NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1989 to December 31, 1989

VOLUME 2

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Commissioner of Education

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which if successfully completed would render them reasonably competitive in society.

The equal opportunity standard I believe must focus on meeting students' needs. Therefore, what T & E requires is a system that neither pays undue emphasis to inputs nor outputs. Rather, what is required is a balanced system which meaningfully addresses the actual educational needs of all of the State's public school children so that children are offered the programs and other educational experiences necessary to assume whatever type of societal participation they are capable of achieving. Students must be offered educational programs that are sufficient to enable them, with proper guidance, to progress toward their future hopes and aspirations.

Because students learn in various ways and at various speeds, an opportunity for every student to achieve this outcome is all that the public school system must constitutionally provide. The Constitution cannot require the impossible. No educational system can guarantee that all students will learn. But recognized student needs cannot go unmet because districts are not providing sufficient programs necessary for students to compete in our society.

The Constitution does not require that individual schools or districts either guarantee learning or address the educational needs and aptitudes of students in a particular manner. There is no standardized curriculum and no particular teaching theory. The Constitution does not require the equivalent of an IEP or ISIP for each student, since the system need not insure that each child is able to develop his/her full potential.

A meaningful educational program addressing students' needs in the constitutional sense, therefore, relates to the Constitution's goal of developing citizens who are capable of contributing productively to our society. Schools must structure their educational programs to provide courses and other experiences which reasonably relate to achieving this overall broad goal of T & E. Students who meaningfully participate in these programs should be reasonably expected to be able to enter our society productively at whatever level of learning they are capable of reaching.

The Constitution's goal is broad enough to permit program flexibility. But flexibility is not the same as inequality based on geographic location. A comparison of educational inputs among school districts thus becomes important in assessing whether the system is providing students with equal opportunity, regardless of socioeconomic status and geographic location, to achieve the constitutionally required result.

The Supreme Court stressed, for example, that a disparity in expenditures per pupil was significant because in order to determine that the system was constitutional, it would have to assume the unlikely proposition that the lowest expenditure was adequate to meet the constitutional requirement and that anything in excess of this expenditure was simply local variation. *Robinson v. Cahill* (Robinson I), 62 *N.J.* 473, 516 (1973). The Court meant that a statewide comparison of inputs was evidential of whether the system sufficiently addressed the educational needs of students. At one point, for example, the Supreme Court explained that a system that did not include a high school program would probably be unconstitutional. *Robinson I*, 62 *N.J.* at 515. Thus, this form of input was deemed

necessary in our contemporary society to provide the required opportunity. As Dr. Yamba explained, pole vaulters using bamboo poles even with great effort cannot compete with pole vaulters using aluminum poles. All children with similar educational needs and aptitudes should be provided substantially similar educational programs and services in every school district in the State. If they are not, then the system is not T & E.

Input standards for local districts would be helpful in assessing whether comparable student needs are handled substantially similarly. These standards would establish the variety of acceptable approaches to providing substantially similar opportunity for comparable students. Inputs alone do not measure the quality of an education. Rather, the determining factor is whether sufficient inputs are applied to address all student educational needs so that meaningful results, or successful outputs can reasonably be expected.

The Constitution does not require that the desired output be measurable on standardized tests. The various programs selected by districts to meet student needs must be reasonably related to developing citizens who can enter our society at any point along the existing broad continuum of meaningful participation. All school programs and services should be directed toward providing students with an opportunity to compete fairly for a place in our society. No student should be handicapped in life because of his/her educational experiences in New Jersey public schools. The Chancellor of the New Jersey Board of Higher education asserted in 1986: "In tomorrow's society the uneducated will compete for low-paid, low-level service jobs if they are lucky; for welfare if they are not." (Exhibit P-203d at p. 17.)

For all students to have equal opportunity, the focus of the system must begin at the school level. For example, Exhibit P-149, the Comprehensive Basic Skills Review on Dickinson High School in Jersey City includes at p. iv-4 this 1980 prescription for solving the learning problem: the school should identify student needs, prescribe specifically for these needs, begin imediately to teach these needs, build student self-esteem by ensuring success and monitor the teacher-learning situation. This prescription for Dickinson High is a good example of what T & E requires at the school level.

For the entire system to be T & E, however, the focus must not stop at the school or the district. If all schools within a district are meaningfully addressing the needs and aptitudes of its students, then the district must ensure that it is addressing the needs and aptitudes of all of the districts' students in substantially similar ways.

Provided intra-district equity is protected, local districts can still tailor education to their communities, but the counties and State must play a broader role. The county superintendent should ensure that all the needs and aptitudes of the students attending schools in the various districts in the county are having their needs and aptitudes addressed in a substantially similar manner. The permissible disparities in the system should relate to the various acceptable educational options. Should the county superintendent discover students with similar needs who are receiving disparate opportunity, the county superintendent should take whatever steps are necessary to equalize the opportunity. (See further discussion below.) And, finally, the Department of Education should verify and ensure that all

of the State's school children with similar needs and aptitudes are being provided substantially similar meaningful educational programs and services.

Is the Existing System Thorough and Efficient?

The defendants contend that the monitoring system is the key to evaluating T & E. The defendants assert that districts which have been certified are T & E. They claim that failing monitoring is presumptive evidence of not providing T & E. Because several districts have in fact failed monitoring, the defendants concede that not every district is running a T & E system, even under their definition of T & E. Nevertheless, the defendants do not believe that plaintiffs have proven any systemic defects and that therefore the system can cure itself through more efficient district administration, State monitoring and State takeover of those few districts which remain unable to cure their own ills.

The major problem with this argument is that I believe the plaintiffs have convincingly proven the presence of several systemic defects and that monitoring, as it has been implemented by the Department of Education, does not address the serious educational problems that have been caused by the systemic defects.

Several of the districts which have failed monitoring, including three of plaintiffs' districts, have been failing, according to the Department, for years. The monitoring improvement record of these districts does not bespeak steady improvement, except possibly with regard to MBS test scores, but rather seems to reflect erratic responses. Items that appear to have been remedied in one monitoring reappear as defects in others. While some of these erratic results can be explained by inconsistent rating procedures and the different perspectives of the

raters, I do not derive optimism from the record, even if monitoring measured those elements truly necessary for T & E. This is especially so when we consider that the State has actually been monitoring districts since the late 70's.

Monitoring is also district specific. No effort is made to compare districts with one another. In fact Department policy discourages DFG A districts, for example, from comparing themselves with DFG J districts. Exhibit P-313 at p. 3 states that MBS score comparisons "should only be made when districts are comparable in terms of other variables such as curriculum, physical facilities, staffing and per pupil expenditure (in addition to being similar in terms of their students' background variables)."

While in the early days of monitoring the record shows that some members of the Department argued for different achievement standards for urban districts, the current statutory and regulatory law requires one statewide standard, which I believe is consistent with the Constitution. Declining to compare districts with one another is a major defect in the implementation of Chapter 212 because it is this failure which has in essence excused deprivations of equal opportunity. The monitors do not assess whether a district's educational inputs are adequate or substantially similar to other districts, only whether the inputs satisfy the limited criteria measured by monitoring.

Additionally, this propensity for tunnel vision sometimes leads to rather bizarre results. For example, under the monitoring Element 9, a district placed under a desegregation order must implement a desegregation plan approved by the Commissioner. A desegregation order may be entered against the district if each school in the district does not mirror the district's entire racial composition.

Thus, a school district with a 75% black and 25% Hispanic student body must ensure the same balance for each school in the entire district. A district failing to ensure this balance will be placed under a desegregation order even though an adjacent district not under such an order may contain a total student body that is 98% white. It seems to me that this result is caused by the district specific analysis and disregards the major thrust of civil rights since *Brown v. Board of Education*, 347 *U.S.* 483, 98 *L. Ed.* 873, 74 *S.Ct.* 686 (1954).

Monitoring also makes no effort to determine whether each district is meaningfully meeting its students' needs. If a district has adopted written educational goals, by following the required procedures, the district will pass this indicator. Comprehensiveness is not part of the analysis. In fact, some districts view this requirement, as, for that matter, most of monitoring, as a "paper chase." Monitoring does not assess the quality or comprehensiveness of the district's approach to its students' needs. (See monitoring findings in Part IV.) Instead, the Department of Education relies on the local budgeting process to reflect the proper and adequate educational needs of the district students. I have already indicated in Part III why I believe this reliance is flawed.

The record also contains evidence that students from urban high schools are not properly prepared for meaningful employment. There is some evidence that students from urban areas have problems completing employment applications, spelling, doing simple math and speaking standard English. The impressions of the witnesses who testified about this deficit, however, may have been formed by observing dropouts of urban high schools or graduates who may

not yet have been subjected to the HSPT. Nevertheless, monitoring does not directly address this concern.

Monitoring seems only to concern itself with program quality improvements for districts which fail Level I and proceed to Levels II and III. Most of the quality concern at this point, however, seems to revolve around basic skills program improvements. The defendants contend that the Constitution requires children to be able to compete only at the level of achievement satisfied by passing the HSPT and therefore their focus on basic skills is critical. I have already indicated that I do not believe that this low level of competition is all that the constitutional standard requires. Fixation upon the HSPT failures results in the Department paying little attention to the needs of students who have passed the HSPT. Those students in non-certified districts who, for example, must be prepared for college and should be challenged with advanced courses, computer training and other such programs are largely ignored.

The record contains evidence that students from property poor urban districts are not adequately prepared for college. Data released in 1981 by the New Jersey Department of Higher Education demonstrate that economically disadvantaged children fare poorly on tests of basic skills needed for college, as compared to students from more affluent districts. Data compiled from the New Jersey College Basic Skills Test demonstrate that many Essex County College students only perform at the 3rd and 4th grade level in mathematics. Dr. Yamba, the President of Essex County College, stated that the kinds of academic deficiencies that children from urban districts in Essex County bring to college are similar to the

problems exhibited by children in other urban centers in Passaic, Hudson, Mercer, Atlantic and Middlesex counties.

During the summer of 1980, 2,690 students attended an Educational Opportunity Fund (EOF) pre-freshmen program. They were tested to determine basic skills needed for college study. Of this group, 72% required placement for remedial developmental work in English composition. In addition, 71% required placement in math and 67% required placement in reading. This type of remediation need continued through the summer of 1983. From 1982 through 1985, every year a smaller proportion of students from poor communities were able to pass the verbal test which indicates academic readiness to engage in college level work. These results indicate the continuing disadvantage of those students competing in college with students from more affluent districts. There is also a high and increasing dropout rate among EOF students

Even for the students who have failed the HSPT, the Department has not ensured that these students, while they receive whatever intensive basic skills remedial help they may need, are not deprived of social studies, science, art, music, physical education and other subjects not tested by the HSPT but which may be important for the future aspirations of these students and which may encourage potential dropouts to stay in school. Secretary Bell's Excellence in Education Commission in 1983 concluded that studying literature, art, music, computer science and other science is as important or more important than the three R's for the 21st century.

As I have found in Part IV, I believe that monitoring appears to focus on most of the elements and indicators of a good educational system. I believe,

however, the problem with monitoring is the failure to look beyond the minimal requirements of monitoring. If all the parts appear to be present on paper, the Department assumes that the students are well served. Districts which have the funds available to spruce up the paperwork just before monitoring begins derive an advantage from this system which may not be related to the quality of the educational program being delivered. Monitoring does not focus on developing effective programs best suited to various student needs.

In historical fact, the Department of Education has spent 12 years monitoring to find out what they already knew. The Department has always known that urban districts were having basic skills problems.

The record reflects numerous program disparities between suburban and urban districts. When the Department elected not to pursue input standards, it in a sense condoned these disparities and deprived the monitors of an important gauge to assess program comparability. Had the State Board promulgated educational input requirements, the defendants would be in a stronger position to complain about districts which fail to advocate vigorously for the full budgetary needs of their students. Without these input standards, well meaning board members were deprived of a tool that may have been used to withstand the political interference, as I have defined it, the political intrusion, that unfortunately sometimes occurs, and the economic concerns that force budgetary restrictive political/economic compromises in poor urban districts.

In addition to the problems with the manner in which monitoring has been implemented, the plaintiffs proved gross expenditure disparities between property poor and property rich districts. These disparities sometimes reach into the

thousands of dollars per pupil. I have already indicated that I do not believe that these expenditure disparities are entirely self-inflicted as urged by defendants. I also believe that the fact that some DFG A districts spend more than other districts of higher DFG does not disprove plaintiffs' contention that Chapter 212 causes these disparities. This phenomenon confirms that there are numerous external and internal forces that affect the exact budgetary amounts raised by districts. The overwhelming weight of the evidence which includes Drs. Goertz's and Reock's reports requires a **FINDING** that the manner in which New Jersey's GTB system operates ensures that the wealthy school districts receive some financial benefit from Chapter 212 and permits continued substantial expenditure disparities largely between property poor and property rich districts. Except for a vague statement by Dr. Fowler indicating that he could not confirm the Reock and Goertz results, the record fully supports their conclusions. In fact, given the manner in which our modified GTB system operates, I also **FIND** that absent any significant changes to district tax rates, the cap law, district property bases or to the manner in which State aid is distributed, the expenditure disparities between property poor and property rich districts are likely to continue indefinitely into the future.

These expenditure disparities raise the inference that insufficient funds cause poor urban districts to be unable to address fully their students' needs. Exhibit P-236, the State Board's *Four Year Assessment*, found in March 1980 that the GTB formula "failed to produce sufficient revenues to assure adequate education programs," especially in urban districts. As an interim measure, the State Board recommended moving from 40% State share to 45% and then to 50%. As previous findings indicate, no such movement resulted.

The record reflects numerous and serious unmet student needs. I have previously indicated that, once again, I do not believe that the districts have caused their own misfortunes, as the defendants argue. I have concluded that the plaintiffs have proved and therefore I **FIND** that the following systemic defects are causing districts to be unable to meet all student needs in a meaningful manner:

1. The system requires school districts to share property bases with municipalities. This causes competition over the tax base that prevents property poor districts from budgeting for all of their students' educational needs and from exceeding the cap limit when necessary.

2. New Jersey's public school system is comprised of numerous school districts which have historically been for the most part coterminus with surrounding municipalities. Efforts to preserve the territorial boundaries of these districts impair the equal opportunity required by the Constitution. Childrens' educational needs are not coterminus with a municipality's border. The perceived need for pre-kindergarten and full-day kindergarten instruction in some property rich districts does not end at a municipality's border. The Constitution requires that attention be paid to comparable educational needs regardless of school district borders.

3. The manner in which the Commissioner chooses to determine whether district budgets are adequate in essence contributes to their inadequacy because he intervenes only after the political/economic compromises fail. He therefore permits the political/economic compromises that prevent

students with similar needs from receiving substantially comparable educations.

4. State initiated programs like Operation School Renewal appear promising. However, few of these programs are exclusively devoted to property poor urban districts and none are geared toward ensuring equal opportunity as I believe the Constitution requires. These initiatives are sporadic and not coordinated with other district priorities. There also is no guarantee that funding will continue and, in addition, the various initiatives do not address disparities caused by the State aid scheme so as to ameliorate the funding law's systemic defects.

5. One of the purposes of the GTB system was to provide some tax relief, but the system has resulted in most urban districts having property tax rates that are exorbitant and unfair when compared with most property rich districts. Because of the large disparities in property values, differences in expenditures among school districts, under Chapter 212, have little relationship to tax effort.

6. The system does not offset the extraordinary drain upon an urban district's managerial energies caused by large numbers of comp. ed., bilingual and disadvantaged students whose enrollment is beyond the control of the local district.

7. According to Uniplan, the ever increasing age and outmoded structure of our school facilities present a statewide problem. Some urban districts, by chosing to provide education rather than maintenance while

dealing with declining budgets, exacerbated their facilities problems. It is clear, however, that urban facility needs are growing daily. The building and refurbishing that is occurring in urban districts appears to be barely sufficient given the existing documentary evidence on facility needs. The current financing system, which requires local districts to generate huge amounts of funds for their facility needs, is unable to deal with these needs with sufficient comprehensiveness, speed or certainty. The voters in some districts will often vote down capital projects no matter how important they may be to students. The unique land acquisition problems faced by urban districts present difficult political and economic issues that can best be addressed by the State.

8. The need for public or board of school estimate approval of school budgets allows the public and the governing municipal body to express general frustration over increasing taxes. The level of voter support in urban districts has diminished because there is a decline in voters who are parents or parents of public school children and therefore have a direct stake in education. There is a large increase in the number of senior citizens who vote against school budgets. The need to vote on school budgets each year in Type II districts requires local administrators and board members to spend great amounts of time electioneering at the expense of time needed for the consideration of educational policy concerns. It also results in school board elections in which candidates may have as their major concern the maintenance of low taxes or the reduction of tax rates rather than educational issues. Local choice in

urban areas frequently focuses on the unavailability of funds and not on educational needs or quality.

9. The technical aspects of the funding system have several features which diminish the equalizing effect of the law and thereby deprive poor urban districts of funds. These were discussed in Part III above and include the following: (a) The GTB Level; (b) Use of Prior Year Budget Data; (c) Use of Prior Year Enrollment Data; (d) Use of Prior Year Wealth; (e) The State Support Limit; (f) Minimum Aid; (g) Distribution of Other Nonequalized Aid; (h) Cap Limits; and (i) Transportation Aid

The 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 the State between the ages of five and eighteen years of age." *N.J. Const.*, Art.8, Sec. 4, Par. 1 (1947).

For all of the reasons expressed I have concluded that plaintiffs have proved that children being educated in property poor urban districts do not have educational opportunities substantially similar to children educated in property rich districts. The numerous program disparities that plaintiffs proved indicate that property poor districts are not providing educational programs to meet all of their students' needs. Children who live in poor urban districts with the same level of talent as the more affluent do not have the same opportunities to fulfill their potential. Therefore, I **CONCLUDE** the existing system is not T & E since educational opportunity is determined by socioeconomic status and geographic location. I

believe there is sufficient evidence in this record for a Court to invalidate Chapter 212 as violative of the T & E clause of the New Jersey Constitution quoted above.

