to amend the BOE's records to show that she was "distinguished;" and petitioners have not brought a constitutional claim. Consequently, this case could also be dismissed as moot and I agree with this.

To reiterate, the petitioners have failed to prove that the respondents wrongfully refused to name L.M.U. a distinguished student speaker" and their case is moot.

ORDER

I **ORDER** the petition **DISMISSED WITH PREJUDICE**.

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

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

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

July 9, 2003
DATE

JOHN R. TASSINI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 10, 2003
DATE

Mailed to Parties:

JUL 16 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioners:

P-1 Board resolution: Approval of New Career Center and Salem County Arts, Science and Technology High School Curricula and Curriculum Modifications for the 2000-01 School Year

For Respondents:

R-1 Affidavit of Dr. Adams

R-A Memorandum (relative to honors distinction) from Superintendent William H. Adams, Ed.D., May 17, 2001

R-B Letter (relative to selection of students for distinguished speaker status) from Superintendent Adams to petitioners, June 11, 2003

R-C Board Minutes: Approval to Establish a Law Enforcement and Public Safety Program for the 1997-98 School Year, December 17, 1996; Board Minutes: Approval of Career Curriculum Changes for the 1997-98 School Year, July 15, 1997; Board Minutes: Board Review and Approval of the 2002-03 District Educational Curriculum, July 23, 2002

R-D Transfer Information, School: Salem County Arts, Science and Technology High School, 2002-03 School Year, Term: Marking Period 3, L.M.U.

R-E Board Minutes: Request and Recommendation for Board of Education Approval of the Career Center and the Salem County Arts, Science and Technology High School Curriculum and Curriculum Modifications for the 1999-2000 School Year, August 3, 1999

R-F Official Transcript, Salem County Vocational Technical Schools, L.M.U.

R-G Board Minutes: Request and Recommendation for Board of Education Approval of the Career Center Curriculum for the 1998-99 School Year, August 26, 1998

WITNESSES

For Petitioners:

K.R.R.

L.L.C.

For Respondents:

Dr. Adams

OAL DKT. NO. EDU 4202-03
AGENCY DKT. NO. 213-6/03

K.R.C. AND N.L.C., on behalf of minor child, L.M.U.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, WILLIAM ADAMS AND JOHN CLIFFORD,	:	
RESPONDENTS.	:	

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

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioners have failed to meet their burden of demonstrating that respondents' actions in not selecting L.M.U. as a "distinguished student speaker" at graduation were arbitrary, capricious or contrary to law. Further, like the ALJ, the Commissioner finds the matter moot given the relief sought by petitioners and the previous denial of their motion for emergent relief.

Accordingly, for the reasons expressed therein, the Initial Decision of the Office of Administrative Law dismissing the Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

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

#477-03

477-03

H.A. DeHART & SONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND HOLCOMB BUS SERVICES, INC.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, unsuccessful bidder, sought emergent relief enjoining respondent Board from taking further action upon the awarding of a contract for pupil transportation services to respondent bus company, setting aside the award of contract and directing the award to petitioner. Petitioner contended respondent company made changes to its original bid violating the bidding laws.

The ALJ concluded that petitioner should be granted the relief it requested insofar as enjoining the Board from proceeding on the award of the transportation contract to respondent since the legal right for disqualification was settled and the harm to petitioner would be irreparable. The ALJ, however, concluded that awarding the contract to petitioner without an immediate rebidding opportunity for the Board would place an economic burden upon the taxpayers, which may be mitigated through a rebidding for the contract; rebidding eliminates the need to review the contentions of the Third Count of the petition (petitioner did not know that the Board no longer required the successful bidder to bear the cost of a bus route coordinator). The ALJ ordered the bids received on July 17, 2003 rejected and ordered the Board to solicit the receipt of new bids for the 2003-04 school year. The ALJ ordered the remaining issues contained in the petition dismissed as moot.

The Commissioner concurred with the ALJ that, under all of the circumstances, the appropriate resolution of this matter is a prompt rebid, which also serves to moot any remaining matters in dispute.

August 14, 2003

State of New Jersey

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

JAMES E. MCGREEVEY
Governor

WILLIAM L. LIBRERA
Commissioner

August 15, 2003

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Roseland, NJ 07068

Dear Parties:

H.A. DeHART & SONS V. BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND HOLCOMB BUS SERVICES, INC., AGENCY DKT. NO. 267-7/03, OAL DKT. NO. EDU 4918-03

We are enclosing a copy of the decision of the Commissioner of Education dated August 14, 2003, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing courtesy copies of Commissioner decisions directly to represented parties or to the Board Secretary or County Superintendent of Schools.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/HADeHartSons.doc
Enclosure

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION FOR
EMERGENT RELIEF
OAL DOCKET NO. EDU 4918-03
AGENCY REFERENCE NO. 267-7/03

H.A. DeHART & SONS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND HOLCOMB BUS SERVICES, INC.,

Respondent.

Thomas H. Ward, Esq., appeared for petitioner (Albertson Ward, attorneys)

Robert A. Muccilli, Esq., appeared for respondent, Board of Education of the Township of West Deptford (Capehart & Scatchard, attorneys)

Thomas S. Cosma, Esq., appeared for respondent, Holcomb Bus Services, Inc. (Connell Foley, attorneys)

Record Closed: August 6, 2003 Decided: August 6, 2003

BEFORE **ANTHONY T. BRUNO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner ("DeHart") seeks emergent relief enjoining respondent, Board of Education of the Township of West Deptford ("West Deptford") from taking further action upon the awarding of a contract for Pupil Transportation Services ("Contract") to respondent, Holcomb Bus Service, Inc. ("Holcomb"), setting aside the award of said Contract to Holcomb, directing the award of the Contract to DeHart, and for costs of suit and other just and equitable relief.

DeHart's verified petition for emergent relief was filed with the Department of Education, Bureau of Controversies and Disputes, on July 30, 2003 and then transmitted to the Office of Administrative Law on August 1, 2003 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. West Deptford's Answer, Affidavit of William H. Thompson, and Brief were filed August 5, 2003. Oral argument was presented on August 6, 2003 at the Office of Administrative Law. Upon conclusion of testimony of the parties a verbal opinion in accordance with the terms of the Initial Decision was given. The hearing record closed August 6, 2003.

STATEMENT OF FACTS

The Petition and Answer address three counts. This decision addresses only the First Count because the allegations of the Second Count and Third Count are rendered moot by the Order contained herein. Further, a plenary hearing would be required because the material facts of the latter Counts are in dispute.

The material facts relative to the First Count of the Petition are not in dispute. On or about July 7, 2003, West Deptford issued Bid Specifications for Pupil Transportation Services for the 2003-2004 School Year (Exhibit A of the Petition, a/k/a Exhibit P-1). Among the documents contained in the Bid Specifications was a multi-page Bid Sheet. The first page of the Bid Sheet contained the following statements:

$ Bids which do not include an adjustment amount will not be accepted.

$ The following routes and aide/attendant (if applicable) are to be bid on a PER DIEM basis.

$ Routes which require an aide are so indicated by an asterisk(*).

Seven columns followed the introduction:

Tier Number	Route Number	Route Cost (without aide)	Tier Cost	Increase/Decrease Adjustment Cost	Per Diem Aide/Attendant Cost (if applicable)	Tier cost Including Aide (if applicable)

Because the dispute in this matter arises from Holcomb's responses to Route 308 and 310, a copy of the Route Description provided in the Bid Specifications for those routes were submitted as Exhibit D to the Petition (Exhibit P-2). The Route Descriptions list as "Special Instructions" for Route Nos. 308 and 310 "Aide."

Bids were returned on July 17, 2003 by DeHart and Holcomb. DeHart's proposal totaled $1,401,416.28 and Holcomb's bid was $1,287,276.00. Holcomb's Bid Sheet for both Route Nos. 308 and 310 were Route Cost $57.00, Increase/Decrease Adjustment Cost $1.00, and Per Diem Aide/Attendant Cost (if applicable) $ N/A. (See Exhibit A attached to Answer, a/k/a R-1). DeHart's Bid Sheet (Exhibit D attached to Answer, a/k/a R-2) shows DeHart's figures were $45.00, $1.25, and $20.00 for Route Cost, Increase/Decrease Adjustment Cost, and Per Diem Aide/Attendant Cost (if applicable) for Route No. 308. The Route Cost for Route No. 310 was $66.00 with the other 2 items being $1.25 and $20.00, respectively.

Upon the opening of the bids DeHart protested Holcomb's bid. West Deptford alleges Holcomb promptly verbally advised West Deptford that Holcomb was not charging for the cost of an aide for Route Nos. 308 and 310. Five days later Holcomb addressed a letter to West Deptford (Exhibit B attached to the Petition, a/k/a R-3) stating, "Holcomb Bus Service, Inc. will not be charging for the aides on these routes [308 and 310]."

ANALYSIS AND CONCLUSION

DeHart contends that the award by West Deptford of its Public Transportation Services Contract to Holcomb violated the public bidding laws of New Jersey and the terms of the Department of Education Regulations for transportation services. The bid sheet which is one of the "documents and forms" required "to be made part of the bid specifications and of the contract" "shall include a separate per diem cost for each aide to be assigned to the route." *N.J.A.C.* 6A:27-9.3(e)1ii. DeHart further suggests that *N.J.A.C.* 6A:27-9.8(c) was violated by West Deptford's consideration of Holcomb's verbal response during the bid opening and its July 22 letter; both of which should be considered as changes to the original bid.

Counsel for West Deptford argued that Holcomb's "N/A" was "understood" by the Board to mean that because no per diem cost was to be charged; the requirement to specify "$0" was neither necessary nor appropriate. To respond "not applicable" was reasonable under the circumstances. Counsel for Holcomb emphasized that Holcomb's bid was not defective because Holcomb did not leave the space empty as was the case in *L. Pucillo & Sons, Inc. v. Mayor of New Milford,* 73 *N.J.* 349 (1977), and *Hall Construction Co., Inc. v. New Jersey Sports & Exposition Authority,* 295 *N.J. Super.* 629 (App. Div. 1996).

"Where authorized by law and where irreparable harm will result without an expedited decision . . . emergency relief pending a final decision on the whole case may be ordered upon the application of a party." *N.J.A.C.* 1:1-12.6(a). Described in *Crowe v. DeGioia,* 90 *N.J.* 126, 132-134 (1982), as "principles, rules or tests" to guide a court in "the most sensitive exercise of judicial discretion," four findings must be made: "a preliminary injunction should not issue except when necessary to prevent irreparable harm, . . . the legal right underlying [petitioner's] claim is [settled], . . . all material facts are uncontroverted, and . . . [weighing] the relative hardship to the parties [who suffer more] . . .". These "fundamental principles" are better stated in *Ispahani v. Allied Domecq Retailing USA, et al.*, 320 *N.J. Super.* 494, 498, (App. Div. 1999), "To obtain a preliminary injunction, the applicant must establish that he will suffer irreparable injury if the relief is denied, that his claim is based on a settled legal right, that the material facts are substantially undisputed, and that the harm to him if the injunction is denied will be greater than the harm to the opposing party if the injunction is granted."

I **CONCLUDE** that DeHart should be granted the injunctive relief it requested insofar as enjoining West Deptford from proceeding on the awarding of the Pupil Transportation Services Contract to Holcomb. However, I **CONCLUDE** that awarding the Contract to DeHart without an immediate re-bidding opportunity for West Deptford will place an economic burden upon the taxpayers of West Deptford, which may be mitigated through a re-bidding for the Contract. Counsel for West Deptford represents that it will be able to re-publish its request for bids, receive and open those bids, and award the Contract in time to meet the September 4, 2003 start date. That the re-bidding process also disposes of DeHart's objection that it did not know that West Deptford no longer required the successful bidder to bear the cost of a bus route coordinator (Third Count) and should result in a lower bid from DeHart should not be overlooked. Re-bidding disposes of the entire controversy without the need for a plenary hearing.

In arriving at the aforesaid conclusion I first **CONCLUDE** that Holcomb's bid must be set aside, the legal right for disqualification being settled.

"Bidding statues are for the benefit of the taxpayers and are to be construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption, their aim is to secure for the public the benefits of unfettered competition. To achieve these purposes all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside." *Terminal Construction Corporation v. Atlantic County Sewerage Authority,* 67 *N.J.* 403, 409-410 (1975). "The long standing judicial policy in construing cases governed by the Local Public Contracts Law, *N.J.S.A.* 40A:11-1 *et seq.* and its predecessors, has been to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines." *L. Pucillo v. Mayor and Council of Borough of New Milford, supra,* 73 *N.J.* at 356. Allowing West Deptford the discretion of what it understood "N/A" to mean frustrates judicial policy.

Respondents emphasize that Holcomb did not leave the space blank or empty, but in fact, responded to indicate that no charge would be made. However, the title of the column "Per Diem

Aide/Attendant Cost" also included the parenthetical "if applicable." The specifications defined aide/attendant cost to be applicable; it is neither unreasonable nor undebateable that Holcomb could use the ambiguous – and contrary to specifications – N/A to withdraw its bid on the grounds of obvious error or oversight. "A deviation is material if: (1) waiver of such defect deprives the purchase of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements and (2) it adversely affects the competitive bidding process by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition." *Hall Construction Co., Inc. New Jersey Sports & Exposition Authority, supra,* 295 *N.J. Super.* At 637. "Material conditions contained in the bidding specifications cannot be waived by the contracting authority." *Ibid.* ". . . [A]dvertised conditions whose waiver is . . . capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions which may not under any circumstances be waived." *Terminal Construction Corporation v. Atlantic County Sewerage Authority, supra.,* 67 *N.J.* at 412.

I **CONCLUDE** that the harm to DeHart should emergent relief not be granted is irreparable; "it cannot be redressed adequately by monetary damages." *Crowe v. DeGioia, supra.* 90 *N.J.* at 133. The final test is relative hardship. West Deptford indicates that it can meet its obligation to transport it students by immediately re-instituting the bidding process. As alluded to at the outset of this decision, re-bidding eliminates the need to review the contentions of the Third Count of DeHart's Petition. The aura of favoritism and unfairness alleged to have resulted from West Deptford's removal of the bus coordinator from the obligations of the successful bidder will be removed with all parties being aware of all of the circumstances for performing the Contract.

Note is made of the request of counsel for Holcomb for a stay of the implementation of this decision. I denied the request because it should be addressed in the Final Decision of the Commissioner.

ORDER

Accordingly, it is **ORDERED** that the Board of Education of the Township of West Deptford is permanently enjoined from taking further action upon a Contract for Public Transportation Services based upon the bids received on July 17, 2003. It is further **ORDERED** that the bid's received on July 17, 2003 are deemed rejected. It is further **ORDERED** that the Board of Education of the Township of West Deptford forthwith solicit the receipt of new bids for Public Transportation Services for the 2003-2004 School Year. It is finally **ORDERED** that upon the implementation of this Order, the remaining issues contained in the Petition are moot and are **DISMISSED.**

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

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

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

August 6, 2003
DATE

ANTHONY T. BRUNO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/tmp

OAL DKT. NO. EDU 4918-03
AGENCY DKT. NO. 267-7/03

H.A. DeHART & SONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY, AND HOLCOMB BUS SERVICES, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision on Motion for Emergent Relief of the Office of Administrative Law have been reviewed. Although applicable rules make no provision for the filing of exceptions to Administrative Law Judge (ALJ) Orders on motion for emergent relief, *N.J.A.C.* 1:1-12.6, Respondent Holcomb's submission of August 12, 2003[1] has been considered by the Commissioner in rendering his decision herein, as has the Board's submission of August 13, 2003, since the ALJ's decision also serves as the OAL's recommended Initial Decision on the merits pursuant to *N.J.A.C.* 1:1-18.3.

Upon review and consideration, the Commissioner concurs with the ALJ that, regardless of what Respondent Holcomb's intent may have been, its bid as actually

[1] Respondent Holcomb's submission seeks a "stay" of the ALJ's Order to reject all bids and rebid the contract at issue. However, since the ALJ's ruling serves as a recommendation to the Commissioner and is, in itself, of no force and effect, respondent's submission is considered as exceptions to the Initial Decision, to be considered by the Commissioner pursuant to *N.J.A.C.* 1:1-18.4 before rendering a final decision. The Board objects to Holcomb's request for "stay" and urges the Commissioner to decide the matter without delay, but excepts to the ALJ's recommended order on grounds that any "defect" in Holcomb's bid, which the Board does not concede, was not material.

submitted is not properly responsive to published specifications governing aides for the designated bus routes.[2] The Commissioner further concurs that, under all of the circumstances, the appropriate resolution of this matter is a prompt rebid, which also serves to moot any remaining matters in dispute.

Accordingly, for the reasons expressed therein, the Initial Decision of the Office of Administrative Law, directing timely rebid of the contract in dispute and dismissing the remainder of the Petition of Appeal as consequently moot, is adopted as the final decision in this matter.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

[2] In this regard, the Commissioner notes that Holcomb's entries in the "Per Diem Aide/Attendant Cost (If Applicable)" column for routes 308 and 310 ("$ N/A") are identical to its entries on routes where the Board did *not* require an aide or attendant.

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

478-03

#478-03

N.A., on behalf of minor child, J.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

August 14, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1598-02
AGENCY DKT. NO. 487-12/01

N.A. on behalf of minor child, J.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON,
Respondent.

N.A., *pro se,* petitioner

Anthony V. D'Elia, Esq., for respondent
(Chasan, Leyner, Bariso & Lamparello, P.C., attorneys)

Record Closed: July 8, 2003 Decided: July 9, 2003

BEFORE: **ELINOR R. REINER,** ALJ

On or about December 3, 2001, petitioner, N.A., filed a petition of appeal with the Commissioner of Education, challenging respondent's residency determination in regard to his nephew, J.A. On January 16, 2002, respondent filed its answer seeking dismissal of the petition and counterclaiming for tuition for the period of ineligible attendance. On February 5, 2002, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) as a contested case for a hearing, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on February 22, 2002, and a telephone prehearing conference scheduled for April 29, 2002. A telephone conference was held on April 30, 2002 and, based upon a possible resolution of this matter, the prehearing conference was adjourned. The prehearing conference was rescheduled and held on July 29, 2002, during which the issues were isolated and a hearing scheduled for January 27and 28, 2003 at the OAL. On January 27, 2003, the parties appeared and settlement discussions were held. Due to a probable settlement of this matter, the hearing was adjourned. Since the settlement agreement was not forthcoming, the matter was rescheduled for hearing on July 8, 2003 at the OAL. As the result of settlement conferences held between the parties on that date, a settlement was reached and the hearing was not held.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement and Board Resolution, indicating the terms of settlement.

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

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

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

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

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

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

July 9, 2003
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7-11-03
DATE

M. Kathleen Duncan/CS

Mailed to Parties:

JUL 14 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

CHASAN, LEYNER, BARISO & LAMPARELLO, P.C.
300 HARMON MEADOW BOULEVARD
SECAUCUS, NEW JERSEY 07094-3621
201-348-6000
ATTORNEYS FOR Respondent, Clifton Board of Education
08550-0001

NA o/b/o JA

Plaintiff(s).

vs.

BOARD OF EDUCATION
CITY OF CLIFTON

Respondent(s).

BEFORE THE COMMISSIONER
OF EDUCATION
DOCKET NO.: 01598-02N

AGENCY REFERENCE NO.: 487-12/01

Civil Action

STIPULATION OF SETTLEMENT

The matter and things in controversy having been discussed by and between the parties, and the parties having agreed as follows:

It is on this 8 day of July, 2003, stipulated by and between the parties as follows:

1. Petitioner agrees to pay the sum of $4,000.00, which sum Respondent agrees to accept in full settlement of its counterclaim herein.

2. The sum aforesaid shall be paid for by Respondent to Karen Perkins, Business Administrator, Clifton Board of Education, 745 Clifton Avenue, Clifton, N.J. 07111 in the following manner:

(a) 30 equal monthly payments beginning with the month of ~~March~~ August, 2003;

(b) All payments to be due on the first of each month;

NA

(c) In the event Petitioner fails to pay in accordance with the terms set forth in this Stipulation then, and in that event, Respondent shall be entitled to obtain the entry of a judgment against Petitioner, Neil Angelino, ex parte in the sum of $4,000.00 (giving ~~Respondent~~ Petitioner and credit for any sum actually paid pursuant to the terms of this Stipulation) along with interest at the maximum rate allowable by law, retroactive to ~~March~~ August 1, 2003 on any unpaid amount plus reasonable attorney fees and costs of suit incurred in obtaining this Stipulation and executing any judgment which may be obtained in accordance with this sub-paragraph;

3. In the event of default of the aforesaid, Respondent shall be entitled to obtain the entry of judgment upon ex parte application with supporting Certification and with notice to the Petitioner, Neil Angelino, only in the form of the application addressed to Neil Angelino, ~~127 East 6th Street~~ 14 Vasser Rd. Newfoundland NJ 07435, ~~Clifton~~, ~~N.J. 07011~~, by First Class Mail, postage prepaid.