Equal Protection

Contrary to the State defendants' contentions, I do not believe that the plaintiffs must show an invidious discriminatory purpose to establish an equal protection denial. Compare *Greenberg v. Kimmelman*, 99 *N.J.* 552 (1985) with *Right to Choose v. Byrne*, 91 *N.J.* 297 (1982) and *Taxpayers Association of Weymouth Twp. v. Weymouth Twp.*, 80 *N.J.* 6 (1976).

I also disagree with the defense assertion that since reform legislation is involved only the most minimal judicial scrutiny would be applied. The law at issue purports to carry out the New Jersey Constitution's mandate of providing a thorough and efficient education. While its purpose was to remedy the constitutional defects of the prior financing system, the law cannot be considered to extend some new benefit to a particular class of individuals, which would be required to conclude that the law is reform legislation.

Abbott v. Burke, 100 *N.J.* 269, 282 (1985) indicated that education is a fundamental right and that even though such label "takes on no talismatic significance," a closer scrutiny will often be employed by the Court. *Id.* at 295.

Also, I believe that the equal protection test requires me to weigh the nature of the restraint or denial against the apparent public justification. *Robinson v. Cahill*, 62 *N.J.* 473, 491-492 (1973) (Robinson I.)

As I have previously found, there appears to be a pattern where children in high wealth communities enjoy high levels of expenditures and other educational inputs and children in low wealth communities receive low levels of school expenditures and inputs. This pattern is not related to the educational characteristics of the children in these districts. In fact, the evidence demonstrates that it is more expensive to educate children with educational disadvantages. Given the characteristics of student bodies in urban and suburban districts, one would expect expenditure rates to be exactly opposite to what they are.

Additionally, except for a few general comments about differing costs, no proofs were presented establishing that regional differences in costs of education services explain the expenditure disparities. In 1974, the Joint Education Committe of the New Jersey Legislature stated: "The committee has received conflicting opinion on the degree to which cost-of-living differences influences school operating costs within New Jersey. This is a small state, and the wider variations anticipated in larger areas may not exist here. Of more immediate concern is the fact that adequate data for different regions within the state do not now exist." (Exhibit D-247 at p. 36.)

Furthermore, I believe that the equal protection test is broader than the T & E analysis even though thorough and efficient, as defined, also involves equal opportunity. As explained above, equal opportunity required by T & E measures whether inputs are adequate to address student needs in a manner which appears reasonably connected to the desired output of competitiveness among all students in a broad array of society's economic, political and social activities. Therefore, expenditure disparities, while evidential of program insufficiencies, under this T & E

analysis need not be equalized. The equal protection question, however, explores the State's justification to perpetuate these disparities. Furthermore, even if certain components of a school program cannot be directly related to the T & E desired output, the equal protection question still probes inequality. I believe, for example, that equal protection concerns ask why certain districts should have complete modern media centers, while others do not?

The crucial equal protection issue is whether there is an appropriate governmental interest suitably furthered by the differential treatment involved. *Barone v. Human Services*, 107 *N.J.* 355, 368 (1987). In striking the balance, the Supreme Court considers the nature of the right affected by the governmental action being challenged, the extent to which the governmental restriction intrudes upon the right, and the degree to which the challenged restriction is necessary to achieve some public need.

The State's obligation in striving for educational equality is broader than simply ensuring that pupils achieve equally in the basic skills, which is the obligation urged by the defense. (See the Defendants' Reply at p. 154.) Standardized testing is not the only tool for ensuring that minimum standards are upheld for the poor, the middle class and the wealthy. Equal protection asks a much broader question: Even if children can compete in and contribute to the same society entered by advantaged children, are there still expenditure or program inequalities proved by plaintiffs which should not be perpetuated, given the State interest involved?

The proofs lead inexorably to the **CONCLUSION** that the quality of a child's education is determined by the school district in which the child happens to reside. When the State asserts that what is appropriate for Pequannock's school

system might not be appropriate for Camden's, they may be right. Size and different student needs will dictate different educational program balances. But, the State must ensure that children of comparable abilities are provided substantially comparable educational opportunities and this they have not done.

Under the existing system, some of New Jersey's property poor urban school districts are unable to fund educational opportunities that are equal to those available to children in affluent districts with large tax bases. The evidence shows that some property poor urban school districts suffer from disparate financial resources, programs, staff and services. The evidence establishes that these disparities are not matters of local choice or district preference. Instead, they are caused by systemic defects in the manner in which the funding system operates.

Balanced against this deprivation is the defense assertion that equity in financial resources, programs, staff and other services need not be provided because of the State's interests in preserving local control, ensuring efficiently operating school districts and protecting an individual's constitutional interest in freedom of association.

The associational rights argument focuses on the right to move freely within the State and choose where one wants to live. I do not believe that this is the kind of intimate associational right which should outweigh other concerns. See e.g., *Matter of Hotel and Restaurant Employees and Bartenders Union Local 54*, 203 *N.J.* Super. 297, 322 (App. Div. 1985).

Furthermore, I have already indicated that I believe T & E requires eliminating differences in educational programs based on geography and

affluence. If the T & E standard is more fully realized, it will eliminate the perceived need to move to a particular community in order to obtain an educational advantage. Making the system more equitable will not impair associational rights.

Given the findings I have already made on local control (See Part IV), the defendants' justification for the disparate educational conditions can be characterized as the need to protect against further diminishment of local control. Local control is already seriously undermined in New Jersey, particularly in districts on the verge of being taken over by the State.

Local control is, however, an important tradition in New Jersey, even though it has been seriously eroded in recent years. The record reflects that it is not necessary to fund the educational system completely with State monies and that there are means by which local administrative control can be preserved and protected even if State funding of education were significantly increased. All of plaintiffs' witnesses urged that local control and some local fiscal contribution to the system be preserved. On the basis of the proofs, I see no reason why this cannot be achieved.

I have already found that the program and fiscal disparities proved by plaintiffs were not caused by district mismanagement. I have also found that some of the program disparities proved by plaintiffs, in my opinion, indicate T & E failings and that T & E requires districts to offer substantially similar programs and services. Nevertheless, the defense argues for the status quo because some property poor urban districts championed by plaintiffs have seriously mismanaged their districts and will continue to do so until efficiencies are institutionalized. Dr. Scambio, the Essex County Superintendent, said that infusing substantial additional funds into

the East Orange, Paterson, Jersey City and Newark districts, for example, would benefit the children, but she was not sure that the districts could use the money effectively and efficiently.

Several State witnesses, however, further explained that they were simply not sure whether additional funds were necessary and that until urban districts demonstrated that they could plan for the future and wisely use the vast sums they now receive, no additional funds should be provided. (See findings below on whether more money is needed.)

These doubts are typical of the distrust of some urban districts which was evident in the testimony of several defense witnesses. I believe it is sincere, but wonder whether the remedy should be continued inequity, particularly when there are recognized regulatory methods available to protect against the inefficient use of public monies. Besides linking potential reform to appropriate management and organizational changes (See some remedy suggestions below), the State can also more aggressively monitor these districts. The State can audit fiscal affairs more closely and require additional reporting if necessary. There is also the possibility of total or partial State takeover for districts with serious deficiencies.

Moreover, there was some testimony about inefficiencies in high-spending districts. If the high-spending districts are not spending money wisely, then why should this spending be permitted? No testimony was provided attempting to demonstrate that high spending districts are spending wisely. If the money is being spent wisely, then why should not these expenditures be permitted in other districts? Under the defense's approach, wealthy districts can continue to spend as much money as they wish. Poor districts will go on pretty much as they

have been unless the State takes them over. The introduction to Coons, Clune and Sugarman, *Private Wealth and Public Education,* states, "If money is inadequate to improve education, the residents of poor districts should at least have an equal opportunity to be disappointed by its failure." (Exhibit P-13 at p. 34, fn. 23.)

I believe that equal protection does not require efficient school districts as its paramount objective. Rather, the constitutional right requires that all public schools provide substantially similar educations for pupils with similar needs. Children with particular characteristics should have available substantially similar programs and services throughout the State. The record demonstrates that poor urban school districts are unable to achieve comparability because of defects in the funding system, including restrictions on the amount of funds which can be raised by these districts, thereby causing the inequities. Many poor urban children are not receiving an education of comparable quality to that offered in suburban districts. These children are being deprived of an opportunity to participate and share fully in the social, economic and political affairs of this State.

I believe that this deprivation outweighs the State interests advanced to maintain the status quo. The valid State interests articulated by the defense can all be protected adequately without depriving urban school children of a crucial means of access to meaningful participation in contemporary society. In short, none of the articulated State interests in my opinion are strong enough to outweigh the rights of thousands of students attending schools in poor urban districts.

It is important also to note that just as T & E does not require all districts to become Princeton's, so also does equal protection not require all districts to become clones of the highest spending districts. Substantial comparability is all that

is required - not the impossible. For example, urban districts need not complement their science programs with nearby ponds, woods, streams and interesting geological outcrops, as do some suburban districts. Substantial compliance may be met in this instance by films, videotapes, in-class or school displays and periodic field trips.

Therefore, I **CONCLUDE** that the defendants' local control, associational rights and efficiency justifications are outweighed by the educational rights of children residing in poor urban districts. There is sufficient proof in this record for a court to find that plaintiffs have also proved a violation of the equal protection clause of the New Jersey Constitution (1947) in Art. 1, Paras. 1 and 5.

New Jersey Law Against Discrimination

A violation of the Law Against Discrimination, *N.J.S.A.* 10:5-4, requires plaintiffs to prove discrimination based on race, creed, color, national origin, etc. I do not think the plaintiffs' proofs are adequate to establish this violation.

Plaintiffs argue that there is sufficient evidence for me to conclude that defendants intentionally discriminate on the basis of race. According to the plaintiffs, the record contains evidence for me to infer this intent. For example, plaintiffs allege that the Commissioner has recognized that there are insufficient resources in Irvington, Camden and East Orange, but he has never ordered a budget increase in those districts. One State witness explained the State guarantees only that youngsters from poor districts can compete "at a minimum level" with affluent districts. The Department advises that even as to basic skills achievement, comparisons between DFG's cannot be made. There is no evidence that any

Department officials recommended changes in the funding formula to eliminate inequalities. Plaintiffs contend that Department officials know that urban students are predominately minority yet the GTB has not been fully funded and the State imposed a 40% limit on its share of total educational costs. In addition, the plaintiffs point to evidence demonstrating that several districts, facing facility shortages, attempted to rent space in neighboring suburban school districts, but their efforts were thwarted, despite the Department's knowledge that the suburban districts' refusal was based on race. Defendants failed to refute plaintiffs' proofs that Chapter 212 was designed to provide tax relief, not to equalize expenditures, which has increased the disparities in expenditures between low wealth and high wealth districts. And that State education officials failed to define clearly the statutory elements of the 1975 Act in State regulations because doing so would have raised inequity issues. Finally, plaintiffs point to proofs in the case of statements from high level Department officials that minority populated urban districts are underfunded, coupled with no evidence of recommendations to change the funding formula to eliminate the inequality.

Preliminarily, I cannot agree that the proofs establish all of these allegations as fully as plaintiffs assert. For example, I have previously determined **NOT** to **FIND** that the defendants were involved in imposing a funding limit of approximately 40% that continues after 1980. I also **CANNOT FIND** that the reason officials failed to issue input standards was because they feared raising inequity issues. I **FIND** that input standards were not adopted because of additional statewide funding concerns that might be caused by these standards and not necessarily because of equity concerns.

I also **FIND** that the Department of Education allowed suburban resistance to urban rentals under circumstances which if true appear to be particularly troubling. For example, testimony indicated that when predominately-minority Asbury Park was ordered not to use substandard spaces, the district asked to use neighboring predominantly-white Deal's facilities. Deal was only willing to take a small number of students and they had to be kept separate from the Deal students. Deal was concerned with the "potential behavior and character of the children." Asbury Park sought assistance from the County Superintendent, Milton Hughes, who was unsuccessful in negotiating with Deal. Asbury Park did not ask the Commissioner for help.

Similarly, Irvington tried to rent schools in South-Orange/Maplewood, Glen Ridge and Bloomfield after its facility problems left many children without a school. The schools sought by Irvington were vacant, but the districts provided excuses giving the clear impression that the districts simply did not want the Irvington children. The County Superintendent was aware of Irvington's efforts and provided no assistance or direct intervention.

Paterson unsucessfully tried to rent a school from Wayne after one of their schools burned down. Assistant Commissioner McCarroll was familiar with Paterson's request. The Department intervened and tried to help but did not direct Wayne to take the children from Paterson. Fairlawn had two elementary schools which could have accommodated the Paterson students. Fairlawn offered one of these schools to Paterson, with the stipulation that no 7th or 8th grade student or kindergarten student could attend and that the students had to be bused in at certain hours and by certain routes.

Much of this rental/resistance evidence is hearsay. Nevertheless, the testimony was extremely upsetting. In the Department's favor, the current law is not clear as to its powers with regard to such problems, short of regionalization or sending-receiving agreements. But, the testimony indicates excessive fealty to district borders and the Department's reluctance to act. In my opinion, the Department of Education should have ensured that the districts cooperated with one another during these emergencies. However, I cannot infer solely from these incidents a violation of the Law Against Discrimination.

While I believe that all of the evidence presented in this case demonstrates that the financing system has resulted in disparate resources for property poor districts and an inadequate education for students who are predominately minorities, I do not believe that defendants' actions were based on race. In fact, I believe that much of defendants' conduct would be repeated even if the students in these poor urban areas were predominately white.

The evidence shows that up to 1980, the defendants expressed much concern about the workings of the financing system and the equalization failures. It is particularly instructive, in this regard to view the State Board's *Four Year Assessment* (Exhibit P-236).

Sometime after 1980, however, the Department of Education's concerns shifted to cost effectiveness. Many of the Department's actions after 1980 were caused by their interpretation of T & E requirements and suspicion over the management abilities of urban districts. After observing the defense witnesses and considering all of the evidence, I have **CONCLUDED** that defendants honestly

believe that several urban districts, particularly Jersey City, East Orange and Paterson, would misuse any additional funds they were provided and that additional monies would not result in higher achievement for urban students. The Department has tried to regulate urban districts in an effort to obtain higher achievement without additional funds.

Several of the various Gubernatorial and Department of Education initiatives appear directed toward helping poor urban school districts. The HSPT Summer/School Supplemental Instruction Grant program, for example, holds promise for several poor urban districts. Whatever strategies are found to work in Operation School Renewal and the effective schools projects will be transported to other districts. The Department's RCSU's broker validated programs, network successful practices and disseminate curriculum materials and information to all districts, including urbans. While the Department efforts are not exclusively directed toward urban schools, some improvement initiatives are evident.

I therefore **FIND** that most of the defendants' actions complained about by the plaintiffs have been taken in an effort to preserve the public's confidence in school districts and government generally and to ensure that urban districts demonstrate that they can efficiently spend the monies they are provided before additional funds are granted; the motivation was not racial discrimination.

On the basis of the proofs, especially showing the fiscal irregularities, illegalities and political intrusion that has occurred in some districts, I believe that the defendants' actions were neither unreasonable nor discriminatory. I believe they acted in a manner they thought best complied with the law and the practical management limitations they perceived in some urban districts. On behalf of

taxpayers the Department was seeking the "most bang for the bucks," as one of their witnesses expressed it. They were motivated primarily by a desire not to throw good money after bad. Consequently, I **CANNOT FIND** that plaintiffs have linked the Commissioner, the State Board or any of the other defendants to violations of the Law Against Discrimination.

I also do not agree with plaintiffs that "a violation of the equal protection clause is [automatically]...a violation of the [Law Against Discrimination]." The equal protection proofs are not based on discrimination against a "suspect" class. In this case, the equal protection violation does not occur because of racial discrimination, but because students in property poor districts are being deprived of the important right of education. See, *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 227 (App. Div. 1987).

Attorneys' Fees

I am not unmindful of the huge expense undertaken by plaintiffs to present this case. I am also not unmindful of the extraordinarily aggressive defense undertaken by the State.

I also recognize that the Commissioner of Education has authority to award counsel fees to a prevailing party in a proceeding like this brought under the Law Against Discrimination. *Balsley v. North Hunterdon Regional High School Board of Education*, 225 *N.J. Super.* 221 (App. Div. 1988). However, I do not believe that plaintiffs have prevailed against defendants under the Law Against Discrimination and consequently, no fees can be ordered.

Immediate Judicial Review of this Initial Decision

Plaintiffs urge me to recommend to the Commissioner and State Board that because they were parties to this proceeding, they should forego review of this decision in order to facilitate prompt judicial review. The plaintiffs contend that the Supreme Court remanded this matter so a complete factual record could be developed and that has been accomplished. The plaintiffs also assert that the Supreme Court would have the benefit of the Commissioner's expertise because his opinions are spread upon this record and that any remaining arguments could be made directly to the courts.

My problem with this position is that the Supreme Court in its remand assumed and specified that the normal administrative hearing route would be followed. *Abbott v. Burke*, 100 *N.J.* 269, 303 (1985). Plaintiffs urge me to disregard the Supreme Court's language because the Court could not possibly have foreseen the extent of the State's defense.

I decline to intuit the Supreme Court's intentions and suggest that plaintiffs seek clarification directly from the Court. This decision will therefore be transmitted to the Commissioner for review.