4. All claims / counterclaims are hereby withdrawn and dismissed.

We hereby understand the terms of this Agreement and consent and agree to the terms as described herein.

Neil Angelino
Dated: 7/8/03

Marie L. Hakim
Marie Hakim, President
Clifton Board of Education
Dated: 2/12/03

Anthony V. DeLa
Attorney for Clifton Board of Education
2h 7/8/03

BOARD OF EDUCATION
CLIFTON, NEW JERSEY 07013
RESOLUTION #2/12/03 - C

APPROVAL TO SETTLE PENDING APPEAL
"NA ON BEHALF OF JA VS. THE CLIFTON BOARD OF EDUCATION"

WHEREAS, the Clifton Board of Education has determined that it is in their best interest to settle the pending appeal "NA on Behalf of JA vs. the Clifton Board of Education";

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education agrees to the terms of settlement as follows:

1.) Petitioner agrees to pay the sum of four thousand dollars ($4,000.00), which sum the respondent agrees to accept in full settlement of its counter-claim.

2.) The aforesaid sum shall be paid by respondent to our Business Administrator in thirty (30) equal monthly payments beginning with the month of March, 2003. All payments are due on the first of each month. In the event that the petitioner fails to pay in accordance with this agreement then the respondent (Board) shall be entitled to obtain the entry of a judgement in the Superior Court of New Jersey against the petitioner in the sum of four thousand dollars ($4,000.00), giving the petitioner credit for any sum actually paid along with interest at the maximum rate allowable by law, retroactive to March 1, 2003 on any unpaid amount, plus all reasonable attorney's fees in the course of the suit incurred in obtaining this settlement agreement and executing any civil judgement which may be obtained.

Introduced by John M. Traier

Second by James A. Leeshock

DATE: February 12, 2003

VOTE: YES: Bernstein,Demikoff,Hakim,Kolakowsky,Kolodziej,Leeshock,Smith & Traier
ABSENT: Kurnath

ATTEST:

Karen L. Pinkus
Secretary/Business Administrator

PRESIDENT Marie L. Hakim

OAL DKT. NO. EDU 1598-02
AGENCY DKT. NO. 487-12/01

N.A., on behalf of minor child, J.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/14/03

Date of Mailing: 8/15/03

479-03

#479-03

MARK STEINBRICK,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL FOR FAILURE TO PROSECUTE
OAL DKT. NO. EDU 4773-01
AGENCY DKT. NO. 315-8/01

MARK STEINBRICK,

Petitioners,

v.

BOARD OF EDUCATION OF SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Rosenberg, attorneys)

Gregory W. Vella, Esq., for respondent (Tucci and Collins, attorneys)

Record Closed: July 10, 2003 Decided: July 10, 2003

BEFORE **STEVEN C. REBACK,** ALJ:

This is an appeal by the petitioner from the allegation that the respondent school district's decision not to renew his employment for the 2001 school year was based upon arbitrary, capricious and unreasonable grounds. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52: 14B-1 to -15 and *N.J.S.A.* 52:14F-1 to –13, on August 15, 2001. The case was scheduled before me for a telephone prehearing conference to be conducted on November 16, 2001. The matter was adjourned in advance at the request of counsel. My chambers was advised by counsel for Mr. Steinbrick that he had spoken to counsel for the district and a settlement of the parties' issues was arrived at and

would be submitted to my office for review and for an issuance of a decision approving it. In the alternative, it was my understanding that Mr. Hunter suggested his desire might be to withdraw the appeal. To date, I have never heard from either party again nor have I received any documents in regard to this case.

Accordingly, it is **ORDERED** that the above-entitled appeal be and is hereby **DISMISSED** with prejudice for failure to prosecute.

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

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

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

7/10/03
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/11/03
DATE

Mailed to Parties:

JUL 16 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 4773-01
AGENCY DKT. NO. 315-8/01

MARK STEINBRICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs that this matter is properly dismissed for failure to prosecute. Accordingly, the Initial Decision of the Administrative Law Judge is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/15/03

Date of Mailing: 8/18/03

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

480-03

#480-03

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND THE BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

August 15, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
PARTIAL SETTLEMENT
OAL DKT. No. EDU 5987-02
AGENCY DKT. NO. 184-6/02

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND THE BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,

Respondent.

Thomas O. Johnston, Esq., for petitioner
(Porzio, Bromberg & Newman, attorneys)

Kathleen Asher, Deputy Attorney General, for New Jersey State Department of Education, respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Kevin B. Riordan, Esq., for Point Pleasant Beach Board of Education, respondent (Berry, Sahradnik, Kotzas, Riordan & Benson, attorneys)

Arla Cahill, Esq., for Summit Board of Education, respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: June 28, 2003 Decided: July 7, 2003

BEFORE **STEPHEN G. WEISS,** ALJ:

This matter was transmitted to the Office of Administrative Law by the New Jersey Department of Education on July 26, 2002 as a contested case and concerns the issue of which Board of Education (petitioner Springfield Board or respondents Point Pleasant Beach Board and/or Summit Board) is responsible for the payment of tuition for two children who petitioner claimed were not domiciled in Springfield during the 1999-2000 school year but, instead, were the responsibility of either Point Pleasant Beach or Summit. Following the filing of the petition, answers and crossclaims were filed by the respondents and the matter was scheduled for hearing in April 2003. Those scheduled dates were adjourned when a motion was filed by the Springfield Board for summary decision.

Shortly thereafter, a Stipulation of Dismissal was entered into between the Springfield Board and the Summit Board whereby it was agreed any claims between those two parties would be dismissed but without prejudice to the claims asserted by the petitioner against the remaining respondents, the Department of Education and the Point Pleasant Beach Board.

Accordingly, having reviewed the Stipulation of Settlement which is attached hereto I **FIND** as follows:

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

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

Therefore, I **ORDER** that the Springfield Board and the Summit Board comply with the terms of the settlement and that the proceedings between those two parties be and are hereby **CONCLUDED**. However, the issuance of this partial initial decision settlement shall not interfere with the continued processing of the claims between the remaining parties.

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

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

July 7, 2003
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

7-10-03
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 11 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

\mvh

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962-1997
Attorneys for Petitioner Springfield Board of Education

SPRINGFIELD BOARD OF EDUCATION, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, POINT PLEASANT BEACH BOARD OF EDUCATION and SUMMIT BOARD OF EDUCATION, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW Agency Dkt. No. 184-6/02 OAL Dkt No. EDU 5987-02 **STIPULATION OF DISMISSAL WITHOUT PREJUDICE BETWEEN PETITIONER SPRINGFIELD BOARD OF EDUCATION AND RESPONDENT SUMMIT BOARD OF EDUCATION**

It is hereby stipulated and agreed by and between petitioner, Springfield Board of Education, and respondent, Summit Board of Education, that all claims asserted herein between and against the Springfield Board of Education and Summit Board of Education, be and hereby are dismissed without prejudice as against any claims between these respective parties and without costs in favor of or against these respective parties, and that the within Stipulation of Dismissal shall have no affect on the claims asserted herein by the Springfield Board of

Education against respondents New Jersey Department of Education and Point Pleasant Beach Board of Education.

SCHENCK, PRICE, SMITH & KING, LLP
Attorneys for Respondent
Summit Board of Education

By: _____
Arla Cahill
An Attorney of the Firm

Dated: 4/30/03

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Petitioner
Springfield Board of Education

By _____
Thomas O. Johnston
An Attorney of the Firm

Dated: 5.1.03

OAL DKT. NO. EDU 5987-02
AGENCY DKT. NO. 184-6/02

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY AND THE BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and notice of dismissal, as to respondent Summit Board of Education, transmitted by the Office of Administrative Law (OAL) have been reviewed. It is noted that this matter was characterized as a partial Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in his Initial Decision. The Commissioner determines that because no settlement terms were brought to the record and the document appended to the decision is an advisement of dismissal, this matter is more appropriately categorized as a withdrawal as to this respondent under *N.J.A.C.* 1:1-19.2. The Commissioner approves the withdrawal and, consequently the Summit Board of Education is no longer deemed a party in this case.

This matter shall proceed at the OAL with respect to the remaining parties.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/15/03
Date of Mailing: 8/18/03

481-03

#481-03

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (IN THE MATTER OF THE DISTRICT'S SUPPLEMENTAL AID APPLICATION)	:	DECISION
RESPONDENT.	:	

August 18, 2003

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

7/14/03
DATE

STEVEN C. REBACK, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/14/03
DATE

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 17 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. EDU 6197-00
AGENCY DKT. NO. 241-6/00

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION (IN THE MATTER OF THE DISTRICT'S SUPPLEMENTAL AID APPLICATION)	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs that this matter is properly dismissed for failure to prosecute.[1]

Accordingly, the Initial Decision of the Administrative Law Judge is adopted for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/18/03

Date of Mailing: 8/18/03

[1] Because this agency is a party to the present matter, had a settlement been effectuated pursuant to *N.J.A.C.* 1:1-19.1(c), it would have been deemed the final decision in this matter. *N.J.A.C.* 1:1-19.1(d).

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

482-05

#482-03

HOPE SANKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

August 18, 2003

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7572-01

Agency Dkt. No. 307-7/01

HOPE SANKER,

Petitioner,

v.

BOARD OF EDUCATION OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Respondent.

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

Rodney T. Hara, Esq., for respondent
(Fogarty and Hara, attorneys)

Record Closed: May 29, 2003 Decided: July 11, 2003

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

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on August 31, 2001 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a settlement letter, which is attached and fully incorporated herein.

I have reviewed the record and the correspondence and **FIND**:

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

July 11, 2003
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

July 16, 2003
DATE

M. Kathleen Duncan (Ca)
DEPARTMENT OF EDUCATION

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 17 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

Springstead & Maurice

Attorneys at Law

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(certified criminal trial attorney)

LAUREN E. MCGOVERN

May 29, 2003

Honorable Mumtaz Bari-Brown, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Hope Sanker v. Englewood Cliffs Board of Education
Agency Ref. No. 307-7/01, OAL Docket No. EDUOR 07572-01N

Dear Judge Bari-Brown:

The above-referenced matter has been amicably resolved by the parties. Would you please consider the matter settled and withdrawn by the petitioner.

Thank you for your attention in this regard.

Respectfully,

Alfred F. Maurice

Cc: Fogarty & Hara, Esqs. (201) 791-3432
Ms. Hope Sanker

OAL DKT. NO EDU. 7572-01
AGENCY DKT. NO. 307-7/01

HOPE SANKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, by the Administrative Law Judge in her Initial Decision. The Commissioner determines that because no settlement terms were brought to the record and the document appended to the decision is an advisement of withdrawal, this matter is more appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2. The Commissioner approves the withdrawal and, consequently, this matter is no longer deemed to be a contested matter before him and is, accordingly, dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/18/03

Date of Mailing: 8/18/03

483-03

#483-03

D.B., on behalf of minor child, J.S., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

August 18, 2003

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11227-02
Agency Dkt. No. 312-10/02

D.B. o/b/o minor child, J.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Keith O.D. Moses, Esq., for petitioner

Stephen J. Christiano, Esq., for respondent

Record Closed: July 1, 2003 Decided: July 11, 2003

BEFORE **EDITH KLINGER**, ALJ:

STATEMENT OF THE CASE

This case was transmitted to the Office of Administrative Law ("OAL") on December 31, 2002 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a Stipulation of Settlement, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

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

July 11, 2003
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

July 16, 2003
DATE

M. Kathleen Duncan (Ex)
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 17 2003
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

Stephen J. Christiano
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU-11227-02

D.B., ON BEHALF OF MINOR CHILD, J.S.,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

(1) Petitioner withdraws his petition of appeal.

(2) Respondent withdraws its counterclaim for tuition charges.

(3) J.S. shall be permitted to attend West Orange High School so long as all school residency requirements continue to be met.

(4) Petitioner shall provide respondent with a copy of the custody order for J.S. as soon as possible.

(5) Petitioner agrees to pay respondent the sum of $1,500 in full settlement of all tuition charges. Payment shall be made in five (5) monthly installments of $300. The first installment is due June 15, 2003, and the succeeding installments will be due

on the fifteenth day of each month thereafter. If petitioner defaults on any of the payments ("default" meaning failure to make a payment within 10 days of its due date), respondent shall be entitled to the entire amount of tuition for the period of J.S.'s school attendance in West Orange during the 2002-2003 year, less any payments made.

(6) This settlement is subject to approval by the Commissioner of Education. If the Commissioner rejects this settlement, any tuition payments heretofore made by petitioner shall be refunded by respondent.

(7) The parties, upon completion of the terms of this settlement, do mutually release the other party, including agents, employees, heirs, executors, personal representatives and assigns, from all claims, demands, damages, causes of action or suits which could have been made, have been made or might have been made with respect to the events giving rise to this action.

(8) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated:

Derrick Bishop, Petitioner

Dated:

Keith O.D. Moses,
Attorney for Petitioner

BOARD OF EDUCATION OF THE
TOWNSHIP OF WEST ORANGE

By: Debbie Haus 6/26/03
President

ATTEST:

Mark A. Young 6/26/03
Secretary

OAL DKT. NO. EDU 11227-02
AGENCY DKT. NO. 312-10/02

D.B., on behalf of minor child, J.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon review, the Commissioner approves the settlement terms and adopts the Settlement Agreement as the final decision in this matter. In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement presented to the Commissioner for his review prior to receiving approval from the Commissioner.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/18/03

Date of Mailing: 8/19/03

484-03

484 -03

STUDENTS – NONRESIDENT TUITION

SUMMARY OF COMMISSIONER'S DECISION

A.K., on behalf of minor child, R.K. v. Robert E. Smith, Superintendent of Schools and the Board of Education of the Rumson-Fair Haven School District, Monmouth County

Petitioning parent challenged the Board's refusal to accept his daughter as a nonresident tuition student.

The matter was dismissed as moot.

August 19, 2003

A.K., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT E. SMITH, SUPERINTENDENT OF SCHOOLS AND THE BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 107-03
AGENCY DKT. NO. 348-11/02

A.K. obo R.K.,

Petitioners,

v.

ROBERT E. SMITH, SUPERINTENDENT OF SCHOOLS, & THE RUMSON-FAIR HAVEN REGIONAL BOARD OF EDUCATION,

Respondents.

A.K., Esq., father of **R.K.**, for petitioners pro se

Martin M. Barger, Esq., for respondents (Reussille, Mausner, Carotenuto, Barger & Steel, attorneys)

Record closed: July 9, 2003 Decided: July 17, 2003

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

STATEMENT OF THE CASE

Petitioner R.K. resides in the district served by the Red Bank Regional (RBR) High School, from which she has now graduated. While a senior in RBR High School during the 2002-03 school year, R.K. applied for admission as a nonresident tuition-paying student to

Rumson-Fair Haven Regional (R-FHR) High School and respondent Robert E. Smith, Ed.D., the R-FHR superintendent of schools, denied the application. Petitioners alleged that the denial of the application violated the R-FHR Board of Education's (BOE's) criteria for admission of such applicants and they demanded orders reversing the denial and requiring respondents to provide a written, detailed decision on the application. By March 2003 R.K. had completed requirements for graduation from RBR High School and she entered a college. In responses to discovery demands, respondents described the policy on applications for admission by nonresident students and explained the decision on R.K.'s application. Given R.K.'s graduation, respondents (who deny any wrongful conduct) move for an order dismissing the petition and its claims as moot. Petitioners move for an order allowing an amended petition and for an order allowing additional discovery.

PROCEDURAL HISTORY
AND
FINDINGS OF FACT

The facts and procedural history are interrelated and are set forth together.

Petitioners reside in Little Silver, which is in the district served by RBR High School.

During the 2001-02 school year R.K. was a junior in RBR High School. Two of R.K.'s eight courses were honors courses: in Pre-Calculus Honors she received a final grade of "79" and in Spanish 4 Honors she received a final grade of "86." In A.K.'s four non-honors courses, she received grades in the "80s"; in Family Life II she received a "92"; and in Band Percussion she received a "99." P-2.

Petitioners allege that, during the 2002-03 school year when R.K. was a senior in RBR High School, she had "conflicts of a personal nature" in her school that distracted her from her academic work and "threatened to cause a motivational decline in [her] studies and academic goals." P-1.

R-FHR High School considers applications from nonresidents to be tuition-paying

students and the R-FHR BOE's policy states that in considering such an application, the school administrator should consider factors including the student's "potential" and the school's "capacity" so as "not to incur any additional expense." P-2.

In October 2002, A.K. (who is an attorney) spoke with Dr. Smith about R.K. applying for admission as a nonresident tuition-paying student. A.K. alleges that Dr. Smith stated that, when space is available and a non-resident tuition-paying student appears likely to be successful in R-FHR High School, subject to the discretion of the R-FHR BOE, an applicant for admission to the high school may be accepted. A.K. represented that R.K. was an "honors student" at RBR High School. A.K. alleges that Dr. Smith stated that R-FHR High School staff would communicate with RBR High School staff relative to R.K. and that he "expressed confidence that the [R-FHR] guidance department would be able to structure a program for R.K. that would accomplish her goal of high school graduation." P-1. A.K. alleges that Dr. Smith stated that he had authority to accept R.K. (before the BOE could act on the application) and that R.K. could begin classes at R-FHR High School as early as Wednesday, November 6, 2002. P-1.

On October 22, 2002, R.K. submitted her application and on October 31, 2002, Dr. Smith interviewed R.K. Dr. Smith then notified A.K. that A.K.'s RBR High School program was "light" and there may be difficulties in preparing a program at R-FHR High School that meshed with A.K.'s RBR High School program. P-2. Dr. Smith discussed the application with Deborah Connolly, R-FHR High School's supervisor of guidance, who held the opinion that R.K.'s RBR High School courses "could not be duplicated" by R-FHR High School. P-2. Having obtained more information about R.K.'s academic history, Dr. Smith was concerned about several factors: R.K. would need extra service from the R-FHR High School staff to overcome her academic deficit; there would be difficulty meshing A.K.'s RBR High School program with a program at R-FHR High School; and A.K.'s application was made when she was already well into her senior year.

On November 1, 2002, Dr. Smith telephoned A.K. and notified him that he may have been "overly enthusiastic" in first discussing the matter with him and that, given the above-described circumstances, he had denied the application. P-2. A.K. has alleged that, during the November 1, 2002, telephone conversation, Dr. Smith also stated that "extra help" would be

needed for R.K. to "catch up" with the R-FHR High School program, which would place an "unreasonable burden" on R-FHR High School. P-1. A.K. requested that Dr. Smith reconsider, but Dr. Smith stated that his decision was final.

On November 6, 2002, the petition was filed with the Department of Education. N.J.S.A. 18A:6-9. (The petition incorrectly identified Dr. Smith as William E. Smith.) Petitioners contended that respondents' denial was arbitrary, capricious and unreasonable, and that it violated R.K.'s right to a thorough and efficient education. P-1. R.K. is Asian-American and petitioners also wrote that the denial of the application "raises the question of whether there may be some hidden racial discrimination at work." P-1. Petitioners demanded an order requiring that respondents reconsider the application, writing:

> such reconsideration [should] include a rational, detailed, and written decision based on a sufficiently thorough analysis of R.K.'s educational, academic, intellectual and personal qualifications, and adequate pedagogical consultation with [RBR High School] for the purpose of determining whether R.K. is capable of succeeding in a transfer to [R-FHR High School] and accomplishing her goal of high school graduation this year.
>
> [P-1.]

On November 7, 2002, respondents' answer and defenses were filed with the Department.

On November 14, 2002, the Commissioner issued a letter denying petitioners' motion for emergent relief.

The Department transmitted the contested case to the Office of Administrative Law, where it was filed on January 15, 2003. N.J.S.A. 52:14B-2(b). On February 24, 2003, I issued a letter scheduling discovery, etc.

By February or March 2003 R.K. had completed the requirements for her high school degree from RBR High School and entered college. However, petitioners did not disclose these circumstances until months later (as detailed below).

In response to discovery demands, respondents provided petitioners with a description of the factors on which respondents rely in acting on applications for nonresident tuition-paying students, as well as copies of records related to R.K.'s application and the denial. P-2.