Remedies Urged by the Parties

Plaintiffs urge me to recommend certain statutory changes necessary to remedy the constitutional defects that I have concluded a court may find. They suggest that these remedies include: (a) a declaration that no future funding

scheme be approved by the judiciary before it is implemented; (b) a proscription against using the GTB system as the mechanism for assuring the constitutionally required educational opportunities; (c) a judically established equality standard to include the level of expenditure needed to provide high quality educational opportunity, measured by educational inputs, on a uniform basis in every school district; (d) the equalization of all expenditures among school districts so that all but an insignificant amount of funds (no more than 5%) and public school children (at least 95% of the children should be included) are fully within the expenditure equalization mechanism; (e) a six year phase-in period for the financing improvements; (f) a recommendation that local burdens not be increased without a specific finding that there will not be any negative impact on the economic and social conditions of the affected school district and included municipality; (g) a 10-year improvement timetable for all facilities in all school districts to be conformed to contemporary educational standards; and (h) the appointment of a special master to oversee the implementation efforts.

In stark contrast to plaintiffs' array of suggested remedies, the defense believes that no remedy is required. Defendants assume that any necessary funds for the schools may be extracted from the local tax base either by request of the school boards or by Commissioner's order. They suggest that whatever inadequacies may exist are non-systemic and therefore can be cured within the existing statutory and regulatory structures. As I have already indicated, I believe plaintiffs have proven that there are systemic defects. Also, I believe that several of New Jersey's municipalities suffer from extreme fiscal distress. The imposition of higher property tax rates on top of those already among the highest in the State

may contribute to their further deterioration. I therefore have **CONCLUDED** that some statutory remedy is necessary.

A few of plaintiffs' remedy suggestions, however, seem related to their hope that the Supreme Court will prevent repetition of certain actions that plaintiffs believe were unfortunate in the prior attempts at meeting the *Robinson v. Cahill* requirements. I believe that these suggestions are best left to the judiciary. It is the Supreme Court which can best assess prior experiences and determine, for example, whether it wishes to direct specific implementation or appoint a special master. Nothing that I could say would add anything to these determinations.

Urban Fiscal Strength And Remedies

There was some proof presented by defendants that New Jersey's cities are increasing their fiscal strength. There is, for example, waterfront development in Jersey City and Camden that appears promising for the cities' tax bases. Camden has also recently been successful in encouraging development by small manufacturers, a resource recovery plant, Campbells' world headquarters and a new county jail. East Orange has a new shopping area in the Brick Church area. Jersey City, according to Barry Skokowski, Director Division of Local Government Services, has recently experienced "fantastic" growth in ratables. Irvington has a clean, thriving downtown shopping area. (But you still cannot shop in downtown Camden, according to Director Skokowski.)

Should our cities substantially improve their tax bases, presumably, defendants would argue that they will be able to raise more monies for their schools and achieve the necessary expenditure equity without any State reforms.

However, while Director Skokowski believed the cities were on their way back, he was not specific about how successful their recovery would be.

Dr. Netzer, senior fellow for the Urban Research Center at NYU, calculated a State equalized ratio, which was comprised of the total assessed value divided by the total equalized evaluation. This ratio showed that the State equalized ratio statewide was 70.05, whereas, among the six communities of Camden, Newark, Jersey City, Paterson, Trenton, East Orange and Irvington, it ranged from 37.95 in Jersey City to 51.84 in Irvington. Camden was 48.93, Paterson was 48.41 and Trenton was 38.56. The rest of the State is 70.97. Thus, it may be that these cities have assessed their properties too low.

However, as of 1984, the fiscal distress of several New Jersey municipalities showed no signs of abating. Dr. Netzer testified that someday, waterfront development in Jersey City may increase its property values relative to the rest of the State, for example, but, as of 1984, it had not. In addition, he explained that urban revitalization takes a long time to complete and sometimes has substantial elements of tax abatement or tax exemption included. Thus, these projects often do not generate a great deal of new fiscal capacity for a city. The economic effects may spill over to adjacent properties that may experience rising land values, as may be the case in New Brunswick. However, the legacy of past deterioration is difficult to overcome, as the example of Atlantic City shows. In this city, more investment has gone into casino hotels than is involved in most revitalization projects in other cities, but tremendous problems remain.

In Newark, as another example, various higher education activities have expanded over the past two decades, but this has not resulted in enhancing

Newark's property tax base because the property being used by higher education is tax exempt. This type of activity can employ local residents and increase their income and thereby stimulate ancillary activity such as restaurants, which pay taxes. However, this form of activity has not provided Newark with the tax base that it has lost over the years.

Dr. Netzer further pointed out that the differences between the total property tax rates in the poorest urban districts and the State average total tax rates are in the range of slightly under 2-4% of market value. In his opinion, as tax differentials approach 3% of market value, business location decisions are affected.

The record also requires that I **FIND** that New Jersey's poor urban centers will have large concentrations of poor and minority residents for the foreseeable future. Urban residents do not currently have the same ability to choose where they will live as do residents of affluent suburbs, *Mount Laurel* notwithstanding. Affluent suburbs are overwhelmingly made up of owner-occupied housing. A resident of such a suburb has to be able to afford those homes. Most of the households in the truly poor cities have neither the income to buy into the affluent suburbs nor to be homeowners at all. Urban residents are also likely to be more restricted in residential choice by the need to be near employment opportunities commensurate with their more limited skill levels. Affluent people usually have high occupational and professional qualifications, permitting them a wider choice of job opportunities that give greater flexibility of residential choice. In addition, residents of poor cities are often poor people who require social services not easily available in affluent suburbs, where few people require such services.

From this record, I **FIND** that some tax base improvements in property poor urban districts can be expected, but that urban property value improvements relative to property rich districts are neither certain nor imminent. Additionally, as property bases improve, poor people are sometimes displaced, exporting the problem to different locations rather than curing the adverse conditions of poverty. I **FIND** therefore that we cannot bank on solving New Jersey's school system's funding needs through the gradual enhancement of urban property bases in a few cities.

Is More Money Necessary?

The GTB system is based on the assumption that the guarantee will provide sufficient support for an adequate education. The record does not demonstrate that the guarantee level was established by any method designed to assess educational adequacy. The driving force behind the guarantee level appears to be perceptions of affordability. There is some doubt on this record whether the guarantee will be sufficient even to provide monies needed by many urban districts to develop effective HSPT remedial and preventive programs. Urban children's remediation needs are high and the record contains evidence that these needs far exceed those of their suburban counterparts. Even assuming that the necessary funds can be made available, comparability needs would remain unaddressed.

One of plaintiffs' witnesses who testified during the 1986-87 school year asserted that $5,500 to $6,000 per pupil would be appropriate for excellence. No further detail was provided. In 1984-85, Paramus spent $5,375 per student and only

24 districts exceeded Paramus. Only six school districts (excluding vocationals) had current expense per pupil at or about the $6,000 level.

There are few indications of program cost on this record. I am unable to determine precisely whether additional monies system-wide will be needed or whether redirection of funds would suffice without impairing the high quality education being offered in some suburban districts.

The defense presented proofs that all four plaintiff districts could afford to increase school costs. Plaintiffs argued in response that some State monies currently being provided wealthy districts should be shifted to poor urban districts and that there is serious doubt as to whether the property bases could support significant school funding increases. According to plaintiffs, to increase property taxes substantially in New Jersey's poorest cities would contribute to their further economic and social decline. This action would drive out more middle class residents, who can afford to move elsewhere and spur the further migration of businesses out of these cities.

The defendants assert that urban districts can shift monies from programs that are not working or through efficiencies to new initiatives that promise success. Some of the large amounts of monies being maintained as surplus by some districts might be available for reform funding. Assistant Commissioner McCarroll believed that $100,000 to $1 million in a budget of $50-60 million could be reallocated. Dr. Ross believes that Jersey City savings through more efficiency would be less than $2 million.

The defendants did not provide any illustrations of which programs districts could eliminate. The record does not include an educational program selected by defendants for elimination, except that the defendants appear to have condoned some of the "hard choices" made by property poor districts over the years when they eliminated such personnel as librarians, art, music and physical education teachers who were not directly related to teaching basic subjects. If this is the kind of shifting that defendants advocate, it probably would violate T & E or equal protection as exacerbating disparities.

The record also contains illustrations of how districts shift funds to address various initiatives whenever deemed appropriate or when necessary to meet State mandates or to reduce tax burdens. Exhibit P-187a, for example, shows that because of the dearth of classroom space in Irvington, the school's media room was eliminated to make room for a computer classroom. The Department of Education does not ask how districts acquire funds to implement corrective action plans. Asbury Park's corrective action plan, for example, includes computer-assisted instruction programs at the elementary and middle schools; a new assistant superintendent position; basic skills summer school; training and technical assistance from Research for Better Schools; and additional basic skills staff at the high school to reduce class size. Plaintiffs' witness from RBS opined that this plan would cost the district at least $1.5 million in its first year. The record indicates that sometimes when districts shift funds, later problems are caused, as was the case when some districts elected to forego facility maintainance.

In the abstract, it may be possible to shift some funds from ineffective to promising new programs. However, on the basis of this record, I have to FIND that I

am unable to determine how much monies could be made available in this manner. I can determine neither the cost of alleged ineffective programs nor the cost of new programs. The Department did indicate that they were providing $1.7 million to fund 23 summer school programs in urban aid districts. One could possibly extrapolate the statewide cost of this promising program. However, the record does not contain sufficient information to calculate precise costs for other programs. For example, the defense lauded Red Bank's mastery learning program, but did not indicate how much money the program would cost in urban districts.

Additionally, plaintiffs' proofs were ambiguous on shifting costs, probably because they urge adoption of a "foundation" system which guarantees State funding at a level sufficient to provide statewide quality education. (See discussion below.) Most of plaintiffs' proofs demonstrated that some of the programs poor urban districts lacked were expensive. No effort was made to tabulate the costs of plaintiffs' suggestions statewide and to compare these costs, for example, against some of the suggested funding reforms, such as redirecting minimum aid into equalization aid. John Leppert testified, however, that pension benefits and categoricals in New Jersey amount to about $900 million.

As an example, while the research is inconclusive on whether small classes can improve achievement, I **FIND** on the basis of this record that small classes are desirable for effectively teaching the educationally disadvantaged, particularly young students. To some extent the fact that the State requires small classes in compensatory education and special education confirms this conclusion. While I do not believe that T & E requires class size reductions for all classes in urban school

districts, I believe that smaller classes may be essential for early intervention programs.

Reducing class size is one of the most expensive reforms suggested by plaintiffs. Evidence shows that to reduce the class size in East Orange, for example, by one student in grades 1 to 12 (using an average teacher salary of $24,000) would require 16 new teachers and cost approximately $380,000. When Montclair reduced class size by one student, it cost the district about $100,000. If Irvington were to reduce its class size to under 25, a conservative estimate required approximately 40 new teachers at a $1.25 million cost. No evidence was presented contrasting these costs with whatever State monies could be diverted from wealthy suburban districts.

Some costs cannot be calculated because precise figures are unavailable and speculative. For example, some assert that students in urban areas need a great deal of remediation and are not interested in more advanced academic courses like calculus. Assuming that this is true for significant numbers of urban students, the remediation needs and lack of advanced academic interest may be the result of failing to ensure comparable educational opportunities at an early age, especially for the educationally disadvantaged. If early education is improved, there may be new demands for more advanced courses, and that would probably involve increased costs.

In 1983 the New Jersey Statewide Joint Task Force on Pre-College Preparation (Exhibit P-310) recommended that the school day and/or the school year be lengthened, which might be especially necessary in urban districts to provide the necessary remediation and still provide other subjects such as music, art,

science and social studies. (The Japanese school year is approximately 240 days.) The recommendation to extend New Jersey's 180-day school year was not adopted but an early intervention program, for example, could consist of very small classes in K-3 during which time districts would actively involve parents to enhance the intensity and amount of instruction provided through 3rd grade, then, the extended day or year would assure time for the special services and diverse programming. The costs of such a program are not contained in this record. If such a program were implemented broadly in all poor urban districts, however, the impacts upon later remedial needs and student interests are also unknown. Based on the research however, one would expect that remediation needs would decline. Hopefully, by 7th or 8th grade, the majority of these students would have a mastery of basic skills and their interest in advanced education would have correspondingly increased. Nevertheless, I **CANNOT CONCLUDE** on the basis of this record how much such a program would cost and whether there would be any fiscal savings.

Based on the evidence in the record, I **FIND** that I am unable to determine whether more money system-wide is needed.

Available Funding Remedies - State Takeover

The defendants claim that where it is shown that a district is unable to provide T & E, the State can ultimately "take over" the district and take whatever steps are necessary to provide T & E, including adding "additional State fiscal support if it is determined that the taxing unit may not reasonably raise its taxes further." (Defendants' Proposed Finding M 60 at p. 84.) (*L.* 1987, c. 398, part d and *L.*1987, c. 399, part c.)

The possibility of additional State funds beyond Chapter 212 has no support in the record except in conjunction with special legislation or State takeover. Thus, additional State funding would be only possible in districts being run by the State. The proofs establishing vast unmet need and unequal program opportunities between urban and suburban districts lead me to **FIND** that such takeover funding would be insufficient to remedy the statewide systemic problems causing the T & E defects enumerated above. A few districts may be helped over the years through takeover, but an appropriate remedy I believe must focus also on the system-wide funding defects proved by plaintiffs. Takeover alone is not a sufficient remedy.

Available Funding Remedies - Improve the GTB System

The record permits consideration of improving the existing GTB system by increasing the amount of equalization monies distributed and correcting some of the other limitations plaintiffs proved. Theoretically, the GTB level and State support limit could be increased to deliver more equalization funds to more districts; State funding could be based on current year educational need, student enrollment and wealth; minimum aid could be eliminated; teacher pensions and categorical program aid could be included in the equalization formula; cap limits could be recalculated to emphasize greater equalization; and full transportation aid could be provided.

These detailed GTB improvements would, in essence, convert our modified system into a pure GTB or power equalizing or percentage equalizing system. However, plaintiffs have proven and I **FIND** that the GTB system, as well as

its functional equivalents, are incapable of eliminating the substantial differences in educational resources and program opportunities that exist among school districts throughout the State.

Drs. Fowler and Reock agree that simply making the GTB operate as a GTB would not provide relief to plaintiffs. There would continue to exist substantial inequality in spending levels. The GTB cannot equalize expenditures. It can only equalize capacity. The system would move closer toward ensuring that all districts making the same tax effort are able to spend the same; tax equalization in this sense will be fostered. However, variations in tax rates would still exist; the owner of a $100,000 piece of property would continue to pay widely differing amounts of property tax depending upon where the property was located. School districts would continue to share property poor tax bases with municipalities and therefore the extraordinary costs needed for facilities improvements may remain unreachable by most property poor urban districts, especially considering the continuing need for public or board of estimate approval of school budgets.

Furthermore, there would continue to be no deterrent to districts using equalization aid for tax relief. All witnesses agreed that increases in basic aid under the current system would result in tax decreases, with little increase in school expenditure. Without a maintenance of effort provision there would continue to be federal and State aid substituted for revenues raised locally. A maintenance of effort provision in the GTB would not narrow disparities but it would ensure greater equalized yield for equal effort.

Substantial tax base equalization could result from regionalizing the property tax base for school purposes. This can be accomplished while retaining

local administrative control in local school districts. Montana, for example, has over 400 school districts, but property taxes for education are levied at the county level. This has a substantial equalizing effect since education revenues are determined by the property wealth of approximately 40 counties instead of hundreds of school districts. Consolidation of school districts, for that matter, would also reduce tax base disparity in the same way that regionalizing the tax base does. Florida, for example, reduced the number of school districts from 450 to 67 (one per county).

If a GTB system levied a county property tax rate, the competition over tax dollars would be shifted from each municipality to the county, but might not be eliminated. In such a system, however, the wealthier municipalities within the county would carry more of the tax burden for the less wealthy in the county. The actual dynamics and collateral consequences of such a shift in New Jersey would be uncertain.

Available Funding Remedies - Comparability Funding

It may also be possible to establish a new categorical "comparability funding" program, to assist poor urban districts to catch up in providing equal educational opportunities. This approach was likened by one of the witnesses to a "Marshall Plan for urban districts." Here, additional monies could be directed by the Commissioner to ensure that poor urban districts are able adequately to address the needs of all their students. This funding method might include a requirement that the Department of Education certify that there are no funds that can be saved by eliminating unnecessary district programs and it could also require the Director of the Division of Local Government Services in the Department of Community Affairs to certify the amount of revenues which can be raised locally to support the

budget, as he is required to do under the State takeover legislation. (*L.* 1987, c. 399 Sec. 19 (b) and (c).) This approach would direct additional funds to districts that clearly need the aid, but also acknowledge the State defendants' firmly held belief that several urban districts can be managed more effectively and that the urban property bases can be used to raise additional revenues.

Comparability categorical funding would enable the districts and Department to target need in the most efficient manner. For example, it may be possible to fund a complete early intervention program for educationally disadvantaged youth including pre-kindergarten, combined grade levels, enhanced counseling services, etc. As part of the aid package, it may also be possible to require various reports and evaluations of program effectiveness to ensure that the money is being well spent.

Addressing the property poor urban districts' comparability needs in this manner may involve the Department of Education and local districts in increased monitoring and auditing concerns and may also create additional administrative problems.

Whether comparability categorical funding solves the systemic defects discussed above depends upon the general school financing method selected to deliver the balance of the funds needed by schools. Another problem is that categorical funding does not address the systemic defects in the funding system.

Available Funding Remedies - High Foundation

Where equalization of expenditures and educational resources are the major objectives of a State aid system, states typically use a high or full foundation program. Under this program, a foundation level is set by the State. Each district is required to levy the same tax rate (termed "required local effort") as a contribution to funding that foundation level. In a foundation system, all property owners pay the same school tax rate, which can be established at any level. The state provides funds to each district in the amount of the difference between the yield raised by the district's required local effort and the State's foundation level amount.

A state has a wide variety of choices about the relative proportion of state and local funds to use in funding a foundation program. For example, New Mexico, which has a high foundation program, is funded by very low property taxes and over 90% State revenues. Foundation programs are typically funded with about two-thirds state revenues and one-third property taxes.

Sometimes foundation programs incorporate some local leeway and permit districts to levy a small amount of tax above the foundation. In Florida, for example, districts may levy 6-8¢ tax above the foundation. Foundation programs cannot permit too much local leeway or expenditure disparities will develop. If no local leeway is permitted, the foundation program is called a full foundation.

The amount of money districts receive under a foundation program can depend on whether the spending pattern is based on teachers, classrooms or pupils. States have established various weightings for differential pupil needs and program

costs. States such as Florida, New Mexico and Utah, for example, use weighted pupil units. Weights have been developed to account for the costs necessary to educate a student in compensatory education, special education, bilingual education, high school and elementary school. There have also been established differing weights for additional cost pupils and programs such as special education and low-achieving children and vocational education programs. Thus, under foundation programs, all school districts will not necessarily receive the same amount per pupil.

Under a foundation system which uses the student as the funding base, the amount of money a school district receives from the state is equal to a certain amount per weighted student times its number of students, from which is subtracted the amount the district raises from local taxes at the required local effort tax rate. A high foundation program emphasizes the state's role in supporting educational programs equally across the state.

There are some categorical funds awarded outside the foundation. Transportation costs, for example, are not associated with teaching; they are a function of geography. Capital outlay, maintenance repair and debt service (not custodial costs) are also needs unrelated to instruction. These costs generally vary from district to district depending upon the age of school buildings. In Florida, therefore, transportation and capital outlay are funded outside of the foundation. In Florida, a number of revenue sources have been tapped for school building, including motor vehicle license fees and a public utilites tax. Florida generates $700 million annually for school construction and no local monies are used. All other costs associated with teaching students are included in the foundation.

Besides Florida, New Mexico and Utah, Washington and Alaska, among others, use a high foundation program to fund education.

The high foundation system is the only school finance system in which both tax equity and educational program equity can be achieved at the same time. Its purpose is to make the quality of a child's education a function of program needs and not a function of local property wealth, or the number of children the district has to educate, or the incidence of high cost programs needed by children in the district, or the willingness of voters to levy adequate local taxes. The program also eliminates the incentive for property wealthy districts to vote against education funds for the rest of the state. If a district wants more money, it must lobby for raising the foundation. Thus the rich districts are not pitted against the poor or vice versa. Also, board of education members tend to be persons interested in delivering educational services and not those interested primarily in keeping the tax rate under control.

However, the foundation funding program also contains some potential problems. If the foundation level, for example, is set too far below the spending level of higher spending districts in a state, there will continue to be wide disparities in expenditures if districts are permitted to raise local leeway monies over the foundation. Additionally, if many of the districts' education costs remain outside the foundation, disequalization will also result. If funds from the state aid program (including the local share) do not cover substantially all the costs of education, such funds must be provided from the unequal local tax bases of school districts. If unequalized local funds represent more than a small percentage of total operating

expenditures, educational expenditures and educational resources are likely to vary substantially thoroughout the state.

Besides these structural concerns, a foundation program would reduce expenditure differences but may mean a large property tax increase in some districts that had previously enjoyed favored treatment because of their wealthy property tax bases. Dr. Fowler testified that he simulated adoption of a high foundation and found there would be a "huge tax increase across the State." Additionally, if the foundation level is low and no significant local effort permitted, then the quality of suburban education may suffer and raise fears of additional flight by the wealthy from public school systems into private systems.

Additionally, the fact that funds are distributed on a per pupil basis under a foundation system means that the districts' budgets would no longer be crucial for funding purposes. District uncertainty as to aid amounts, which causes budgeting uncertainty, would be eliminated. Also, efficiency might be a concern. Florida, for example, uses program cost accounting to enhance efficiency by permitting a comparison of program effectiveness with the resources devoted to the program. The Department of Education would still be required to monitor district budgets even under a high foundation program because of the State's responsibility to ensure equal opportunity. In Florida, for example, the State believed it was necessary at one time to require districts to spend 90% of the money earned in any category for the children and the school that generated the weighting. Under a foundation program without such a restriction, a district could spend the money received for compensatory education, for example, on some other program or even in some other school in the district.

Implicit in a foundation program is the plaintiffs' major position that equalizing expenditures goes a long way toward equalizing educational opportunity. This may be true. But, on the basis of this record which demonstrates that some districts have engaged in questionable fiscal practices, the Department of Education would have to play an active role in ensuring that equal opportunity and program comparability were being reasonably addressed by district spending. Nonetheless, with adequate controls, a high foundation system would address equity concerns as they relate to both educational opportunity and tax burden.

Funding Recommendations

As is obvious from the above discussion, I believe there are several available alternatives from which the State could choose to solve the constitutional problems caused by the present system. Each has its own problems.

However, I believe the plaintiffs have proven and I **FIND** that unless major revisions are made to the manner in which the GTB system operates, it can achieve neither expenditure equality nor equitable property tax rates.

Based on the record presented in this case, I **FIND** that plaintiffs have established that utilizing a high foundation funding system will reduce the vast expenditure and property tax rate disparities that currently exist. The high foundation system could include a property tax with a uniform rate for the local effort. The State contribution to the foundation could be made up in the same way State aid is currently provided. Transportation and facility expenses should be outside the foundation and aided categorically. All other expenses related to

educating students, including teacher pension contributions, would be included in the foundation. This will eliminate the competition between the municipality and the school district over the tax base. No discretion in how much to levy would be possible under this system and, therefore, there should be no political or fiscal budgeting interference present. The inequity in tax rates would be eliminated.

I am also concerned that further adjustments to the already modified and complicated GTB system will cause unforeseen difficulties that may be best avoided by establishing a more simplified system directly focused on achieving the T & E and equal protection goals.

Additionally, unless school district tax bases are separated in some fashion from their surrounding municipalities and the public's role in the budgetary process clarified, there will continue to be restrictions placed on the property poor school district's ability to serve the educational needs of all its students.

I believe the high foundation funding system solves both of these concerns. As explained by plaintiff witness John Leppert, it is a relatively simple system which eliminates any incentive to focus local energies on reducing tax rates. The public's role is changed from "fiscal watchdog" to what is really intended by the tradition of local control, a concerned participant in establishing educational policy for the community.

I do not, at this time, share plaintiffs' confidence that equalizing expenditures is all that is necessary to achieve T & E. I understand that plaintiffs contend that expenditure equality is the clearest and easiest reform goal to achieve. I agree with plaintiffs that if all districts had substantially equal revenues there

would be a reasonable likelihood that the programs offered to similar students would also be substantially similar. I also agree with plaintiffs that on equal protection grounds the vast differences in per pupil revenues raised cannot be justified.

However, the record is clear that equalizing expenditures, though very important, is not the only reform necessary to achieve a T & E system. Expenditures must be intelligently utilized to ensure that students receive the quantity and quality of necessary program opportunities. While I have found that the record does not allow me to conclude that mismanagement and improprieties are widespread through all property poor districts, I am concerned enough not to be able to recommend expenditure equity as the only reform. Consequently, I believe that further modifications, to be discussed below, are also necessary. (See below: District Location and Size, Separate But Equal and the Department of Education's Role.)

On the basis of the record, however, I recommend that New Jersey seriously consider combining a high foundation system as described above with comparability categorical funding added to transportation and facility aid during a phase-in-period. (See Facility Improvement Reform suggestions below.)

I believe that only the high foundation system (with transportation and facility categorical aid) addresses all the defects of the existing system and meets the equal protection demands. But, I suggest that categorical comparability funding be used immediately to address early intervention needs or other statewide

comparability concerns like computer education, as New Jersey phases in the high foundation system.

I suggest New Jersey start with the local contribution set at a clearly affordable level with additional local expenditures permited over the foundation provided by the State. Over a period of years, New Jersey could increase the foundation and decrease the amount of local leeway until we obtain a high foundation with little local leeway permitted. When South Carolina enacted a foundation system, it allowed high spending districts to maintain their expenditure levels until inflation caught up with them. There are other methods that have been used by various states to make the transition more palatable. The goal, however, should be to level up and not down. There are many fine programs being offered in wealthy districts. These should be offered across the State, not eliminated because of insufficient funding.

Using categorical comparability funding immediately, however, will enable districts to address the most presssing comparability needs prompty. And the Department will be given an opportunity to improve district fiscal and management practices before the high foundation system is fully implemented.

District Location and Size

The record in this case is clear that many educators believe that New Jersey has districts that are either too large or too small to provide a T & E system. Districts that are too small cannot efficiently offer the breadth of programming that is necessary for a meaningful comprehensive education program. The very large districts, typically in our urban centers, present management and student-

environment problems that stagger the imagination. The day to day operational problems besieging our urban districts include student drug problems, suicide, pregnancy and violence, besides the normal academic concerns; enormous educational challenges, including high student mobility and dropouts, large basic skills deficiencies, significant numbers of bilingual students; parent complaints about the normal range of disturbances together with the district's difficulties in reaching generally unavailable working parents to discuss student needs; large teacher absences and insufficient substitute pools which cause daily scheduling and administrative difficulties; and plant facility mishaps, not only those relating to maintenance and safety but also those relating to urban areas, including break-ins, violent crimes and other disturbances perpetrated from the outside. These trying day-to-day existence problems make planning for short or long term future needs virtually impossible, without substantial staffs. The record is clear that most of our urban districts do not have adequate sized staffs to handle all of the day-to-day problems and, at the same time, to plan efficiently for the future.

I **FIND** that the large urban districts are too big to be run very efficiently. I also **FIND** that the large student bodies, particularly in elementary and middle schools, add to the students' academic problems by creating a non-caring, non-personal environment where some students feel overlooked or ignored. This bigness may also cause some of the mismanagement that defendants have proven and some of the disparities that plaintiffs have proven. For example, the record indicates that there are additional vocational education funds that could be obtained by plaintiffs' districts if they could qualify as LAVSD'S. The inability to obtain this money may be directly related to the district's size, which requires it to expend most of its attentions on day-to-day survival. As another example, Essex County Superintendent Scambio believes that to develop a comprehensive staff

development and training program in Newark like the one in Scotch Plains/Fanwood, it would be necessary to break the district down into manageable units.

I of course realize that district size and location is a very controversial subject. But, should the courts agree that a violation of equal protection is present, it might be propitious for district size and location to be considered by the Legislature. In *Robinson I*, the Supreme Court declined to analyze the equal protection implications partly because of the possible application to all municipal services. *Abbott*, however, requires an equal protection analysis. If school districts were separated from municipalities, the municipal non-education services responsibilities could be more easily distinguished from the specific constitutional requirements for a thorough and efficient educational system.

In short, I believe strongly that New Jersey should move toward re-configuring our school districts with boundaries based upon how best to deliver meaningful educational programs as the prime focus instead of pre-existing historical and parochial interests. New Jersey, I believe, should commit itself to reorganizing our school districts to eliminate those too large or too small to provide effective, stimulating and personalized environments.

Separate But Equal

Plaintiffs argue that if poor urban districts are to be separate, then at least they should be equal. I categorically reject the premise upon which this argument is based. The separation of minorities is contrary to many of our

contemporary laws and principles. I cannot in my heart sanction a return to *Plessy v. Ferguson*, 163 *U.S.* 537, 41 *L. Ed.* 256, 16 *S. Ct.* 1138 (1896).

Student educational needs, however, should not be limited by arbitrary barriers. I have indicated that I believe one of the county superintendent's functions ought to be to ensure that all children in the county receive comparable services. The Department of Education should have the necessary powers to ensure that this occurs. For example, if a district has a few students who could benefit from a course offered by any school in the county, the superintendent should be able to arrange for the course and any necessary transportation. The county superintendents, in my opinion, should be empowered to compel districts to service other district students when necessary to ensure comparable services. It should also be made clear that county superintendents may compel districts to cooperate with each other by entering into leaseholds or in any other ways deemed necessary to provide educational services to students.

In prior years, some South Brunswick administrators proposed that the district sponsor an outing to its environmental center in the Poconos with students from Newark and Elizabeth. The South Brunswick Board, however, disapproved this expenditure. Under the suggested reform, the Department should foster such cooperation and joint programs.

The Department of Education might also consider the possibility of establishing county magnet systems where the county superintendent and all district superintendents in a county decide which schools within the county should be available to deliver what types of services. Care would have to be taken to ensure that sufficient heterogeneity occurs, but such a system, if properly

established, could achieve better racial balances and more efficient delivery of educational services. There is precedent for this in county vocational schools.

I do not believe that this State should support or encourage the separation of races, no matter how equal the facilities or services may appear. The enhanced powers to move students between districts and greater cooperation in delivering county-wide educational services should, in my opinion, be carefully considered in any reform efforts, whether or not the districts are reconfigured as suggested above.

Facility Improvement Reform

It is quite obvious on this record that facilities present a statewide problem. Besides differences in the quality of school facilities between poor urban districts and wealthy districts, our school facilities generally need modernization .

While there is some testimony indicating that the condition of school facilities relates to academic achievement, the testimony is largely anecdotal and the input output studies that have been undertaken are, in my opinion, inconclusive. Nevertheless, it seems obvious that to provide a thorough and efficient educational system in New Jersey requires adequate physical plants. *Bd. of Ed. of Elizabeth v. City Coun. of Elizabeth*, 55 *N.J.* 501 (1970). "Adequately equipped, sanitary and secure physical facilities" is an element of T & E, as defined in Chapter 212. *N.J.S.A.* 18A:7A-5(f). Educators agree that an aged, outmoded physical plant can hinder the effective delivery of educational services. Similarly, I

do not believe that widely differing physical plants can be justified on an equal protection basis.

Plaintiffs have proven that the existing financing system inadequately funds facility improvements. The funding in each district is limited by the same factors that adversely affect the fiscal ability of the district to provide adequately for its students. There is political/economic interference caused by the shared property bases and a public that is sometimes overly hostile to building projects, no matter how necessary they may be. I FIND that a more systematic way of dealing with replacing and renovating outmoded physical plants should be incorporated into the financing system.

I agree with plaintiffs that capital outlay should be funded categorically since the need for new or renovated school facilities varies substantially from district to district. It should not be part of the equalization formula. In Maryland and Florida, for example, the state provides most of the school facilities funding based on a statewide priority needs list.

Under the Maryland program, school districts do not have to pass bond levies to build schools. The local contribution of 10% of school construction costs can come from operating monies or from bond funds, depending upon the local jurisdiction's discretion. Under the Maryland program, the state pays for new school construction, renovation of existing buildings, site planning and relocatable classrooms. School districts pay for site acquisition, architects fees and movable furniture and equipment. Maryland also operates a maintenance inspection program in which every school in the state was inspected for maintenance in 1974 and those rated poor or fair reinspected in 1976. Since 1980, the program has

conducted maintenance inspections in 100 schools per year. In addition, when Maryland instituted its program, the state took over most of the local district indebtedness for school facilities.

As explained by plaintiff witness Dr. Stenzler, the Maryland school construction program uses the following six priority classifications to determine funding of school facilities projects: (1) new schools or additions to provide instructional space for significant additional student capacity; (2) replacement of obsolete schools that have been in use for more than 40 years; (3) renovation of schools or those portions of schools that have been in use for more than 25 years; (4) renovation of schools or those portions of schools that have been in use for 15 or 25 years; (5) limited use additions such as auditoriums, gyms, locker rooms or expanding or altering facilities of this type; and (6) less critical facilities such as swimming pools, food service improvements, site modifications and outdoor education facilities.

Prior to the implementation of the Maryland School Construction Program in 1971, school facilities were often unequal between school districts. Wealthier districts typically had better facilities than poorer districts. The poorer districts tended to be urban and rural. Many schools in Maryland were over 25 years of age and some were over 50 years old. Special education students were taught in book storage closets or rooms created under stairs. Older schools generally were not accessible to the handicapped. Media centers were tiny. Because of overcrowded facilities, some schools were on double sessions. These problems are remarkably similar to those facing New Jersey and have been solved by Maryland through its construction program.

All elementary schools in Maryland have media centers and all have space for the arts. All middle schools have industrial arts space and media centers. All high schools have science labs, special education space, media centers, gyms, industrial art and music space.

The record contains a detailed description of the Maryland program and I suggest that a similar program could handle New Jersey's facility needs.

The Department of Education's Role

It could be considered presumptuous for me to make findings on the Department's role. However, there was a great deal of contested testimony challenging some of the methods chosen by the Department to implement Chapter 212. The following suggestions constitute my resolution of these conflicts.

The Department of Education appears committed toward maintaining its regulatory role. The culmination of this commitment can be seen in the State takeover legislation, through which the Department will try its hand at personally reforming "failing" school districts.

The Department of Education should not be seen as the enemy by local school districts. Unfortunately, there was a great deal of antipathy toward the Department expressed by local district witnesses. Some of this friction is probably unavoidable, but I believe that the Department should search for more ways to be seen as a partner in the process rather than its policeman. For example, in monitoring, under the reforms I have suggested, the Department would have to

focus on assisting districts in meeting its students' educational needs in meaningful ways. This may require it to compel reluctant districts to open its doors to "outsiders." This may cause further friction. Efforts could, therefore, be undertaken to develop sharing arrangements that are not only fair but are also perceived by all as fair. To accomplish this result, I suggest that the Department consider advising the State Board of Education that it attempt to negotiate a rule for this new venture. (See *N.J.A.C.* 1:30-3.5.)

I also suggest that the Department focus further attention on how to provide additional, meaningful assistance in areas that would be seen as helpful by local districts. Certainly, the Department's distribution of its computer analyzed HSPT results and other such studies are helpful. The RCSU's could be expanded and further publicized to continue their good works. The Department should also continue to locate and disseminate to the districts those programs that show the most educational promise.