On June 2, 2003, petitioners filed a motion for orders relative to discovery and a proposed amended petition. Petitioners submitted copies of their discovery demands and the respondents' responses, including answers to interrogatories and copies of documents. Petitioners seek an order allowing additional discovery, e.g., respondents' "prior record of adjudicating applications of non-resident applicants, comparative degree of burdensomeness on the teaching staff of accepting students after the start of the school year, and regarding the school district's non-discrimination policy" and "all Stringed Instrument Ensemble courses" offered at R-FHR High School. P-2.

In the proposed amended petition, petitioners allege that respondents willfully disregarded their policies relative to applications for admission by non-resident students; they contend that the denial of the application was arbitrary, capricious and discriminatory; and they allege that the denial of the application harmed R.K.'s educational career and record, harmed her ability to gain admission into the school of her choice, harmed her self-esteem, and constituted violation of her due process and constitutional rights. P-3. The proposed amended petition demands compensatory damages of $50,000 and punitive damages of $150,000. P-3. (Petitioners did not file a motion for an order allowing the proposed amended petition, but I am treating their submission as such a motion. See N.J.A.C. 1:1-1.3; R. 4:9-1.)

On June 11, 2003, I conferred with A.K. and respondents' attorney. A.K. stated that by February or March 2003 R.K. had completed her requirements for a high school degree from RBR High School and that she had entered a college. Upon learning of R.K.'s circumstances, respondents' attorney represented that he would file a motion for summary decision, dismissing petitioners' claims as moot. I stated that I would defer any decision on petitioners' motion relative to discovery, etc., until I had decided respondents' anticipated motion.

On June 24, 2003, respondents filed their papers in support of their motion to dismiss and in opposition to petitioners' motion for an order allowing the amended petition.

On July 9, 2003, petitioners submitted a letter memorandum in opposition to respondents' motion.

Summary of Facts

R.K. resides in the district served by RBR High School, from which she has now graduated. During the 2001-02 school year, when R.K. was a junior in RBR High School, two of her eight courses were honors courses. In the honors courses she received a "79" and an "86," and in most of her other courses her grades were acceptable, but not very high. Well into the 2002-03 school year, when R.K. was a senior, she applied for admission to R-FHR High School. The R-FHR policy on applications for admission of nonresident tuition-paying students provides that the chief school administrator should consider factors including the student's "potential" and the school's "capacity" so as "not to incur any additional expense." P-2. A.K. represented to the R-FHR superintendent that R.K. was an "honors" student and the R-FHR superintendent was optimistic about R.K.'s chances for admission. However, after obtaining more information about R.K.'s academic history, the R-FHR superintendent was concerned about several factors: R.K. would need extra service from the R-FHR High School staff to overcome her academic deficit; there would be difficulty meshing A.K.'s RBR High School program with a program at R-FHR High School; and A.K.'s application was made when she was already well into her senior year. Consequently, the R-FHR superintendent notified petitioners that he had denied the application. In this litigation, respondents have provided to petitioners information and copies of documents detailing the relevant factors and process of decision-making on R.K.'s application and reasons for the denial. R.K. has received her high school degree from RBR High School and has entered college.

CONCLUSIONS OF LAW

New Jersey's constitution requires that the Legislature provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the

children in this state between the ages of five an eighteen years. N.J. Const. art. VIII, § 4, ¶ 1. The Legislature complies with this requirement by providing for school districts, including regional school districts operated by boards of education, to provide instruction to school-age children residing within their districts. See N.J.S.A. 18A:13-1 to -81.

R.K. resides within the RBR High School district and, consistent with the above-cited laws, RBR High School has provided her with instruction. Petitioners have cited no authority requiring the R-FHR's BOE to provide instruction to R.K., who is not a resident of its district. However, when a public school system accepts applications from school-age children to enter its school as nonresident tuition-paying students, in making a decision on the application fundamental fairness requires that it use reasonable factors and that it notify the applicant of the reasons for a denial of an application. J.A. v. Board of Educ. for S. Orange, 318 N.J. Super. 512, 525-26 (App. Div. 1999).

The BOE's factors for decisions on applications relate reasonably to both the potential for success of the applicant and to the potential burden on the school system. The factors are realistic and equitable. Following A.K.'s representations about R.K.'s academic achievement, when Dr. Smith had more complete information about her academic history, he determined that she would need "extra help" to "catch up" with the R-FHR High School program, which would place an "unreasonable burden" on R-FHR High School. P-1; P-2. Petitioners have not shown that respondents' denial of R.K.'s application was arbitrary, capricious or unreasonable or that it resulted from invidious discrimination. Dr. Smith spoke with A.K. about the denial and, by way of the discovery process in this case, respondents provided additional information and copies of relevant documents. Respondents thereby provided a reasonably detailed explanation of the factors and process involved in the decision on R.K.'s application. Petitioners have submitted no evidence creating an issue necessitating a trial-type hearing.

R.K. has graduated from her high school and entered college, so petitioners' claims, which are based on her application for admission to the respondents' high school, are also dismissible as moot. Oxfeld v. New Jersey State Bd. of Educ., 68 N.J. 301, 303-04 (1975). A.K. has provided no reasonable basis for his speculation that the denial "raises the question of whether there may be some hidden racial discrimination at work." P-1. That is, petitioners have

submitted no evidence showing, e.g., some matter of compelling public importance capable of repetition such that this case should be decided despite its mootness. See In re J.I.S. Landfill, 110 N.J. 101, 104-05 (1988) (citing Matter of Conroy, 98 N.J. 321, 342 (1985); Guttenberg Sav. & Loan Ass'n v. Rivera, 85 N.J. 617, 622-23 (1981); Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 22 (1973)).

Relative to petitioners' motion for an order compelling additional responses to discovery demands, etc., respondents have already reasonably complied with petitioners' initial discovery demands. Petitioners' proposed discovery requests information relating to, e.g., respondents' "prior record of adjudicating applications of non-resident applicants, comparative degree of burdensomeness on the teaching staff of accepting students after the start of the school year, and regarding the school district's non-discrimination policy" and relating to "all Stringed Instrument Ensemble courses" offered at R-FHR High School, etc. P-2. An order compelling respondents to expend time and effort complying with such discovery requests would waste public funds.

Relative to petitioners' proposed amended petition, the proposed claims for alleged damages cannot be granted in this administrative education case. N.J.S.A. 18A:6-9; see J.A. v. Board of Educ. for S. Orange, supra, 318 N.J. Super. at 526.

The motion for summary decision is an efficient means of resolving a contested case, available where there is no genuine issue of material fact that necessitates a trial-type hearing. The movant bears the burden of persuasion that there is no such genuine issue of material fact and, in making such a determination, reasonable inferences are drawn in favor of the objector. N.J.A.C. 1:1-12.5; R. 4:46-1; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-40 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). Even where a statute calls for a hearing, where the objector submits no evidence to demonstrate such a genuine issue of material fact, the motion procedure constitutes the hearing and no trial-type hearing is necessary. South Brunswick Asphalt v. Department of Envtl. Protection, No. A-693-98T5 (App. Div. April 10, 2000) (citing Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996)), certif. denied, 165 N.J. 487 (2000).

Petitioners have shown no basis in law or in fact for their petition and/or claims or for their proposed amended petition. There is no need for a trial-type hearing here. The BOE's motion must be granted. Petitioners' motions must be denied.

ORDERS

I **GRANT** the respondents' motion and I **ORDER** the petition **DISMISSED WITH PREJUDICE**.

I **DENY** the petitioners' motion for an order allowing amendment of the petition and for orders requiring compliance with petitioners' discovery requests.

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

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

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

July 17, 2003
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 17, 2003
DATE

Mailed to Parties:

JUL 23 2003
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

EXHIBITS

For Petitioners:

P-1 Petition for Emergent Relief, certified by A.K., November 5, 2002

P-2 Papers in support of A.K.'s motion to compel more specific answers to interrogatories; interrogatories and answers; answer to request for production of documents; Dr. Smith's notes regarding application for admission of R.K.; letter from Deborah Connolly; Nonresident Policy; Non-resident Student Tuition Contract (form); R.K.'s Application for Admission; R.K.'s academic records; petitioners' proposed second set of interrogatories, etc.

P-3 Proposed "First Amended Petition"

For Respondents:

None

OAL DKT. NO. EDU 107-03
AGENCY DKT. NO. 348-11/02

A.K., on behalf of minor child, R.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT E. SMITH, SUPERINTENDENT OF SCHOOLS AND THE BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioner excepts, *inter alia*, to the Administrative Law Judge's (ALJ) determination that this matter is moot. Rather, he argues, "a teenager's due process rights with respect to applying to other school districts which have chosen to accept non-resident applications, is a matter of sufficient public importance to fall under the doctrine of exceptions to mootness." (Petitioner's Exceptions at 17)

Upon his full and independent review, the Commissioner finds and determines, as did the ALJ, that inasmuch as R.K. graduated from high school in February or March 2003 and now attends college, the debate concerning her admission to Rumson-Fair Haven Regional High School as a nonresident, tuition-paying student is academic and moot. Additionally, contrary to

the advancement of petitioner, this matter presents no issue of significant public importance or other compelling reason warranting deviation from the general rule against adjudicating moot issues. There being no relief which the Commissioner can grant petitioner herein, the Board's motion for summary decision on the basis of mootness is appropriately granted.[1] This being the case, the Commissioner finds it unnecessary to reach to the discussion of the ALJ or the arguments of the parties which go to the underlying merits of this case.

Accordingly, the Initial Decision of the OAL, as modified above, is adopted. The instant Petition of Appeal is hereby dismissed as moot.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: August 19, 2003

[1] The Commissioner additionally concurs with the ALJ that petitioner's motion to amend his petition to include a claim for damages must be dismissed for lack of jurisdiction.