The Department could also, however, identify new ways to be helpful. For example, some districts have been criticized by the Department during monitoring for not having curricula in all subjects. The Department could develop model (not uniform) curricula, particularly in difficult areas, that would be of use to districts. The sample curricula should not be mandated and districts should be allowed to modify the curricula as they deem necessary. But having such models would save districts enormous effort and some expense. The Department could focus on developing other services, like the model curriculum, that the local districts either do not have sufficient staff for or may find too costly to develop on their own. By getting involved in these helpful projects, the Department would also prevent the current duplication of efforts by individual districts trying to do these

things. As a further example, the Department of Education could obtain bilingual texts or locate available texts that can be used by districts. The Department presumably should have greater contact with textbook publishers and other states than individual districts and can best provide this service. In short, the Department should try to return somewhat to the concept of "helping teacher" it had before monitoring.

In an effort to be a helpful partner to local districts in providing T & E, the Department cannot abdicate its regulatory responsibilities. The Department of Education should continue and possibly expand its audit functions, for example, to ensure that districts not only properly comply with fiscal regulations but also do not mismanage funds. Since the Department must ensure that the entire sytem is T & E, some tension between local districts and the Department is inevitable. I hope this tension is minimal and can be channeled to yield constructive improvements.

The Department should be perceived as the protector of public school students and should initiate whatever actions may be necessary to ensure fulfillment of the Constitution's promise. Additionally, even though the Constitution does not require the system to focus on individual students, the Department should encourage and assist all districts in developing the individual talents of all students. In my opinion, the goal of the Department of Education should be to foster an educational program that develops the full potential of each student in New Jersey's public schools.

CONCLUSION

Some fear was expressed by the defense that alteration of our financing system would present a risk of causing damage to other social values and to the system itself. I do not believe in fixing what is not broken. However, plaintiffs have proven the system is broken. The implementation of Chapter 212 gave the appearance of constructive movement, but a reordering of resources has not occurred and the quality of education statewide has not improved.

I believe the case comes down to whether this State desires to enhance the educational opportunity of students living in poor urban areas. This case has illuminated for me the prodigious efforts which must be undertaken by those urban youth who make it through the current system into productive lives. I have acquired a greater appreciation for this effort. If we do not wish to spend monies easing these students' entry into contemporary society, then there are those who argue that we will have to spend the funds later in welfare, Medicaid, job training and prisons. They argue, therefore, that a thorough and efficient education system would be cost efficient.

I do not believe that this question should be answered only on a cost-benefit basis. Some of the costs are relatively easy to calculate, but the benefits are not. How do you evaluate retaining a few students who would have dropped out? How do you weight the one student who becomes a successful artist and creates works that provide enjoyment for thousands of people? How do you cost-out the student who learns to enjoy reading and thereby adds excitement to what otherwise would be a rather ordinary existence? How important to society are

flexible, imaginative and inventive citizens? I cannot even guess. Suffice it to say that I opt for providing equal opportunity to all our children, no matter where they may live.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my initial decision with **SAUL COOPERMAN** for consideration.

8/24/88
DATE

STEVEN L. LEFELT, ALJ

Receipt Acknowledged:

8/24/88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

8/25/88
DATE

OFFICE OF ADMINISTRATIVE LAW

RAYMOND ARTHUR ABBOTT, a minor, by his guardian ad litem, Frances Abbott, ET AL.,	:	
PLAINTIFFS,	:	
V.	:	COMMISSIONER OF EDUCATION
FRED G. BURKE, ET AL.,	:	DECISION
DEFENDANTS.	:	
	:	

INTRODUCTION

The Commissioner has reviewed the extensive record in this matter. He notes that the parties have filed lengthy exceptions and reply exceptions pursuant to the provisions of N.J.A.C. 1:1-18.4.

Given the enormity of the record developed in this matter and the length and complexity of the initial decision, the Commissioner deems it appropriate to focus again upon the direction provided by the New Jersey Supreme Court in remanding this matter to the Commissioner for his initial consideration.

In remanding the matter, the Supreme Court in Abbott v. Burke, 100 N.J. 269 (1985) stressed the factors to be considered in reviewing plaintiffs' claims under the thorough and efficient education clause by relying on language from Robinson V. 69 N.J. 449 (1976). In determining whether the Public School Education Act of 1975 meets the State's constitutional responsibilities, the Robinson V Court concluded that "...a measure of local educational expenditures in terms of 'dollar input per pupil...is plainly relevant.'" Abbott at 291-2. The Supreme Court in Abbott, however, also cited the Robinson V Court in emphasizing that "...the Court has 'been constantly mindful that money is only one of a number of elements that must be studied in giving definition and content to the constitutional promise of a thorough and efficient education.'" Id. at 292. Further the Court in Abbott declared that "...in considering plaintiffs' claim under the thorough and efficient education clause, the Court's analysis of the 1975 Act's financial provisions as applied cannot be separated from its analysis of the statute's educational goals, components and procedural processes." Id. at 293.

Thus, this case is about funding New Jersey's public schools, but only insofar as whether the formula devised by the State Legislature in Chapter 212 in conjunction with the monitoring process envisioned therein is sufficient to provide a thorough and efficient system of education as defined by the Legislature in N.J.S.A. 18A:7A-5. Id. at 283. Accordingly, in conformity with the Court's directives, the Commissioner will review the current public education funding law, as applied, as an integrated whole, rather than merely as a "funding case."

To establish that the Public School Education Act of 1975 as applied violates both the Equal Protection Clause of the State Constitution and the Thorough and Efficient Clause of the State Constitution, plaintiffs must submit proofs demonstrating they "...suffer educational inequities and that these inequities derive, in significant part, from the funding provisions of the 1975 Act." (emphasis supplied) Id. at 296.

Based upon the instruction of the Court, plaintiffs in this matter also bear the burden of demonstrating in terms of educational achievement and program offerings that "...significant numbers of students in plaintiffs' school districts fail to receive an effective secondary education by reason of the 1975 Act's operation...." Id. at 291.

The Court has likewise dictated that failure to provide equal educational opportunity may also be demonstrated by "...allowing equivalently-qualified students to attend schools providing significantly disparate program offerings." (emphasis supplied) Id.

Ultimately, failure to provide a thorough and efficient education requires "...proofs that, after comparing the education received by children in property-poor districts to that offered in property-rich districts, it appears that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children." (emphasis supplied) Id. at 296.

Finally, to meet the burden of demonstrating a violation of the State Equal Protection Clause, proofs must be offered "...that, even if all children receive a minimally thorough and efficient education, the financing scheme engenders more inequality than is required by any other State interest." Id.

SUMMARY OF CONCLUSIONS

Having initiated this decision by enumerating the tests to which the evidence in this matter must be submitted, the Commissioner deems it appropriate to summarize his findings in relation to such tests at the outset of his review of the case.

In response to the Court's requirement that determination be made as to whether plaintiffs suffer educational inequities, which are derived in significant part from the funding provisions, the Commissioner rejects the initial decision and instead has concluded that there has been a failure to demonstrate that the educational inequities claimed by plaintiffs are systemic in nature. Where differences have been demonstrated to exist, they are district specific and are capable of being remediated both programmatically and financially through the existing administrative process established pursuant to law and regulation and through the existing funding formula.

The Commissioner has also concluded by way of an analysis of the record and the proofs submitted that significant numbers of students in plaintiffs' districts do not fail to receive either an effective elementary or secondary education by reason of the operation of the 1975 Act. In reaching this determination, the Commissioner rejects the initial decision's conclusions to the contrary. In so deciding, the Commissioner has relied upon the specific requirements as to what elements must be present in the educational program of each school district in order to assure that such program meets the requirements of a thorough and efficient education. In the Commissioner's view those elements as embodied in N.J.S.A. 18A:7A-5a-j as set forth below and further amplified in N.J.A.C. 6:8-2.1 represent a reasonable and appropriate definition of the content of a thorough and efficient education as is discussed at length in Part V.

Based upon the foregoing standards and upon the analysis provided in this decision as it relates to alleged program and funding disparities and the statutory and administrative procedures established for monitoring the progress of districts toward achieving a certified status, the students in plaintiffs' districts, as well as all other similarly situated students, are receiving an effective educational program by virtue of the Act's operation. The Commissioner rejects the initial decision conclusions to the contrary. Those deficiencies which do exist and which, through the legislative and administrative procedures provided by the Act, have been identified are being addressed. In reaching this conclusion, the Commissioner deems it significant to recognize that the Court's decision in Robinson I, 62 N.J. 473 (1973) relied heavily upon financial support issues because it had little else by which to measure what elements were necessary to ensure a thorough and efficient education. The Court in Abbott, supra, however, fully recognized that scrutiny of the degree of financial support could not be separated from the administrative procedures and processes established for purposes of implementing the Act.

By way of further conclusion, the Commissioner through his analysis of the contentions of plaintiffs and the ALJ regarding alleged program disparities has determined that plaintiffs have not met their burden of proof that the manner in which the Act has been applied both fiscally and programmatically has allowed equivalently qualified students to attend schools providing significantly different program offerings. The Commissioner believes, and has so concluded, that a thorough and efficient education is that which the Legislature and the State Board have appropriately defined through law (N.J.S.A. 18A:7A-1 et seq.) and implemented through a process provided for in both statute and regulation. Consequently, when a school district, in conformity with law and regulation, attains certification, it is deemed to be presumptively thorough and efficient. In the Commissioner's view the thorough and efficient standard does not require a sameness of programming, but requires an equality of opportunity for all children to function effectively as citizens and in the labor market. The programmatic and fiscal requirements for a particular district are those which are sufficient to accomplish the aforesaid goal.

Since, in the Commissioner's view, T&E does not require an absolute sameness of programming or even financing, equal protection can only be considered to be denied if the system established under law failed to provide those educational opportunities which are mandated by law.

There has been no demonstration by plaintiffs in this matter that children educated in property-poor districts which have attained certification through the administrative process established by the State are in any way disadvantaged and unable to compete in and contribute to the society entered by the relatively advantaged children. It has not been demonstrated that there is a minimum spending level required to provide a thorough and efficient education. Where districts have failed to meet the requirements for providing a thorough and efficient system of education as measured by the achievement of certification, the monitoring process established by administrative rule has identified the reasons for failure and has caused to be set in place remedial actions designed to assure the provision of a system of education which is capable of overcoming any disadvantage existent as a result of ineffective leadership and programs. Ultimately, by legislative enactment, the State has the authority to take over failing districts in order to accomplish the ultimate goal required by law.

Finally, in conformity with the Court's direction, the Commissioner's consideration of the proofs in this matter has not convinced him that the financing scheme provided for in the 1975 Act engenders more inequality than is required by any other State interest. The Commissioner believes that the defendants in this matter have demonstrated that a rational basis exists for funding in accordance with Chapter 212, that is, to preserve the right of local interests to provide differentiated programs and services above and beyond those which may be required by law and regulation which are designed to meet the specific needs of their particular constituency.

In this regard, it is the Commissioner's considered judgment that the existing mechanism for funding education in New Jersey is sufficient, if fully utilized, to achieve those goals and standards established under law and that the administrative process for monitoring progress toward achieving the goals of T&E is fully capable of ultimately assuring that all children will have access to a thorough and efficient education.

The Commissioner has, however, determined to recommend to the Legislature that state aid on a current year basis be provided to all districts below the guaranteed tax base (GTB) as a means of dealing with the "mind set" expressed by plaintiffs' school districts relative to "municipal overburden" and their perceived inability to raise sufficient funds through taxation.

The Commissioner has also concluded that the existing funding formula as it relates to meeting facilities needs, while

sufficient to assure the health and safety of children and to meet current limited scale alterations and repairs, will soon prove inadequate to the larger needs of modernizing or replacing aging buildings many of which are close to a century old. Addressing the enormity of the State's long-term school building and renovation needs is a matter which, in the Commissioner's view, can only be resolved through a statewide bond referendum initiative. In the interim, the Commissioner is also recommending current year state aid funding for capital projects to enhance the ability of districts below the GTB to undertake such projects without the initial impact on the local tax rate required to be borne in the first year under the existing state aid funding formula.

PART I

PROGRAM DISPARITIES

In considering the totality of factors that constitute a thorough and efficient education, it is necessary to determine if program inequities prevent plaintiffs from receiving a thorough and efficient education. In so doing, the Commissioner is mindful of the "constitutional promise" established by the Legislature which the Court has found acceptable, that is, that a thorough and efficient system of free public schools shall provide to all children in New Jersey, regardless of socioeconomic status (SES) or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society.

In addressing the issue of program disparities, the ALJ states that neither party presented much evidence about programs in average or mid-SES districts. Plaintiffs' comparisons were with districts above the guaranteed tax base (GTB) which defendants contend is an unfair comparison of extremes since poor urban districts are more like the majority of districts than the comparison districts used in this matter.

Upon review of the evidence and testimony about educational programs, the ALJ finds that there are extreme disparities in some program offerings between poor and affluent districts. He also states that there were no standards against which to measure what is offered in urban districts to determine what is average or extraordinary "because the State does not define input requirements and monitoring is district specific***." I.D. at 141.

A summary of the ALJ's findings regarding program disparities is provided below:

COMPUTER EDUCATION

- Poor districts lag behind wealthy districts in computer education with the wealthier

districts having higher computer-student ratios, more years of experience in their use and a higher percentage of staff trained in computer use. (I.D. at 142)

FOREIGN LANGUAGE

- Foreign language instruction in poor districts is rudimentary, limited and usually begun no earlier than 7th grade while wealthier districts offer instruction in more languages, in longer sequences that include advanced instruction and begin instruction earlier. (I.D. at 146)

SCIENCE

- Plaintiffs were able to contrast conditions in poor urban districts with science programs in wealthy suburban districts; however, the record does not indicate the average condition of science education in all New Jersey school districts or how many meet the standards of the New Jersey Science Teachers Association. (I.D. at 148-49)

- High schools in affluent areas have more demand for advanced science courses than those in poor districts. (I.D. at 149)

- Laboratory inadequacies exist in plaintiffs' districts and when laboratory facilities do exist in urban districts, they are more likely to be older with only one lab table. (I.D. at 150)

- The condition of science facilities in elementary schools may be a statewide problem. (I.D. at 150)

- There are few true science classrooms at Camden High School, i.e., the majority of rooms for science being regular classrooms, and facilities for hands-on experiments are not available. (I.D. at 151)

- Because of the high concentration of minorities in urban districts and the failure to encourage science education in those districts or to provide modernized instruction, the need to reverse the under-

representation of minorities in science careers is not being addressed in plaintiffs' districts. Children who do not get a good background in science and technology will not be prepared to compete for career opportunities which require that knowledge. (I.D. at 152)

GIFTED AND TALENTED/ADVANCED PLACEMENT

- No specific standards regarding types of gifted and talented programs, curricula or availability to students exist nor does the State provide specific funding for gifted and talented programs. (I.D. at 153)

- Differences exist in gifted and talented programs in poor and affluent districts in terms of numbers of teachers, percentages of students involved and types of opportunity available. (I.D. at 154-55)

- This situation is similar with advanced placement courses. Neither Camden nor East Orange offer any. (I.D. at 155)

ART

- Although artistic expression and appreciation are State education goals, N.J.A.C. 6:8-2.1(b)9, the State does not require art classes at the elementary level nor that it be taught by art specialists. High school graduation requirements include one year of fine, practical and/or performing arts. (I.D. at 156)

- In large urban districts, budget constraints appear to affect the availability of art instruction. (I.D. at 156)

- There was no evidence from either party about the availability of art instruction, facilities, supplies or special programs in other New Jersey school districts. (I.D. at 160)

MUSIC

- Aside from the goal that every child "acquire the ability and the desire to express himself or herself creatively in

one or more of the arts and to appreciate the aesthetic expressions of other peoples," N.J.A.C. 6:8-2.1(b)9, New Jersey does not specifically require music education. (I.D. at 160)

- Plaintiffs' evidence indicated several affluent suburban districts offer more exposure to music than some poor urban districts. Proofs were not offered by either party regarding the type or extent of music education in all school districts. (I.D. at 160)

PHYSICAL EDUCATION

- By statute, every school child in New Jersey must be provided 150 minutes per week of physical education, health and safety instruction and adaptive physical education must be provided for children who are handicapped. (I.D. at 163)

- It is not required that PE be taught by certified PE instructors. (I.D. at 163)

- Evidence on the existence of staffing, equipment and facilities disparities between poor and affluent districts was presented but none on average or mid-SES districts. (I.D. at 163)

GUIDANCE AND COUNSELING

- State Board regulations require that each school district provide "[c]omprehensive guidance facilities and services for each pupil***." N.J.A.C. 6:8-2.1(c)5 No counselor-pupil ratio exists nor does monitoring assess the sufficiency of guidance services as it relates to student needs. (I.D. at 167)

- Despite the evidence of the benefits of extensive and early counseling for disadvantaged children, the record indicates that this need is not met in plaintiffs' districts; schools are not providing the kind of specialized, intensive counseling that would benefit most students. (I.D. at 168)

VOCATIONAL EDUCATION/INDUSTRIAL ARTS

- There is categorical aid for vocational education available from federal and State sources that provides considerable amounts of money for these programs. Because many students in poor urban districts do not continue beyond high school, a drop-out vocational education is particularly important in providing entry level job skills, a factor recognized by urban districts which are attempting to meet the need with varying success. (I.D. at 179)

- Basic skills and compensatory education needs impact on vocational education requiring scheduling and facilities that may otherwise be used for vocational education. (I.D. at 180)

- There is less of a need for vocational education in affluent districts but some have developed advanced technology-oriented programs in vocational education nonetheless. (I.D. at 180)

- There appears to be some duplication of effort in providing vocational education since districts and county vocational schools may be serving the same student population.

LIBRARY/MEDIA

- Library/media disparities span personnel, spending, quantity of collection, media equipment and facilities and tend to affect poor urban districts more severely. (I.D. at 187)

- Sometime in the early 1980's library/media budget restrictions severely affected some urban centers. (I.D. at 187)

CLASS SIZE

- Poor urban elementary schools tend to house more students with many more large classes than wealthy suburban districts. Three of plaintiffs' districts have elementary schools exceeding the number of students preferred for effective teaching of elementary students. (I.D. at 191)

- An elementary school's enrollment should be between 300-500 students. (I.D. at 188)

TEACHING AND PROFESSIONAL STAFF

- Even when average teachers' salaries are higher in poor urban districts, they are not high enough to enable poor urban districts to compete equally with affluent suburban districts for qualified teaching applicants. (I.D. at 198)

- Overall, students in urban districts are more likely to have a greater number of less qualified teachers during the span of their education than those in affluent districts. (I.D. at 200)

- While there are indications on the record that better leadership by building principals and superintendents may help improve urban teaching, actual improvement may be hindered by the same limiting factors which result in less qualified teaching. (I.D. at 200)

- As the level of per pupil expenditures increases so also does the size, experience and education of professional staff; higher spending is associated with more staff per 1,000 pupils with more experience and postgraduate education. (I.D. at 205)

- Fewer in-service opportunities are provided urban teachers by their districts than wealthy districts. (I.D. at 208)

- There appear to be some urban districts with fewer health professionals than recommended by the School Nurses Association. (I.D. at 209)

- The proofs in this area are confusing because they cut across numerous teaching subject matters and did not differentiate between expensive and relatively inexpensive items. After considering all of the evidence *** I must FIND that plaintiffs have not proven inadequate funding as the cause. (I.D. at 214)

MATERIALS

- When textbooks and workbooks are purchased without categorical State or federal funds, several poor urban districts have professed the need to economize by phasing in such purchases or reusing consumable materials. (I.D. at 214)

EARLY INTERVENTION

- Irrefutable proof established that educationally disadvantaged children can benefit from early intervention. (I.D. at 218)

- Despite acknowledged benefits of early intervention, such programs are neither required nor specifically funded by the State. (I.D. at 215)

CONCLUSIONS

- Plaintiffs' proofs on program disparities illuminate several areas in which the educational needs of identified groups of students in poor urban districts are not being addressed and highlight apparent program and service inequities. (I.D. at 227)

- The extent of disparities indicates that whatever indirect attention monitoring may pay to ensuring programming consistency across district lines is inadvertent. (I.D. at 227)

- A child born in an affluent district who attends public school is likely to obtain the following advantages over a child born in a poor urban district:

  - more breadth of program offerings;

  - earlier exposure to specialized knowledge such as foreign language, science, computer education;

  - more advanced academic courses including gifted and talented and advanced placement opportunities;

  - more appropriate physical education facilities and outdoor play space;

- fewer students with special needs such as compensatory education and bilingual education;

- more attention to individual needs of students;

- smaller school populations.

(I.D. at 227-28)

Defendants take exception to the findings with respect to program disparities primarily because they are too broad and because there is no evidence in the record that the ten comparison districts are representative of the education received in most of the school districts in New Jersey. They likewise except to the entire section of the initial decision making comparisons of programs, arguing that the fact one district provides a program or a particular input is not material to whether another district is meeting the needs of its student body and meeting the requirements for a thorough and efficient education as set by State law and State Board of Education regulations. Defendants contend that the fact some districts choose to do more than they must is reflective of local discretion and locally established goals and objectives. Moreover, Chapter 212 has clearly preserved the role of local government in matters pertaining to budgeting and curriculum and at no place in law is there any requirement that all districts in the State should mimic the budgetary decisions and curriculum offerings of the ten comparison districts in this matter.

Defendants argue that the ALJ's conclusion that Chapter 212 has not provided T&E is based on his finding that there are differences in expenditure levels between plaintiffs and comparison districts, which differences he determines have precluded them from offering educational programs of equal quality and variety of opportunity. As to this, defendants take exception both to the ALJ's comparison of expenditure levels and to his finding that the difference in such levels is responsible for any deficiency in the provision of programs or equal educational quality or variety.

Defendants argue that the ALJ erred in decrying the impact of mandated compensatory education on the delivery of educational programs and services, e.g. the delivery of vocational education is handicapped by such programs and that it causes districts to focus resources on basic skills areas, such as urban in-service training, concentrating on basic skills rather than professionally oriented concerns. As to this, defendants urge that (1) the concentration on basic skills is a necessary activity where a significant portion of students is in need of remedial services; (2) the impacts of such concentration on breadth of program are an unavoidable and necessary consequence; and (3) that given the level of remedial need in plaintiffs' districts, they have adopted curriculum which appropriately addresses that need. Defendants also point out that much of the evidence discussed by the ALJ in this section is

anecdotal in nature and urge that while the specific descriptions of programs help in conveying what differences and similarities exist in programming between the selected districts, they are not descriptive of representative differences or similarities between all urban and suburban school districts.

Plaintiffs urge that comparisons between property-poor and property-rich districts are appropriate given the specific directives of the New Jersey Supreme Court in Abbott, supra, calling for proofs which do make such comparisons. They also contend that defendants do not define what makes the comparisons nontypical and what would satisfy their understanding of a typical education.

Plaintiffs reject defendants' contention that a district's failure to opt for discretionary programs is an exercise of local choice and that not providing discretionary programs does not implicate a failure to provide T&E. They urge that the constitutional standards for the delivery of a thorough and efficient education are not met by the current State curriculum requirements nor are they met by present State standards for certification of school districts. As to this, plaintiffs contend that such statements by defendants ignore the requirement for a breadth of program offerings designed to develop the individual talents and abilities of pupils, N.J.S.A. 18A:7A-5, and the ALJ's findings (1) that the State has never developed criteria for program comprehensiveness and (2) that when monitoring, the State limits itself to State mandates generally avoiding the more difficult and costly educational issues. They further urge that the Commissioner consider the Abbott Court's recognition that T&E is an evolving concept. They also aver that the record establishes that since 1975 defendants have not fulfilled the requirements of N.J.S.A. 18A:7A-8 and 9 which mandate that every five years there be the review and update of State goals and objectives and a comprehensive needs assessment program of all students in the State in light of those goals and standards, the results of which must be made available to local districts which in turn must review and update their particular goals, objectives and standards. Thus, they urge, the ALJ is correct in finding that State oversight does not assure that the actual needs of all students are being met. I.D. at 424.

As an example of the insufficiencies of current requirements, plaintiffs strenuously decry the fact that despite such legal mandates as:

- N.J.S.A. 18A: 7A-2.a(4) which states that the sufficiency of education depends "upon the economic, historical, social and cultural context in which education is delivered;"

- N.J.S.A. 18A:7A-5(g) which requires "[q]ualified instructional and other personnel;" and

- N.J.A.C. 6:8-2.1(c)5 which requires that there be "[c]omprehensive guidance facilities and services for each pupil;"

the Department of Education instructs districts that certified counselors are not required at the elementary level. Neither does it set pupil-counselor ratios, nor does it monitor the sufficiency of counseling staff to meet student needs. Moreover, they point to the ALJ's finding that if funds were used to purchase certain inputs for disadvantaged children, such as preschool programs and counseling in the early grades, "it is likely over a period of years that the present correlation between affluence and test results would weaken." I.D. at 539.

Plaintiffs also decry the fact that despite the statutory requirement for breadth of program, defendants persistently maintain that curriculum which focuses on basic skills at the expense of other program offerings appropriately addresses needs in their districts. They urge that such a claim fails to recognize that (1) preventive measures like preschool intervention can preclude basic skills failures (I.D. at 226) and (2) the needs of those who have achieved the desired level of basic skills would benefit from non-basic skills programs. I.D. at 221-22. Plaintiffs also aver that defendants' position does not address such things as the ALJ's finding that the current level of science instruction in plaintiffs' districts is not addressing the underrepresentation of minorities in science careers. I.D. at 152.

Plaintiffs also point out that despite N.J.A.C 6:8-2.1(b)9 and the fact that art and music play an important role among poor, disadvantaged children, neither art nor music is required by the State at the elementary or secondary level, except that for graduation from high school one year of either fine, practical or applied arts is sufficient. Further, they note that the Department does not require that physical education be taught by certified instructors at the elementary level and that the quality of physical education depends on facilities available.

COMMISSIONER'S DETERMINATION

In reviewing the program disparity aspect of this case, the words of the Supreme Court in Abbott, supra, have been carefully kept in mind, namely, do plaintiffs suffer significant inequities in their educational programs due to the current funding mechanism and upon comparison of the education received by children in property-rich districts, does it appear that the children in property-poor districts will not be able to compete in and contribute to the society entered by relatively advantaged children.

Upon careful examination of the record, the Commissioner disagrees with the ALJ that plaintiffs' proofs illuminate several

areas in which the educational needs of identified groups of students in poor urban districts are not being addressed and that they highlight apparent program and service inequities. Nor does he accept the implication that, therefore, the current system of public education in New Jersey is fatally flawed or unconstitutional. As was recognized by the Court in Robinson V, supra at 459, there is no mandate in this State that all children receive the same educational program and services. See also Abbott, supra at 291. Thus, dependent upon the needs of the students and the desires of the community in a given district, a greater or lesser emphasis may be placed on one type of programming than on another. Similarly, differences in monies allocated to various programs will depend upon the student needs and choices of the given districts.

First, it must be emphasized that six of the curricular areas addressed by the ALJ are not State-mandated programs, namely computer education, early intervention, art, music, vocational education/industrial arts (except as noted above for the one year of fine or practical/applied arts requirement for high school graduation) and foreign language. Does this mean then that because art and music and foreign language are not specifically mandated, a district not providing any courses in those subject areas could still be deemed to be thorough and efficient? The answer to this is unquestionably no because the goals for a thorough and efficient education set by the State Board, N.J.A.C. 6:8-2.1, mandate, inter alia, that the public schools of New Jersey shall help every pupil in the State to acquire the knowledge necessary for further education (N.J.A.C. 6:8-2.1(b)5) and to acquire the ability and desire to express himself or herself creatively in one or more of the arts and to appreciate the aesthetic expressions of others (N.J.A.C. 6:8-2.1(b)9). An absence of any foreign language offering would be contrary to the first of these requirements, as foreign language is quite often one of the criteria for college admission. Moreover, a denial of opportunity to take a foreign language in a property-poor district would not meet the Court standard that similarly situated students have equality of opportunity. Abbott, supra. As stated above, however, this does not mean that because a given language is taught in a property-rich district, all must have program access to that particular language. Nor does it mean that because foreign language is introduced earlier in one district than another, a failure to provide T & E exists. To reiterate, local choice dictates the breadth, scope and sequence of course offerings. While the ALJ chides defendants for arguing various positions on issues in this case from a "what ought to be" stance rather than "what is," so too does the ALJ on this issue argue "what ought to be" programmatically from his perspective and beliefs rather than "what is" in terms of State requirements. It must be emphasized that if a program is mandated by statute or regulation, it is the obligation of the Commissioner and the Department to see that it is provided. If it is not mandated by statute or regulation, and if not otherwise mandated by State educational goals, then local choice must dictate the bounds of such offerings.

In this regard, the Commissioner strenuously disagrees with many of the ALJ's overly broad findings in this section of the initial decision. For example, the decision implies that if a district offers only two foreign languages and does not offer ice hockey or lacrosse, then the district is somehow less than thorough and efficient because program equality has not been achieved with some affluent districts. There is no evidence whatsoever that any student in this State has been denied admittance to any college because French and Spanish were the only two foreign languages available rather than Mandarin Chinese and Russian or German. Moreover, the fact that Montclair offers ice hockey and lacrosse and other districts do not, be they urban or suburban, simply does not provide proof that athletic programs in such districts are not thorough and efficient or that unconstitutional program disparitv exists.

As to the areas of art and music, no evidence has been provided that programming in these areas is absent from plaintiffs' districts or other urban districts. The fact that an art or music program is not taught by special subject field endorsed staff at the elementary level does not provide proof that a thorough and efficient education is being denied to students in urban, suburban or rural districts, so long as the exposure to such subjects is being provided by K-8 certified staff who are by law deemed qualified to teach all subjects at that level. The fact that Paterson offered only one gospel choir performance to its high school students in a given year, while South Brunswick offered a madrigal singing group, a concert choir and a women's ensemble, serves in no way to diminish the conclusion that plaintiffs have not borne their burden of proof in demonstrating a failure to meet constitutional requirements for thorough and efficient education in New Jersey.

The same conclusion is reached with respect to computer education. Few would argue the desirability for students in this State to become computer literate. While programming in this area is not mandated, many of our districts, including plaintiffs', have added computer education to their curriculum offerings. That the computer-student ratio in Princeton is 1:8 and in Moorestown 1:11, as opposed to 1:22 for Jersey City high school students or 1:43 in East Orange, simply does not provide proof of a failure of plaintiffs' districts to meet the thorough and efficient needs of their students. Merely stating without specific reference to definitive research and specific proofs that "[i]t has been estimated that a district needs one computer for every 12 children in order for each child to receive 30 minutes of computer time every day" (I.D. at 145) does not in any way constitute evidence that there is a failure to be T&E if a district does not meet or come close to meeting such an unsupported, glibly-stated standard. There simply is no research base in existence that states how many computers per student a school should have.

As to the areas of gifted and talented, advanced placements, guidance and counseling, library skills and health needs, only Jersey City which is the subject of takeover pursuant to N.J.S.A. 18A:7A-34 et seq. has been found noncompliant with State requirements for any of these areas. D-285. While the ALJ may criticize the standards set for each or, as in some instances, decry the lack of specificity found in law or code, it is not his role to substitute his judgment for that of the State Board and the Legislature who are the competent and legally designated authorities define what the requirements of a thorough and efficient education shall be. For example, despite the ALJ's and plaintiffs' criticism, there is no requirement in law or code that elementary schools have certified guidance personnel nor have plaintiffs persuasively demonstrated why such requirement should exist. A variety of options exist to assure the availability of comprehensive guidance facilities and services to pupils in New Jersey (N.J.A.C. 6:8-2.1(c)(5)). Which option a given school district desires rests with the local board of education. No one option to guidance has been or should be mandated. While there are many who advocate having certified counselors in each elementary building, there are many who advocate a generalist rather than specialist approach to guidance at this level wherein teachers, principals and other staff are deemed key to the delivery of guidance and counseling. Which option among the array of possibilities a given school selects rests squarely with the individual district as the law and code permit.

While the record does point to the absence of library facilities in some of plaintiffs' elementary schools, the record, with the exception of Jersey City (D-285), does not establish that adequate classroom library books are not available to students in any school in any of the other plaintiff districts, nor the absence of personnel qualified to teach library skills at that level.

Moreover, it is emphasized that in not one instance was there proof submitted that State health mandates had been violated. Failure to meet the ratio or level of service of the New Jersey School Nurses Association in no way constitutes an implication that T&E is somehow compromised. It must be emphasized that if the Legislature or State Board wished to require conformance with such standards as those of the School Nurses Association then the Commissioner would vigilantly see to it that those standards were met, but such is not the case herein.

As to the two mandated curricular areas addressed in the initial decision, science and physical education, it is concluded that the proofs do not establish that there is a failure to provide a thorough and efficient education in either subject area. No allegation is made that PE as required by law is not provided. Nor is there any demonstration that despite less modern laboratory facilities, adequate breadth and scope of science are not provided. No evidence exists that college entry has been denied any students for failure to have a given science course(s) or that inadequate

science preparation exists for the world of work. The ALJ's statements to the contrary on page 152 are overly broad and are without any basis whatsoever in the record. This is not to say that perfection exists. Where more desirable delivery is identified, facilities appears to be the major hurdle to overcome. Facilities deficits are a grave concern which is addressed elsewhere in this decision. Notwithstanding this fact, it must be stressed that it has not been demonstrated that because of old facilities science cannot be learned or that the absence of a soccer field signifies that physical education has not been or cannot be taught.

The anecdotal nature of most of the ALJ's treatment of the program disparities section quite simply does not provide compelling proof that the funding formula is unconstitutional because significant program disparities are denying urban children a thorough and efficient education. The Commissioner agrees with defendants' position that the district comparisons were highly selective in this section. Moreover, it is noted that repeatedly the ALJ states that no data or evidence was presented about science, music, art, guidance, etc., in middle SES or more "typical" districts than Moorestown, South Brunswick or Princeton. Further, he fully agrees with defendants that any remedies that may be needed to address deficiencies in local districts should not be general and systemic, namely, recommending trashing the existing system of public education in New Jersey. Rather, remedies should be district specific based on the identified needs of the given district. For example, the Level III Corrective Action Plan for Camden City (D-312) does identify needs with respect to such areas as library facilities, art facilities and health suites, with specific strategies and timelines indicated for progress toward correction. Equally important, however, it also clearly states the following on page 217:

Note

* The elementary schools without central libraries (IMC's) use classroom libraries and book room centers. The classroom teacher teaches library skills. Students are also scheduled to nearby schools with libraries (IMC).

* The elementary schools without gymnasiums use outside facilities, weather permitting, or use the gymnasiums in nearby schools for special programs. Physical education and health education are taught by the classroom teacher with the capability of scheduling additional assistance from the helping teacher for physical education.

* In the elementary schools without art rooms, students are taught art in their regular classrooms by the classroom teacher with the capability of scheduling additional assistance from the helping teacher for art.

* In the elementary schools without music rooms, music is taught by the classroom teacher with the capability of scheduling additional assistance from the helping teacher for music.

As to early intervention programs, i.e., prekindergarten and full day kindergarten, the Commissioner agrees that educationally disadvantaged children can benefit from such programs. Agreement with this statement does not signify, however, support for the ALJ's further finding that the Department of Education has failed to assure that all districts with large numbers of such children are able to implement early intervention programs.

First, it must be emphasized that early intervention programs are not mandated. Moreover, the requirement for a provision of a thorough and efficient education does not extend and has never been extended to three and four year old children in this State except for those who are handicapped pursuant to N.J.S.A. 18A:46-1.1 et seq. N.J.S.A. 18A:38-1 affords the right to a free public education to those between the ages of 5 and 20. Thus, the Department of Education has no legal basis whatsoever to compel a district to provide such programs or to assure that they are provided.