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

485-03

485-03S

NANCY WILTBANK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 19, 2003

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

July 21, 2003
DATE

Ana C. Viscomi
Ana C. Viscomi, ALJ

Receipt Acknowledged:

July 23, 2003
DATE

M. Kathleen Duncan (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 25 2003
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jck

EXHIBITS

Jointly Submitted

J-1 Stipulation of Dismissal and Settlement Agreement

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

NANCY WILTBANK, Petitioner, v BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY, Respondent.	:BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDUOR 06672-01S **STIPULATION OF DISMISSAL AND SETTLEMENT AGREEMENT**

This matter having come before this forum on the petition of Nancy Wiltbank, Richard A. Friedman, Esq., appearing, and a response having been submitted by the Deal Board of Education, Honora O'Brien Kilgallen, Esq., appearing, and the school nurse, Marianne Baumann having intervened in the matter, Stephen B. Hunter, Esq., appearing, and the parties having agreed to amicably resolve the issues in dispute, it is hereby stipulated and agreed as follows:

1. That the petitioner, Nancy Wiltbank, shall dismiss the claims asserted in the petition of appeal against the respondent, Deal Board of Education, in consideration of a total settlement amount of $7,500.00, which shall be paid no later than

4a

September 30, 2003; and

2. That the dismissal of the claims asserted in the petition of appeal applies only to Ms. Wiltbank's and Ms. Baumann's present assignments of health and physical education classes, and that Ms. Wiltbank reserves and retains her tenure and seniority rights, so that if additional physical education or health classes become available, or additional physical education or health classes are assigned to any other teaching staff member or to Marianne Baumann, Ms. Wiltbank reserves the right to assert tenure and seniority claims to any such classes, positions, or assignments; and

3. That the terms of this settlement shall be held in the strictest of confidence and that no party to this action shall reveal the terms of this Settlement Agreement to any third parties, except for representatives of the respondent, Deal Board of Education or of the New Jersey Education Association, either verbally or in written form, except to the extent required by law; and

4. That the fully executed original of this Stipulation of Dismissal and Settlement Agreement shall be submitted to the Office of Administrative Law and that each of the parties shall receive and obtain one fully executed copy of this document for their respective files.

KILGALLEN & KILGALLEN, LLP

By: _____
Honora O'Brien Kilgallen, Esq.
Attorney for Respondent

Dated: 6/18/03

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

By: _____
Richard A. Friedman, Esq.
Attorney for Petitioner

Dated: 6/13/03

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

KLAUSNER & HUNTER

By: Stephen B. Hunter
Stephen B. Hunter, Esq.
Attorney for Mary Ann Baumann

Dated: 6/20/03

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

OAL DKT. NO. EDU 6672-01
AGENCY DKT. NO. 384-9/01

NANCY WILTBANK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: August 20, 2003

* The Commissioner is, however, compelled to comment on Term 3 of this agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions and the underlying proceedings are a matter of public record.

486-03

486-03SEC

IN THE MATTER OF JUAN SANTIAGO,	:	
PATERSON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION
	:	

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated *N.J.S.A.* 18A:12-24.1(j) when dealing with personnel or confidentiality issues (writing a letter to the superintendent requesting the demotion of the assistant superintendent and copying that person's subordinates among other parties). The Commission recommended the penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

August 19,2003

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C01-03**
JUAN SANTIAGO	:	
PATERSON BOARD OF EDUCATION	:	
PASSAIC COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

The above-captioned matter arises from a complaint filed by Paterson Board of Education (Board) member Joseph Atallo against Board member Juan Santiago alleging that Mr. Santiago violated N.J.S.A. 18A:12-24.1(c), (d) and (j) of the Code of Ethics for School Board Members of the School Ethics Act when he wrote a letter to the superintendent of the Paterson school district requesting that assistant superintendent, Dr. John Sico be demoted from his position and copied Dr. Sico's subordinates.[1]

Mr. Santiago filed an answer to the complaint on February 25, 2003 admitting that he did write the above-referenced letter. Mr. Santiago denies that his actions were in violation of any provision of the Code of Ethics.

The Commission invited the parties to its March 25, 2003 meeting to present witnesses and testimony to aid in the Commission's investigation. Dr. Atallo appeared *pro se.* Mr. Santiago appeared and was represented by counsel, Gregory Johnson, Esquire. After hearing testimony, the Commission voted at its public meeting to find probable cause to credit the allegation that Mr. Santiago's conduct was in violation of the Code of Ethics section N.J.S.A. 18A:12-24.1(j). The Commission found no probable cause to credit the allegation that Mr. Santiago violated N.J.S.A. 18A12-24.1(c) and (d) of the Code of Ethics

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, the Commission advised the parties that it would decide the matter on the basis of written submissions pursuant to N.J.A.C. 6A:28-1.14(b). Mr. Santiago was invited to provide a written submission to the Commission within 30 days of the date of the probable cause decision, May 14, 2003, and set forth why the Commission should not find Mr. Santiago in violation of N.J.S.A. 18A:12-24.1(j) for the above stated action. He was also told that his written submission should include the respondent's position on an appropriate sanction should the Commission determine that the Act was violated.

[1] Although Dr. Atallo did not cite these specific sections, he quoted the language from these provisions.

The Commission did not receive a response from Mr. Santiago. It discussed this matter at its meeting of June 24, 2003 and voted to find Mr. Santiago in violation of N.J.S.A. 18A:12-24.1(j) and recommended a penalty of reprimand.

FACTS

Based on the pleadings, documents and testimony, the Commission found the following facts to be undisputed.

Mr. Santiago became a member of the Paterson Board of Education (Board) in April 2002. At all times relevant to this complaint, he was serving as Board president.

On May 1, 2002, the Panther Academy held an induction ceremony for its new students at the Passaic County Community College (PCCC).[2] The ceremony was planned and organized by Dr. Sico. Several students in the district were honored at the ceremony, including eleven students from the district's school no. 11. Board members Dr. Anthony Davis, Dr. Jonathan Hodges and Dr. Joseph Atallo were present. Mayoral candidate William Kline also attended the ceremony. The superintendent of schools, the building principals from school no. 11 and the other Board members were not officially notified of the event. After the ceremony, a reception was held in the PCCC cafeteria where "Vote for Kline" buttons were made available.

Mr. Santiago discussed the aforementioned events with those Board members who were not formally invited to the ceremony. Mr. Santiago also met with the superintendent of schools, Dr. Edwin Duroy, to advise him that Dr. Sico had engaged in what he believed to be prohibited political activity for school employees. Dr. Duroy recommended that Mr. Santiago set forth his complaint in a letter to him.

In his letter to Dr. Duroy, dated May 3, 2002, Mr. Santiago alleged that Dr. Sico concealed the induction ceremony for new students of the Panther Academy from certain Board members for political purposes. Mr. Santiago further requested that the superintendent demote Dr. Sico from his position as assistant superintendent of schools. The letter was copied to the Board, Dr. Sico, assistant superintendents, building principals, the State Department of Education and the New Jersey School Boards Association.

ANALYSIS

The Commission found a violation to credit the allegation that Mr. Santiago's conduct, particularly in copying Dr. Sico's subordinates on his letter asking the superintendent to demote Dr. Sico, was in violation of N.J.S.A. 18A:12-24.1(j). It provides:

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

[2] The Panther Academy recruits 8th grade students of the Paterson School District and other districts to participate in math and science enrichment courses.

The Commission finds that the board president and superintendent were not properly notified and political activity occurred at the Panther Academy ceremony. Therefore, the Commission does not find any fault with the fact that Mr. Santiago wrote the letter to the chief administrative officer as he requested. Clearly, such action is what N.J.S.A. 18A:12-24.1(j) contemplates when a board member has or hears a complaint. The Commission finds that a violation of the Code of Ethics occurred; however, when, instead of writing the letter in confidence and waiting for the chief administrative officer's response to the letter, he copied it to the Board, assistant superintendents, building principals, the State Department of Education and the New Jersey School Boards Association. Building principals are school employees under Dr. Sico's supervision. Personnel matters are not supposed to be addressed publicly pursuant to N.J.S.A. 10:4-12(b). Here, Mr. Santiago did not wait for an administrative solution before notifying Dr. Sico's staff and others of his complaint. The Commission concludes that by so doing, Mr. Santiago violated N.J.S.A. 18A:12-24.1(j).

DECISION

For the foregoing reasons, the Commission concludes that Mr. Santiago acted on his complaint prior to the failure of an administrative solution in violation of N.J.S.A. 18A:12-24.1(j) of the Code of Ethics for School Board Members. Due to the conduct that precipitated Mr. Santiago's action, specifically Dr. Sico's failure to properly notify Mr. Santiago of a District-related event and the distribution of political buttons at the event, the Commission recommends that the Commissioner of Education impose a penalty of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, Mr. Santiago may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C01-03

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony presented; and

Whereas, at its meeting of June 24, 2003, the Commission found that Juan Santiago violated N.J.S.A. 18A:12-24.1(j) of the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission requested that its staff prepare a decision consistent with the aforementioned conclusion; and

Whereas, at its meeting of July 22, 2003, the Commission reviewed the draft decision and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on July 22, 2003.

Lisa James-Beavers
Executive Director

IN THE MATTER OF JUAN SANTIAGO,	:	
PATERSON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Juan Santiago, member of the Paterson Board of Education, violated *N.J.S.A.* 18A:12-24.1(j), set forth in the Code of Ethics for School Board Members of the School Ethics Act, and recommending a penalty of reprimand have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

Comments filed by counsel on behalf of respondent state that he does not disagree with the Commission's decision. He appreciates that, notwithstanding it is common practice for District board members to copy parties on letters sent to the superintendent, particularly with respect to personnel or confidentiality issues, this practice must cease. Respondent understands his action was improper and agrees to accept a letter of reprimand for such action.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act **is not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to

reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record and full consideration of respondent's comments, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violation found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS HEREBY ORDERED that Juan Santiago be reprimanded as a school official found to have violated the School Ethics Act.*

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: August 20, 2003

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

494-05

494-03 SEC

IN THE MATTER OF PAUL	:	
BLOCKER, LAWNSIDE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, CAMDEN COUNTY.	:	DECISION
_____	:	

August 21,2003

SCHOOL ETICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
PAUL BLOCKER	:	
Lawnside Board of Education	:	**SEC Docket No.: T03-03**
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Paul Blocker was appointed to a term on the Lawnside Board of Education in September 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Blocker failed to provide any response to the Order to Show Cause and further failed to attend a June training session; and

/

WHEREAS, the Commission notified Respondent, by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent did not respond to this letter, nor provide any reason for failing to attend the required training program for more than the one year allowed by law; and

WHEREAS, the Commission finds that this failure to attend board member training from September 2001 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds removal from the Board to be the appropriate penalty for failure to attend training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Blocker violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove him from the Board of Education herewith.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

LJB/PSC/m:ethics/trainingresT03-03

AGENCY DKT. NO. 261-7/03

IN THE MATTER OF PAUL	:	
BLOCKER, LAWNSIDE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, CAMDEN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member did not reply to the Order to Show Cause and further failed to attend a June training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be removed from the Board and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the filing of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2003