N.J.S.A. 18A:44-1 and 2 permit district boards of education to establish nursery school programs and to admit four year olds to kindergarten but no mandate exists to compel such action. N.J.S.A. 18A:44-4 permits the costs of such programs to be paid out of current expenses. Moreover, programs for four year olds which meet the requirements of kindergarten, i.e., 180 school days for a minimum of 2.5 hours a day, receive state aid based on pupil enrollment. Additionally, one-half day kindergarten classes are funded as though they were full-day programs; thus, districts gain the benefit of that money. Bloom 5/29/87 T63. District boards of education may also allocate Chapter I funds for such programs but no power exists on the part of the Commissioner or State Board to compel them to do so.

Thus, if a board of education believes that early intervention programming is necessary to meet the needs of its children there are means available within existing statute and code to do so. Whether it is done or not is dependent on the district itself, first to identify the need, then to establish it as an objective and finally to budget for it.

Defendants' witness, Mr. Howard Shelton, testified that Camden, East Orange, Hoboken, New Brunswick and Plainfield are in fact providing prekindergarten programs through Chapter I funds. He also pointed out that the Camden program provides 450 minutes of instruction per week vs. the State average for prekindergarten education of 300 minutes per week. H. Shelton 3/23/87 T60-61. Red Bank has had early intervention since 1980. Abrams 4/7/87 T64-68.

Moreover, the Commissioner is aware of the fact that in 1987, 72 public school districts in 15 counties enrolled 5,800 four year olds in kindergarten which resulted in an estimated $7 million in state equalization aid. The Commissioner is further cognizant of the fact that federally funded Head Start programs in 21 counties during the same period provided prekindergarten education to 9,700 three and four year old disadvantaged children and their parents. Also, publicly funded child care programs administered through the State's Department of Human Services was provided to 9,000 three to five year olds which included early childhood education. Prekindergarten for Urban Children: A Pilot Program in New Jersey, New Jersey State Department of Education, May 1988, at 33.

Such information is important because it emphasizes that early intervention programs for preschool children are neither solely nor primarily a responsibility of boards of education which by law are responsible for providing a thorough and efficient education to those children ages 5-20 and those ages 3-5 who are handicapped. Early intervention to poor urban children addresses a myriad of social, health and educational needs such that an interdisciplinary approach is necessary. Many states including New Jersey recognize that early intervention programs may have positive effects on the education of poor urban preschoolers and have taken steps to initiate programs or pilot programs in that area. It must be emphasized, however, that no state in the nation mandates such programming.

In New Jersey the Governor and the Departments of Education and Human Services have initiated a three year prekindergarten education pilot program to help further the research on this question. It will serve approximately 1,200 of our neediest urban three and four year olds and will be implemented in September 1989. The programs will be based in a public school and will be administered either by the local board of education or, through joint application, by a Head Start Program. Governor's Budget Message and Taxpayers' Guide Fiscal Year 1989-90 at 63.

As to early intervention efforts by districts statewide, the recommendation for current year funding being made by the Commissioner in Part II, Sufficiency of Funding, should assist districts below the GTB who wish to provide more extensive early intervention programs to do so because the funds will be provided within the year of program delivery. Another possible resource to defray the costs of such programs in urban districts that have had to return unused state compensatory education funds would be to

target state compensatory education funds for supplemental services supported by Chapter I funds, thus freeing up Chapter I monies which may by law be used for prekindergarten programs. See D-230, Table V.

Finally, as can be seen above there is much more being done statewide to provide early intervention education to the three and four year old children who live below the poverty line in New Jersey than is conveyed in the initial decision. Certainly, however, the record has not demonstrated that existing mechanisms whether under education law or through other publicly funded programs are insufficient to meet the needs of such children.

As to the issue of qualified teachers, the record does not in any manner support the ALJ's conclusion that urban districts have less qualified teachers. No correlation between level of education and quality of teaching has been established, nor is there proof that a correlation exists between salary level and quality of teaching. The monitoring process has ensured that all teachers in all districts of this State hold appropriate certification. Provisional certificates are awarded only to alternate route personnel who hold a bachelor or other degree(s), have a subject matter major, pass a certification test and who are part of an intensive supervised educational experience. Emergency certificates are issued in only the most limited circumstances and will soon no longer be available at all. See also Part V of this decision.

Further, there is no merit found in plaintiffs' arguments and the ALJ's overly broad and unsubstantiated assertions that monitoring does not look to breadth, scope or quality of programming. The absence of interdistrict comparisons does not mean that program review is only a paper exercise as discussed in depth in Part III of this decision.

Moreover, there is no basis to the allegation that either the State Board or the Commissioner has failed to meet the requirements of N.J.S.A. 18A:7A-8 and 9. In June 1984 and January 1987, the State Board readopted with amendments the entire code section on the thorough and efficient system of free public schools, N.J.A.C. 6:8-1.1 et seq. The State goals and standards are an essential element of this chapter and underwent full review by the public and legislative committee as required. As to the needs assessment component, when the Commissioner took office, he was not satisfied that the annual planning process as implemented up to 1982 was achieving effective results in terms of the flow of objectives being derived from local assessments. He therefore invoked a system that he interpreted to be more effective and efficient. In the fall of 1982, the Commissioner charged a committee to develop a local planning process linked to student outcomes. The plan required local districts to develop from three to five local objectives that addressed student performance in the educational process. The local planning process was implemented in September 1983 and it serves to provide the State Board with a needs assessment in light of State goals and standards. McCarroll 2/2/87 T11-13.

The Commissioner also charged the statewide committee the ALJ refers to on page 400 of the initial decision to review and make recommendations for a revised system of monitoring local districts into which the local planning process was integrated. Since January 1984 each district in this State has been required to do a needs assessment of its pupils based on its district goals which must be consistent with the State goals. The district's specific objectives were then reviewed by the county superintendent and a determination made as to whether or not the objectives were attained.

Each of the local district objectives was analyzed by the county superintendent and forwarded to the Regional Curriculum Services Unit (RCSU) for the appropriate area. The objectives were examined and placed in priority order for three consecutive years, 1983-84, 1984-85, 1985-86. Training and technical assistance by the RCSU's were tailored to help districts meet their local objectives while simultaneously addressing statewide needs through seminars, institutes and publications aligned to the districts' expressed needs and objectives. Solomon 4/6/87 T11-12. The information resulting from this process was made available to anyone requesting it, as is true with any public document. It was the Commissioner's belief that the planning and assessment process went beyond the requirements of the law. The needs analysis was done for three consecutive years as stated above, not every five years as required by law. Further, the assistance provided to districts via training, institutes, seminars, publications and other initiatives to aid districts, though not specifically required by law, was deemed by the Department of Education as a necessary service to meet the intent and spirit of it. Such an approach to the planning and assessment requirement was deemed more efficient and responsive to actual local needs than would be the spending of millions of dollars for development of a state test/instrument for needs assessment which, when published, could have little relevance to local districts.

Finally, the Commissioner is in full agreement with defendants that concentration on the basic skills is a necessary and legitimate activity where a significant portion of students are in need of remedial services and that the impacts of such concentration on breadth of programs are an unavoidable and necessary consequence. Plaintiffs' very own citation to the large numbers of students needing remedial programming in our colleges serves well to underscore the need for such basic skills programming at the high school level. The harsh reality is that an increase in advanced placement courses may not be the soundest choice educationally when the more compelling need is to concentrate on raising basic skills competencies. The fact that South Brunswick has three advanced placement courses and some urban districts have none does not mean that ineffective secondary education is rampant. Again, this is not to say that students already proficient in the basic skills should not have available to them a solid college preparatory foundation of traditional academic core subjects such as chemistry, physics,

trigonometry, calculus, foreign language, social science, etc. There is no evidence in the record to indicate that any academically strong student in an urban district has been denied access to college due to a lack of availability of such courses. Certainly, this is not to imply that studies in this area cannot be targeted by individual urban districts which identify a need to expand course offerings. What it does mean, however, is that no proofs were provided to recommend invalidation of the current funding mechanism for New Jersey's public school system.

Lastly, as to the focus of basic skills being appropriate and necessary, the Commissioner must emphasize that instruction in this area need not mean that other content areas be sacrificed. Indeed, sound educational practice would dictate that students receive instruction in reading for meaning and comprehension, in writing, and in mathematical concepts across the entire curriculum, not just in reading, English or math classes. For example, social studies instruction can and should include strategies for reinforcing and/or strengthening basic skills mastery through the vehicle of specific content of that subject area. This is precisely what curriculum alignment is intended to accomplish.

Accordingly, the Commissioner finds and determines that while program disparities exist among school districts examined in this case, such diversity is not contrary to the thorough and efficient mandate of the State Constitution. As pointed out by the Court in Abbott, supra at 291, the thorough and efficient clause does not require the Legislature to provide the same means of instruction for every child in the State.

Upon a thorough review of the record, the Commissioner concludes that it has not been demonstrated that plaintiffs' districts fail to provide (1) educational programs necessary to prepare their students to function economically, politically and socially in a democratic society and/or (2) education programs and services required by law and code, with the exception of Jersey City which is deficient in the areas of gifted education, library skills, and guidance (D-285) but which is currently subject to State intervention pursuant to N.J.S.A. 18A:7A-34 et seq. The Commissioner is thus fully satisfied that the constitutional mandate of providing a thorough and efficient education has not been thwarted by impermissible program disparities within plaintiffs' districts.

PART II

SUFFICIENCY OF FUNDING

Having considered the proofs related to alleged program disparities, the Commissioner will next examine the second leg of the specification of the proofs laid out by the Abbott Court, that is, sufficiency of funding.

The Commissioner observes that the Supreme Court in Abbott reiterated its earlier ruling in Robinson V in addressing

plaintiffs' challenge that the existing inequities in the State's T&E funding formula result in a failure by the State to meet its constitutionally mandated and statutorily prescribed obligations to comply with the major elements of the provisions of N.J.S.A. 18A:7A-5. More specifically, the Abbott Court held in pertinent part as follows:

> The 1975 Act [Public School Education Act, Chapter 212, N.J.S.A. 18A:7A-1 et seq.] defines the goal of a thorough and efficient educational system: "free public schools shall***provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." N.J.S.A. 18A:7A-4. The Legislature specifically acknowledged the major elements of the State's obligations, as follows:
>
> a. Establishment of educational goals at both the State and local levels;
>
> b. Encouragement of public involvement in the establishment of educational goals;
>
> c. Instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills;
>
> d. A breadth of program offerings designed to develop the individual talents and abilities of pupils;
>
> e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;
>
> f. Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies;
>
> g. Qualified instructional and other personnel;
>
> h. Efficient administrative procedures;
>
> i. An adequate State program of research and development; and

j. Evaluation and monitoring programs at both the State and local levels. [N.J.S.A. 18A:7A-5]

This definition of a thorough and efficient education satisfies the constitutional requirement for legislative standards, assuming "the requisite of sufficient fiscal support." Robinson V, 69 N.J. at 457. The question remains whether the operative terms of the 1975 Act in fact assure that all the state's children receive their due. (emphasis supplied) (100 N.J. at 283-4)

Thus, it is clear from a reading of the Court's language set forth above that it was granting plaintiffs an opportunity to come forth with their proofs in an attempt to establish that the fiscal (sufficiency of funding), as well as non-fiscal (N.J.S.A. 18A:7A-5), components of the Public School Education Act of 1975 render it legislatively inadequate or constitutionally invalid.

In the Commissioner's judgment the sufficiency of funds for financing the legislative scheme for guaranteeing a thorough and efficient system of education established by the Public School Education Act of 1975 (N.J.S.A. 18A:7A-1 et seq.) is an important consideration in this case.

A close examination of plaintiffs' Proposed Finding of Fact relative to the operation of the school finance process and its educational impact and the findings reached by the ALJ in this matter reveals a virtually complete acceptance of plaintiffs' position. See Plaintiffs' Proposed Finding of Fact at 87-126.

In reviewing the budget development process, the ALJ points out that accurate planning on the part of school districts is hindered by the statutory scheme which requires the Commissioner on or before November 15 to calculate and inform school districts the amount by which they will be able to increase their budget and the amount of state aid to be anticipated. N.J.S.A. 18A:7A-25. Because of the fact that these figures are calculated prior to the Governor's annual budget message and action by the Legislature appropriating state aid funds, in any year where the formula has not been fully funded, all districts have received less aid than originally reported to them under the formula, thus inhibiting adequate planning.

A further impediment to adequate budgetary planning and implementation is the uncertainty created by the length of time required to successfully appeal a budget reduction directed by the governing body in the case of Type II districts upon defeat of the budget by the electorate and by the boards of school estimate in Type I districts. Budget appeals begun in the spring of the pre-budget year are frequently not completed until well into the succeeding budget year requiring significant reductions of service.

Finally, the ALJ concludes that the Department of Education has failed prior to 1986 in its responsibility to review budgets for adequacy as required by statute.

Although the ALJ's review of spending for education in New Jersey places the State third or fourth in per pupil expenditure in the country, he finds that since 1979-80 the percentage of state aid to total education expenditures ranged between 40% and 42% by virtue of what the ALJ accepted as a decision on the part of the State. I.D. at 62.

By virtue of the manner in which a guaranteed tax base (GTB) system operates, expenditures and educational opportunities above the guarantee, which has been to the 65th percentile in New Jersey, are dependent upon the willingness of the voters or governing bodies to vote for local tax levies. The ALJ finds that disparities in availability of funds under the New Jersey GTB system are exaggerated because all districts, even those above the guarantee, are assured of minimum aid under the funding formula, thus depriving property-poor districts of the financial benefit of those funds. A further alleged flaw in the total process for distributing state aid is the fact that with the exception of students requiring both basic skills and bilingual categorical aid, the Department of Education has not permitted students eligible for categorical aid to be counted in more than a single category. This so-called "unduplicated count" policy means that if a student requires basic skills instruction in both reading and mathematics, the district is entitled to state aid in only one category. Because property-poor urban districts have so many students in special aid categories, the ALJ finds that the "unduplicated count" policy does not provide as much categorical aid as is necessary to provide the necessary instruction. Further, since all categorical aid is distributed on a non-equalizing formula basis, the ALJ contends that it has little equalizing effect upon expenditures.

In analyzing the effect of the funding formula upon school district expenditures, the ALJ concluded that plaintiffs had succeeded in demonstrating that differences in per pupil expenditures between property-rich suburban districts and property-poor urban districts had increased after 1980. Notwithstanding arguments by defendants that the analyses utilized by Dr. Reock and Dr. Goertz, expert witnesses produced by plaintiffs, were less reliable than the statistical method of regression analysis utilized by defendants' experts, the ALJ concluded that one form of analysis was not superior to another and that expenditure inequities had indeed increased after 1980 by whatever measures utilized and whether the expenditure per pupil was measurement by NCEB, current expense per pupil or current expense per weighted pupil. See Chart, I.D. at 100.

While the ALJ acknowledges that the funding formula has produced some leveling of expenditures of the lowest spending districts toward the median expenditure per pupil, he tended to find

such leveling as being lacking in significance because, in his view, it ignored the disparities in amounts spent above the median. The ALJ likewise rejected the argument presented by defendants that a more appropriate measure of comparing per pupil expenditure is day school expenditure per pupil which includes all categorical and federal aid. Even though the ALJ acknowledges that the use of day school expenditures per pupil does appear to increase equity based on defendants' analysis, the ALJ rejects its use because of what he conceives to be the lack of certainty of the availability of federal funds which are appropriated on an annual basis.

The ALJ further concludes the assessed valuation per pupil in the urban areas, including plaintiffs' districts, now represents a smaller percentage of the State average assessed valuation per pupil than in 1975-76. See Chart, I.D. at 112. He further finds that the lowest wealth districts are making a greater tax effort on the average than the wealthiest districts and that "***there is a substantial relationship between property wealth and expenditure in the financing system." I.D. at 118.

Finally, the ALJ concludes his analysis by stating as follows:

> I FIND that even with considerably higher school tax rates, the poorest districts cannot generate substantially equal revenues in comparison to the higher wealth districts. Property poor districts, even exerting substantial tax effort are handicapped in raising revenues because of their property poor tax bases. Spending differences among all districts in the State are not related to differences in tax rates. The GTB system is not providing equal yield for equal effort in the State as a whole.
>
> (I.D. at 121)

Having determined that per pupil educational disparities do exist and have become worse than at the inception of Chapter 212, the ALJ proceeds to discern the meaning and impact of said disparities on the pupils of the urban districts. While acknowledging that equal expenditures may not be directly translatable to equal educational opportunity, the ALJ concluded on the basis of his evaluation of the testimony of various witnesses that "***per pupil expenditure comparisons are relevant in determining whether districts are able to provide educational programs of substantially equal quality and variety of opportunity.***" I.D. at 125.

The ALJ concluded that plaintiffs in this case have proven by a preponderance of the credible evidence that many urban districts are receiving less in the way of financial resources than property-rich suburban districts. Based upon this finding, the ALJ proceeds to consider at great length both the alleged program disparities which he believes flow from these conclusions and

infirmities of the State monitoring process in being able to detect and correct the deficiencies.

Both the alleged program disparities and the evaluation of the monitoring process are considered in other portions of this decision.

In considering the causes for the program and expenditure disparities, the ALJ notes that determinations of local boards of education have not always related exclusively to educational needs but were often guided by political consideration of voter reaction. Poor districts, alleges the ALJ, have not been able to insulate themselves from political pressure in part because of lack of State Board input standards and because of the failure on the part of the Commissioner to ensure adequate budgets. He attributes the failure of urban district boards to budget up to their full needs not to timidity or lack of concern for education, but due to the fact that they are required to share property-poor tax bases with the municipality. Their failure to budget fully to cap or to apply for cap waivers should not be attributed to a belief that the budgets they were recommending were adequate but to a recognition on their part of fiscal realities and the impact of the tax increases upon the population as a whole. Nor, contended the ALJ, can failure to pursue appeals of budget cuts on the part of the municipality be ascribed to mismanagement. Since plaintiffs' cities must use a larger portion of their small tax bases to raise revenues for non-educational services than suburban municipalities, boards of education face fiscal pressures from political leadership and thus are inhibited in addressing educational needs. These factors in the view of the ALJ validate the claims raised by plaintiffs concerning the existence of municipal overburden.