Date of Mailing: August 22, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

495-03

495-03 SEC

IN THE MATTER OF LOUIS SCALDINO, :

LINDEN BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

UNION COUNTY. : DECISION

:

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
LOUIS SCALDINO	:	
Linden Board of Education	:	**SEC Docket No.: T28-03**
Union County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Louis Scaldino was elected to serve a three-year term on the Linden Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Scaldino responded and advised Commission staff on July 17, 2003, that he was registered for the October 2003 training session; and

WHEREAS, the Commission notified Respondent by letter dated July 15, 2003, that it would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and

could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent provided no reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Scaldino fails to attend training by the end of **October 2003**, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Scaldino violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Garbarini

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers

Lisa James-Beavers, Executive Director

(LJB/PSC/m:ethicstrainingresT28-03.doc)

AGENCY DKT. NO. 259-7/03

IN THE MATTER OF LOUIS SCALDINO,	:	
LINDEN BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
UNION COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member advised that he was registered for the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to attend the October 2003 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in October 2003, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2003

Date of Mailing: August 22, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

496-05

496-03SEC

IN THE MATTER OF JAY	:	
CARTER, BRANCHVILLE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, SUSSEX COUNTY.	:	DECISION
	:	

August 21, 2003

AGENCY DKT. NO. 262-7/03

IN THE MATTER OF JAY	:	
CARTER, BRANCHVILLE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, SUSSEX COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member did not reply to the Order to Show Cause and further failed to attend a June training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be removed from the Board and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the filing of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2003

Date of Mailing: August 22, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

497-03

#497-03SEC

IN THE MATTER OF RANDIE ZIMMERMAN, :

ROCKY HILL BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

SOMERSET COUNTY. : DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board President violated *N.J.S.A.* 18A:12-24.1(e) and (g) by taking private action that compromised the Board, sending letters under her title of Board President and not acting in concert with her fellow Board members. The Commission recommended the penalty of reprimand.

Upon review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty, concurred with the Commission's recommendation and, thus, ordered respondent reprimanded as a school official found to have violated the School Ethics Act.

August 21, 2003

IN THE MATTER	:	
	:	**BEFORE THE SCHOOL**
OF	:	**ETHICS COMMISSION**
	:	
RANDIE ZIMMERMAN	:	**SEC Docket No.: C49-02**
ROCKY HILL BOARD OF EDUCATION,	:	
SOMERSET COUNTY	:	**DECISION**
	:	

PROCEDURAL HISTORY

This matter arises from a complaint alleging that Rocky Hill Township Board of Education (Board) member Randie Zimmerman violated the Code of Ethics of the School Ethics Act, N.J.S.A. 18A:12-21 et seq., when she investigated a complaint by a member of the public and drafted a letter that appeared to have the endorsement of her Board. The complaint alleged that Ms. Zimmerman took private action that may compromise the board in violation of N.J.S.A. 18A:12-24.1(e); used the schools for personal gain or for the gain of friends in violation of N.J.S.A. 18A:12-24.1(f); failed to provide accurate information in violation N.J.S.A. 18A:12-24.1(g); and failed to refer all complaints to the chief administrative officer and act on the complaints at public meetings only after the failure of an administrative solution in violation of N.J.S.A. 18A:12-24.1(j) of the Code of Ethics within the Act.

Ms. Zimmerman filed her answer to the complaint setting forth that she tried to contact the superintendent in order to address her neighbor's concerns, but her calls were not returned. It was only then that she went to the school to investigate the neighbor's concerns and eventually wrote the letter that became the subject of this complaint. She denied having violated any provision of the Code of Ethics.

The Commission discussed the case at its meeting on March 25, 2003. The parties appeared, Ms. Zimmerman with counsel. At its public meeting on that date, the Commission voted to find probable cause to credit the allegations in the complaint that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(e) and (g). The Commission found no probable cause that respondent's conduct violated N.J.S.A. 18A:12-24.1(f) or (j). The Commission found that the material facts were not in dispute and therefore agreed to accept a written submission from Ms. Zimmerman.

The Commission received a timely written submission from Ms. Zimmerman in which she denied having committed any violation of the Code of Ethics for School Board Members. However, in the event that the Commission reaches a different conclusion, she asserted that the lowest sanction of reprimand would be the appropriate penalty.

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted and testimony. The Commission found these facts to be undisputed.

At all times relevant to this complaint, complainant Ms. Regan-Seither and Ms. Zimmerman were members of the Rocky Hill Township Board of Education. Ms. Zimmerman has been a member since 1998. Since April 2001, Ms. Zimmerman has served as the president of the Board. Rocky Hill sends all of its students to the Montgomery School District.

On or about September 13, 2002, a parent of a child who is sent to the Montgomery School District and who happens to be a neighbor of Ms. Zimmerman, expressed concerns to Ms. Zimmerman regarding her ill child being placed in a kindergarten classroom that appeared to her to be a large, windowless closet. In response, Ms. Zimmerman tried to contact the superintendent, Dr. Stuart Schnur, but she was unable to reach him.

On September 18, 2002, Ms. Zimmerman personally appeared at the Village School to discuss the matter with the school principal, but the principal refused to see her without an appointment. On September 25, 2003, she informed members of the Board, without having the issue placed on the agenda, that she intended to return to the school on parents' night to see whether the parent's concerns were warranted. The Board did not discuss any specific actions that Ms. Zimmerman would undertake on the Board's behalf nor was there any motion made regarding any such action.

On September 25, 2002, at parents' night, Ms. Zimmerman was informed that one of the parents had drafted a letter to Dr. Schnur. That parent requested that the other parents who were there sign and forward copies of the letter to him. Although complainant alleged that Ms. Zimmerman had the letters at the Board meeting, Ms. Zimmerman testified that she obtained a copy of the letter on computer disk from a parent and printed it out when she went home with her own signature. In any event, she forwarded the parent's letter to Dr. Schnur with a cover letter that she drafted. The parent's letter sets forth that the classroom in question is a converted resource/storage room that has only one exit so the children have no escape route if there is a fire outside the classroom door. The letter further provided that the room has no window for sunlight or fresh air, no ventilation system and has insufficient space for classroom materials and resources. The letter goes on to suggest that Dr. Schnur placed a first year teacher in that room because she would not be able to complain about the situation without risking her job. In her cover letter, Ms. Zimmerman refers to the "substandard kindergarten classroom" and says that the room is an "obvious Fire Code Violation" because there must be two available exits to any classroom." She signed both letters as Rocky Hill

School Board President and, on the parent's letter, copied the school principal, the President of the Montgomery School Board and the Somerset County Superintendent.

In a letter dated October 7, 2002, Dr. Schnur, apparently upset with Ms. Zimmerman's letter, challenged the accuracy of the correspondence and accused her of an ethics code violation. He noted that the room was not a resource/storage room, but a classroom that had been approved by the county superintendent for music instruction in 2001-2002 and for a kindergarten classroom in 2002-2003. In the letter, he also faulted her for representing that she was acting with the knowledge and support of her Board during a conversation that he had with her while she was at the school.

Ms. Zimmerman denies having had such a conversation with Dr. Schnur and believes that this fact is material to the resolution of the case.

ANALYSIS

The Commission found probable cause that Ms. Zimmerman's conduct violated N.J.S.A. 18A:12-24.1(e), which sets forth:

> N.J.S.A. 18A:12-24.1(e) of the Code of Ethics sets forth:
>
> > I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission found sufficient evidence that Ms. Zimmerman took private action using her position as Board President to create the impression that she was representing the interests of her Board when she complained about the classroom in question. Even if the Commission discounts Dr. Schnur's assertion that Ms. Zimmerman represented to him that she was acting on behalf of her Board, there is sufficient evidence to sustain a finding that Ms. Zimmerman took private action that may compromise the Board. Ms. Zimmerman's writing of such a strongly worded letter and copying the county superintendent could have resulted in the revocation of the use of the room by the county superintendent. The letter that she provided him, referencing an "obvious fire code violation" surely could have compromised the Board and greatly damaged its relationship with the Board's receiving district. For the foregoing reasons, the Commission concludes that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(e).

Complainant next found probable cause that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(g), which provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my

fellow board members, interpret to the staff the aspirations of the community for its school.

The Commission found probable cause that Ms. Zimmerman did not provide accurate information and act in concert with her fellow board members to interpret to the staff the aspirations of the community for its school. Ms. Zimmerman does not dispute that, particularly while serving as board president, she has the duty to provide accurate information. The classroom had received approval from the Department of Education and was not a fire code violation. Yet, Ms. Zimmerman called the room substandard and "an obvious fire code violation." She further signed the letter as Board President and proceeded to copy the Montgomery Board of Education and the County Superintendent on the parent's letter, which further suggested that Dr. Schnur placed a first year teacher in that room because she could not complain about the situation without risking her job. The Commission concludes that she did not provide accurate information. Further, she did not discuss these strong allegations with her own Board or give the administration opportunity to address the concerns raised. Therefore, she did not act in concert with her fellow board members to interpret to the staff the aspirations of the community for its school. For the foregoing reasons, the Commission finds that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(g).

DECISION

For the foregoing reasons, the School Ethics Commission concludes that Ms. Zimmerman violated N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act.

The Commission, in determining the appropriate penalty, considered the fact that Ms. Zimmerman was trying to do the right thing in making inquiries on behalf of a constituent. However, by signing the negative letter of the parents as if it were her own and adding her title of Board President, she went too far and violated the Code of Ethics. The Commission recommends that the Commissioner of Education impose a penalty of reprimand.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C49-02

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof and the testimony; and

Whereas, at its meeting of June 24, 2003, the Commission found probable cause to credit the allegations that Respondent violated the School Ethics Act, N.J.S.A. 18A:12-24.1(e) and (g); and

Whereas, after considering Respondent's submission in response to the finding of probable cause, the Commission determined that Respondent violated N.J.S.A. 18A:12-24.1(e) and (g) of the Act; and

Whereas, the Commission requested that its staff prepare a decision consistent with the aforementioned conclusion; and

Whereas, the Commission has reviewed the decision and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter on July 22, 2003 and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this decision was
adopted by the School Ethics Commission
at its public meeting on July 22, 2003.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 249-7/03

IN THE MATTER OF RANDIE ZIMMERMAN, :
ROCKY HILL BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION
SOMERSET COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of reprimand, have been reviewed. Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Respondent submitted no comments.

This matter comes before the Commissioner to impose a sanction upon Respondent Randie Zimmerman, President of the Rocky Hill Board of Education, based on findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24(e) of the School Ethics Act by taking private action using her position as Board President to create the impression that she was representing the interests of her Board, and that she violated *N.J.S.A.* 18A:12-24(g) of the School Ethics Act for not providing accurate information and for not acting in concert with her fellow Board members to interpret to the staff the aspirations of the community for its school.

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the Act is **not reviewable by the Commissioner.** Only the School Ethics Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to

reviewing the sanction to be imposed following a finding of a violation by the School Ethics Commission. Therefore, this decision is restricted solely to review of the recommended penalty and its implementation.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violations it found, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/03

Date of Mailing: 8/25/03

* This decision, as the Commissioner's final determination regarding penalty in this matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

498-03

#498-03SEC

IN THE MATTER OF STEVEN NICHOLAS,	:	
HALEDON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
STEVEN NICHOLAS	:	
Haledon Board of Education	:	**SEC Docket No.: T25-03**
Passaic County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, the School Ethics Commission passed a resolution on March 23, 1999 which states in pertinent part,

> Any school board member newly elected or appointed as of April, 1999 and forward, who would have previously been exempted from attending a new board member orientation because of previous service on a board of education prior to June, 1992, is no longer exempt and must attend a new board member orientation conducted by the NJSBA;

and

WHEREAS, Respondent Steven Nicholas was elected to serve a three-term on the Haledon Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was offered in March 2003; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Nicholas responded by letters, dated June 30, 2003 and July 14, 2003, generally advising that he attended training before and thus, was "grandfathered" with regard to the training requirement and thus, asked the Commission to reconsider its demand that he be "re-trained," and asked the Commission staff to confirm his previous attendance with his board secretary or NJSBA; and

WHEREAS, in a letter dated July 15, 2003, Respondent was notified by Commission staff that he was required to produce a record of his attendance at a training session between 1992 and July 18, 2003, in order to have this matter dismissed against him, and that without such proof, this matter would be considered at the Commission's meeting on July 22, 2003, where Respondent was invited to be heard, but, that he could be found in violation of the School Ethics Act; and,

WHEREAS, the Commission was able to confirm that Respondent attended an NJSBA training conference in 1987, through representatives at the NJSBA, but was unable confirm his attendance at any training session since the inception of the School Ethics Act in 1992; and

WHEREAS, Respondent's attendance at a training session prior to June 1992 does not warrant his exemption to the training requirement, pursuant to the Commission's March 23, 1999 Resolution, and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a *per se* violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend; and

WHEREAS, the Commission finds that if Mr. Nicholas fails to attend by the end of **October 2003**, the Commission finds it appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Nicholas violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that

the Commissioner of Education suspend him until he attends training, but remove him from the Board if he fails to attend one of the October training sessions.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

ljb/psc/m:ethics/trainingresT25

AGENCY DKT. NO. 264-7/03

IN THE MATTER OF STEVEN NICHOLAS,	:	
HALEDON BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY.	:	DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member responded by letters of June 30, 2003 and July 14, 2003 asserting that he had attended training before and was, therefore, "grandfathered" with regard to the training requirement and, thus, asked the Commission to reconsider its demand that he be "re-trained," and asked the Commission staff to confirm his previous attendance with his Board secretary or the New Jersey School Boards Association (NJSBA); and

Whereas, the above-named Board member was advised by the Commission by letter of July 15, 2003, that he was required to produce a record of his attendance at a training session between 1992 and July 18, 2003, in order to have this matter dismissed against him, and that without such proof this matter would be considered at the Commission's meeting on July 22, 2003, where he was invited to be heard, but, that he could be found to be in violation of the School Ethics Act; and

Whereas, the Commission confirmed that the above-named Board member had attended an NJSBA training session in 1987, but was unable to confirm his attendance at any training session since the inception of the School Ethics Act in 1992; and

Whereas, the Commission considered the above-named Board member's reasons for failing to attend the required training program for the one year allowed and determined that his attendance at a training session prior to June 1992 does not warrant his exemption to the training requirement, pursuant to the Commission's March 23, 1999 Resolution; and

Whereas, the Commission found that the above-named Board member's failure to attend board member training from April 2002 to April 2003 constitutes a *per se* violation of *N.J.S.A.* 18A:12-33; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to attend the October 2003 session, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete the training session in October 2003, the above-named Board member shall be summarily removed from office as of that date.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/03

Date of Mailing: 8/25/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

499-03

#499-03SEC

IN THE MATTER OF MICHAEL BAILEY,:

MONROE TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, GLOUCESTER COUNTY. : DECISION

_____:

August 21, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
MICHAEL BAILEY	:	
Monroe Township Board of Education	:	**SEC Docket No.: T12-03**
Gloucester County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Micheal Bailey was elected to a term on the Monroe Township Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Bailey failed to provide any response to the Order to Show Cause and further failed to attend a June training session; and

WHEREAS, the Commission notified Respondent, by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent did not respond to this letter, nor provide any reason for failing to attend the required training program for more than the one year allowed by law; and

WHEREAS, the Commission finds that this failure to attend board member training from September 2001 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds removal from the Board to be the appropriate penalty for failure to attend training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Bailey violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove him from the Board of Education herewith.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

LJB/PSC/m:ethics/trainingresT12-03

AGENCY DKT. NO. 265-7/03

IN THE MATTER OF MICHAEL BAILEY,:

MONROE TOWNSHIP BOARD OF : COMMISSIONER OF EDUCATION

EDUCATION, GLOUCESTER COUNTY. : DECISION

_____:

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member did not reply to the Order to Show Cause and further failed to attend a June training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be removed from the Board and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the filing of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/21/03

Date of Mailing: 8/25/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

487-03

487-03 SEC

IN THE MATTER OF WILLIAM EVANS, BELLMAWR BOARD OF EDUCATION, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

August 19, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
WILLIAM EVANS	:	
Belmawr Board of Education	:	**SEC Docket No.: T05-03**
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, William Evans was elected to serve a three-year term on the Hammonton Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, he responded and advised that was unable to attend in June due to family obligations but that he would attend the October training session; and

WHEREAS, the Commission notified him by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Evans fails to attend by **October 2003,** the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Evans violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the October training session.

Dated: July 24, 2003

Paul C. Gabarini

Paul C. Gabarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers

Lisa James-Beavers, Executive Director

(psc/ljb/m: ethics/trainingresT05-03.doc)

AGENCY DKT. NO. 257-7/03

IN THE MATTER OF WILLIAM EVANS, BELLMAWR BOARD OF EDUCATION, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member advised that he was unable to attend in June due to family obligations but that he would attend the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to so attend, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete such training by October 2003, the above-named Board member shall be summarily removed from office as of the date of the October 2003 session.*

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: August 20, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

488-03

488-03SEC

IN THE MATTER OF KIM SCOTT HEINLE, TUCKERTON BOARD OF EDUCATION, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

August 19, 2003

SCHOOL ETICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
KIM SCOTT HEINLE	:	
Tuckerton Board of Education	:	**SEC Docket No.: T23-03**
Ocean County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Kim Scott Heinle was elected to serve a three- term on the Tuckerton Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why he had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Mr. Heinle responded by letter advising that he was unable to attend in June due to business and family obligations but that he would attend the October training session; and

WHEREAS, the Commission notified him by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered Respondent's reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds suspension to be the appropriate penalty for failure to attend through June; and

WHEREAS, the Commission finds that if Mr. Heinle fails to attend by **October 2003**, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Heinle violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends, but remove him from the board if he fails to attend by the October training session.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

psc/ljb/m:ethics/trainingresT23

AGENCY DKT. NO. 256-7/03

IN THE MATTER OF KIM SCOTT HEINLE, TUCKERTON BOARD OF EDUCATION, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why he had not attended a training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member advised that he was unable to attend in June due to business and family obligations but that he would attend the October 2003 training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be suspended from the Board until he attends the October 2003 session and removed if he fails to so attend, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing of this decision and shall remain suspended pending completion of the requisite training, and, in the event he fails to complete such training by October 2003, the above-named Board member shall be summarily removed from office as of the date of the October 2003 session.*

COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2003

Date of Mailing: august 20, 2003

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

489-03

#489-03SEC

IN THE MATTER OF LAURETTA	:	
BRUNETT, AUDUBON PARK	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION,	:	DECISION
CAMDEN COUNTY.	:	
	:	

August 20, 2003

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
LAURETTA BRUNETT	:	
Audobon Park Board of Education	:	**SEC Docket No.: T04-03**
Camden County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Respondent Lauretta Brunett was elected to a three-year term on the Audobon Park Board of Education in April 2002; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on January 3, 2003 and February 19, 2003; and

WHEREAS, the NJSBA conducted seven training sessions between April 2002 and April 2003 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes;* and

WHEREAS, the last training session to fulfill the requirement was held in March 2003; and

WHEREAS, the Commission issued an Order on May 21, 2003, directing Respondent to Show Cause why she had not attended training up until that time; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, Respondent failed to provide any response to the Order to Show Cause and further failed to attend a June training session; and

WHEREAS, the Commission notified Respondent, by letter dated July 15, 2003, that the Commission would discuss this matter at its July 22, 2003 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, Respondent did not respond to this letter, nor provide any reason for failing to attend the required training program for more than the one year allowed by law; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2002 to April 2003 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds removal from the Board to be the appropriate penalty for failure to attend training;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Brunett violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove her from the Board of Education herewith.

Dated: July 22, 2003

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 River View Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on July 22, 2003.

Lisa James-Beavers, Executive Director

LJB/PSC/m:ethics/trainingresT04-03

AGENCY DKT. NO. 258-7/03

IN THE MATTER OF LAURETTA BRUNETT, AUDUBON PARK BOARD OF EDUCATION, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission (Commission) has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas the Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on May 21, 2003, the Commission issued an Order to Show Cause why she had not attended training up until that time; and

Whereas, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

Whereas, the above-named Board member did not reply to the Order to Show Cause and further failed to attend a June training session; and

Whereas, the Commission voted on July 22, 2003 to recommend that the above-named Board member be removed from the Board and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 29, 2003, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution; and

Whereas, no comments were received from, or on behalf of, the above-named Board member; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendation of the Commission; now therefore

IT IS ORDERED that the above-named Board member is removed from office as of the filing of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/20/03

Date of Mailing: 8/21/03

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.