Further, while the ALJ acknowledges the demonstration of political interference and mismanagement in Jersey City and East Orange, he declined to consider, based upon the record, that such circumstances exist in all of the urban districts or that mismanagement to whatever degree it might exist could explain what he believes to be the significant program disparities existing between property-poor urban districts and property-rich suburban areas.

DEFENDANTS' EXCEPTIONS

Defendants' exceptions strongly disagree with the ALJ's findings and urge the Commissioner to conclude "***that the existing regulatory and financing system does work in most instances and can work in all instances." Defendants' Exceptions at 1. It is defendants' contention that to the degree that the current system fails to properly work, such failure must be attributed to the failure to utilize existing mechanisms. Defendants aver that some boards have failed in their responsibility to be advocates for their students and have bowed to political pressure to keep down the tax rate. These districts, allege defendants, have not set their budgets at a level equal to the level established by caps and thus

derive the full benefit of the state aid multiplier effect; have failed to take budget appeals when budgets have been cut by municipal governing bodies; and have failed to apply for cap waivers when they have deemed additional monies were required. Consequently, defendants argue that the failure of some districts to carry out their responsibilities under the law should not serve as a basis for declaring the entire financing system as being fatally flawed. Had those districts sought what they believed to be the necessary financing, the State's authority to require budgetary sufficiency would have been able to assure those funds which could be justified. Defendants' position is best summarized by the following excerpt from their exceptions:

> Defendants have acknowledged that there are a number of districts within the State which have failed the State's monitoring examination. As such, these districts are presumptively not thorough and efficient. However, a "T&E" failure does not per se translate into a determination that the school district is underfunded.
>
> It is the defendants' position that the failure of these districts to be thorough and efficient does not in and of itself invalidate the entire public school education system in New Jersey, nor does it require a system-wide remedy. Rather, each failing school district must be examined thoroughly to determine the causes of its failure and individualized remedies then developed. It is defendants' position that the causes of an individual district's failure to meet thorough and efficient requirements may be multiple and therefore require a combination of remedies. Defendants acknowledge that in some cases one of the remedies which may be required is the expenditure of additional fiscal resources. Defendants assert that the current financing system of New Jersey, which includes both a State and local component, is capable of providing adequate fiscal support as a part of the remedy for failing school districts where it is shown that inadequate fiscal support is a problem. Id. State takeover of failing school districts is, ultimately, the final component in assuring that a thorough and efficient education is delivered to pupils.***
>
> (Defendants' Exceptions at 10-11)

In arguing in favor of the sufficiency of the funding mechanism embodied in Chapter 212, defendants point out that the Supreme Court in Robinson V found the formula to be facially constitutional and was likewise aware of the fact that such formula did not guarantee nor require identical expenditure levels. In so

doing, the Court was aware that local districts would have discretion to choose their own expenditure level up to a specified cap calculated on the basis of a statutorily driven formula.

In considering the financial and economic state of plaintiffs' cities, defendants contend that the ALJ has overgeneralized the condition of plaintiffs' cities and reached a conclusion that whatever deficiencies exist in providing a T&E education are due to the single factor of inadequate financial resources. In accepting the position of plaintiffs relative to the ability of plaintiffs' districts to adequately fund the educational program, defendants claim that the ALJ totally ignored the testimony to the contrary of Barry Skokowski, Director of the Division of Local Government Services within the Department of Community Affairs.

Defendants further except to the ALJ's finding that the county superintendents, as the agents of the Commissioner, have failed to carry out the statutory requirement of N.J.S.A. 18A:7A-28 to review budgets for adequacy prior to 1986. Defendants argue that the budgetary review process is linked to the monitoring process established by the Department of Education and that the degree and depth of budgetary review is dictated by the status of the district with districts which are certified being reviewed primarily for accuracy and maintenance of effort and with districts at Level II and III being reviewed with much greater scrutiny. This process, contend defendants, permits the Department of Education to give more of its attention to the districts requiring it.

Of decidedly more significance is defendants' exception to the ALJ's conclusion not to consider day school expenditure per pupil as being a more valid measure of the true amounts available for school expenditure per pupil. Utilizing day school expenditures, contend defendants, presents a truer picture of the actual amount available to school districts. In support of their position, defendants cite Exhibit D-253 which indicates the substantial amount of federal funds available to plaintiffs' districts over the five-year period under consideration. Since the bulk of these funds represents Chapter I funds for needy pupils, defendants argue that the ALJ's contention of uncertainty of funding lacks validity. Defendants cite the fact that using day school expenditures as a measure, Jersey City was able to spend $4,327 per pupil in 1984 as opposed to using current expense or current expense per weighted pupil with figures of $3,685 and $3,116 per pupil, respectively. Such omission on the ALJ's part magnified and distorted expenditure disparities. Defendants' Exceptions at 29. In support of the above contention, defendants point out that using day school expenditures per pupil, Newark, Trenton, Jersey City, Asbury Park, Hoboken and New Brunswick are all above the State average in per pupil expenditures, while Camden and East Orange are only $300 and $600, respectively, below the State average. See Fowler 5/3/87 T38:16 to 40:4 and Exhibit D-317.

In regard to the relevance of any disparities of expenditures between property-poor urban and property-rich suburban districts, defendants hold that a GTB system is not designed to foster equality of expenditure nor does the Constitution require such equality. The material issue, contend defendants, is whether the expenditure made by a district is adequate to support a thorough and efficient program. "The T&E program of the district should be the scale against which expenditure adequacy is measured." Defendants' Exceptions at 39.

Defendants argue that the ALJ erred in concluding that differences in expenditure of necessity equate with differences in program adequacy. Defendants aver there is no support for this finding in either the record or the law. It is not equal expenditure which the Constitution requires, contend defendants, but equal educational opportunity for each child to assure his or her role as a citizen and member of the labor market.

Pupil expenditure differences between districts are only relevant, contend defendants, if they can be proven to be a reliable measure of performance. Defendants' exceptions assert that there is no evidence in the record to support an argument that per pupil expenditures are related to achievement. In support of their position, defendants cite the testimony of one of their expert witnesses, Dr. Walberg. Walberg 9/27/87 T39:10-13 and T41:19-25. In further support of their position, defendants cite examples of districts where expenditures are relatively low and where results are high. See Defendants' Exceptions at 42-44.

Defendants further object to the failure on the ALJ's part to acknowledge the superiority of the regression analysis used by their experts as opposed to the range analysis utilized by plaintiffs' expert, Dr. Goertz. It is defendants' contention that the methodology utilized by Dr. Goertz reflects simple statistical methods used in early school finance cases. In support of such position, defendants cite excerpts from the testimony of Professor Garms, one of their own expert witnesses. (For a fuller description of the differences in technique, see Garms 5/7/87 T25:15 to T38:13.)

Defendants also urge the rejection of Dr. Reock's analysis because he included districts above the GTB. Defendants contend that the GTB which was approved by the Supreme Court in Robinson V was not intended to require expenditure equality above the guarantee since the equalization effects of a GTB does not assist districts in a material way once they move above the GTB.

Ultimately, defendants urge the Commissioner to reject any arguments that dollar expenditures effectively ensure the ability of a school district to provide educational programs and services designed to meet the district needs and State and local educational goals.

Defendants' exceptions go on to challenge the ALJ's findings on various relationships between expenditures and property and district wealth. In each instance defendants urge the Commissioner to reject the conclusion drawn by the ALJ that a direct relationship exists between property wealth and district wealth and the amount of money expended on education.

Defendants also take exception to the ALJ's finding relevant to the relationship between school tax rates and district wealth and spending because they do not focus on the operation of the GTB formula as used in New Jersey. Defendants argue that the true test of a GTB is whether equal effort produces equal yield.

The ALJ's finding that the poorest districts are not able to generate substantially equal revenues despite considerably higher tax rates is irrelevant, contend defendants, because the analyses done to test the hypothesis included data of districts both above and below the guarantee. When properly analyzed, defendants claim, the GTB has been successful in promoting property taxpayer equity below the guarantee. Defendants contend that their expert, Dr. William Fowler, found:

> ***that while for the State as a whole there was no relationship between tax rate and expenditure there was a strong relationship between those factors for districts below the guarantee. (Defendants' Exceptions at 57)

Finally, defendants urge the Commissioner to reject any conclusion rendered by the ALJ comparing district-by-district per pupil expenditures. Any determination related to adequacy of expenditure in a given school district should be based upon an individual examination of that district's student needs, the programs designed to meet those needs and a review of the fiscal resources required to support the necessary programs. This can only be accomplished, aver defendants, through the administrative procedures established by the State Board of Education for purposes of monitoring whether districts are achieving the goal of providing a thorough and efficient education.

PLAINTIFFS' REPLY EXCEPTIONS

Plaintiffs' reply exceptions dispute defendants' contention that existing administrative remedies can provide for the unmet needs of poor urban children. Plaintiffs contend that defendants have substituted the bureaucracy of an administrative process for adequate funding. Plaintiffs likewise dispute defendants' contention that adequate means exist to require low spending districts to increase their expenditures. Pointing out that defendants ignore the fiscal stress and the incapacity of the urban districts to raise the necessary funds, defendants "*** are asking this Commissioner to ignore what his predecessor recognized in 1981, that ordering budget increases which require tax increases

'will increase the burden of these tax poor districts'." Plaintiffs' Reply Exceptions at 23. Plaintiffs urge the Commissioner to find that the system is "broken" and has long deprived poor and minority children of an equal educational opportunity.

Plaintiffs' reply exceptions argue that determination as to whether students are receiving an equal educational opportunity requires an examination of both fiscal and educational inputs. In support of such position, they cite the Supreme Court in Robinson I as the basis for emphasizing its relevance of dollar input.

Plaintiffs further iterate that the ALJ was correct in citing that much expert opinion acknowledges the importance of educational inputs. Principal among the experts cited was Dr. Wise who testified to the effect that unequal educational opportunities exist when a finance system provides more inputs for children of wealthy families than it does for children of poor families. "Of all the values of choice, adequacy, efficiency and equity, only equity is susceptible to reasonable measurement." Plaintiffs' Reply Exceptions at 27.

In summation of their position on the paramountcy of expenditures, plaintiffs rely on the testimony of Dr. Wise who argued that public opinion and common sense conclude that expenditures and inputs make a difference. He claims that everyone connected with education from parents to teachers and administrators believes that money makes a difference. Id. at 28.

Plaintiffs further contend that defendants' position concerning the use of output goals, namely passing of the High School Proficiency Test, as a measure of demonstrating the ability of "producing students who can function as citizens and compete in the labor market" is flawed. Id. at 29, quoting defendants' position.

Plaintiffs' reply exceptions urge the Commissioner's acceptance of the ALJ's finding that a guaranteed tax base is not designed to equalize expenditures and that the operation of the GTB as established in New Jersey results in substantial differences in educational expenditures. Plaintiffs further urge that the Commissioner conclude, as did the ALJ, that there is a substantial relationship in New Jersey between the property wealth of school districts and their expenditures.

Plaintiffs contend that the substantial disparities in expenditures between property-poor and property-rich districts have been demonstrated by defendants' own exhibits. They further urge the Commissioner to affirm the ALJ's conclusion that federal funds shall be excluded from any comparison because such funds are by law required to supplement and not supplant State funds.

In response to defendants' contention that the effectiveness of the GTB in meeting the requirements of demonstrating financial ability to fund a thorough and efficient education can only be fairly determined by comparing districts at or near the guarantee, plaintiffs contend that such a method of comparison would "***[ignore] the educational resources available to hundreds of thousands of children in the state's most property rich districts." Plaintiffs' Reply Exceptions at 46. Such a limited review, it is urged, is not supported by the Supreme Court's opinion in Abbott, supra.

Plaintiffs urge that the Commissioner accept the findings of the ALJ that the lowest wealth districts are making a greater tax effort on the average than the wealthiest districts and that the disparity between the tax rates of the property-rich districts and the property-poor districts has widened since 1975-76.

Plaintiffs challenge defendants' contention that urban school districts are able to spend 95% of the State average. This conclusion, claim plaintiffs, is based upon a typographical error and that Dr. Reock's analysis of funding disparities found the current figure to be 85% of the State average. Plaintiffs further cite the finding of Dr. Reock that suburban communities averaged 111% of the State average expenditure and that approximately $1,500 per pupil separated the major urban centers and the suburban communities. Plaintiffs' Reply Exceptions at 50, citing I.D. at 106.

Plaintiffs urge rejection of defendants' argument that differing circumstances relative to operating expenses between districts make dollar comparisons untrustworthy. In response to such argument, plaintiffs contest that the record demonstrates that urban districts spend a higher percentage of their funds for non-instructional purposes such as maintenance, insurance and security, thus magnifying differences in per pupil expenditures.

Plaintiffs take further exception to defendants' assertion that the present budgetary review process meets the standard established by statute relative to adequacy. In taking such exception, they cite with favor the analysis of the review process found in the initial decision at page 58.

COMMISSIONER'S DETERMINATION

After having carefully considered the arguments presented by the parties and the findings of the ALJ, the Commissioner notes for the record the diametrically opposed perceptions of the plaintiffs and the ALJ on the one side with those of the defendants on the other as to the nature of the case. Plaintiffs on the one hand stress the emphasis placed by the Supreme Court in Abbott, supra, upon examining of the funding mechanism of the Public School Education Act of 1975 for purposes of determining whether that mechanism provides a sufficient financial basis for delivering a thorough and efficient system of education, as required by the

New Jersey Constitution. In so doing, it appears that plaintiffs have placed virtually sole emphasis upon that element of the Court's instruction in presenting its proof in this matter and have generally expressed a view that all that is needed to solve the problems of urban education is a scrapping of the current process for funding education in New Jersey and replacing it with a funding mechanism which will guarantee equity of expenditure and program between property-rich suburban schools and admittedly property-poor urban centers. Understandably omitted from plaintiffs' emphasis is the equally important recognition by the Court that analysis of the application of the financial provisions of the 1975 Act cannot be examined without also considering whether the statutory and regulatory scheme created by the Act and State Board regulations are sufficient to cure educational inequities in individual school districts.

Defendants, likewise understandably, de-emphasize any financial disparities resulting from application of the Act and place their primary emphasis upon the viability of administrative process and its ability to detect and ultimately cure whatever educational deficiencies may exist in districts which are currently less than thorough and efficient. The ALJ, while examining at length the administrative process of monitoring established by the State for implementing the provisions of Chapter 212, dismisses its efficacy as a means of overcoming what he accepts as the significant programmatic and fiscal inequities demonstrated by plaintiffs.

Having examined elsewhere in this decision the programmatic issue and, further on the monitoring process, it remains for the Commissioner to consider the fundamental issue of funding. In doing so, the Commissioner must emphasize that in his view the funding issue in this matter is not absolute equity of expenditure but sufficiency of resources to assure the provision of an education consistent with both constitutional and legislative mandates.

In systematically examining the findings of the ALJ relative to adequacy of funding, the Commissioner deems it important to initially consider the alleged defects in the budgeting process which the ALJ concludes hampers effective fiscal planning on the part of school districts. First of the supposed impediments to effective fiscal planning is the requirement that districts be provided with estimates of cap and state aid figures by November 15, many months before the Governor has announced his proposed budget and the full extent of school aid which is being recommended. In assessing the actual impact of such hindrance upon effective planning, the Commissioner notes former Assistant Commissioner Calabrese's testimony before the ALJ indicating that the average impact of any decrease in state aid between the figure calculated by the Commissioner in November pursuant to the formula and that which is actually appropriated after the Governor's budget recommendation represents approximately 1% of a district's total budget. While the total dollar amount discrepancy for large urban districts may appear to be large, the percentage of the actual budget is small. See Calabrese 5/11/87 T36:5-10.

Notwithstanding the small impact this may have on a local district budget, the Commissioner has always requested full funding of Chapter 212 in the Department's annual budget request to the Governor and will continue to do so. The Commissioner further recommends that a remedy be developed for the distribution of state aid in the case of a shortfall which will have the least impact on school districts which fall below the GTB.

A further problem related to budgetary planning as determined by the ALJ is the uncertainty which arises from the amount of time required to successfully appeal a budget reduction occurring as a result of a budget defeat by the electorate or a similar reduction undertaken by the board of school estimate in a Type I school district. The ALJ concludes that the anticipation of a protracted court battle with an uncertain outcome and the fact that restored monies may actually come long after they can effectively be used discourages districts from undertaking appeals. In response to such conclusion, the Commissioner notes that the protracted time for concluding a budget appeal does not provide an excuse for urban districts to fail to undertake such an appeal. Initially, it should be recognized that notwithstanding the duration of any such appeal, because of the multiplier effect of state aid and the method of budget cap calculations, any district benefits in the long run from monies which are restored in the appeals process. Further, the Commissioner notes that the Department of Education has within the last year established an accelerated budgetary appeal process in which the Commissioner himself or a designated assistant commissioner retains jurisdiction for directly hearing budget appeals from districts which are in the Level II or Level III monitoring process. Such an appeal procedure significantly reduces the time required for finalization of a decision by eliminating the necessity for a hearing before OAL. See Calabrese 5/11/87 T52:2-4.

Most significant of the alleged defects relative to budgetary practices is the ALJ's conclusion that the Commissioner through the county superintendents had failed to meet the requirement established by statute to annually review budgets submitted by local districts for adequacy. In support of his finding, the ALJ relies upon testimony of Assistant Commissioner McCarroll to the effect that budgets were not reviewed for adequacy until 1986. As pointed out by defendants, however, such conclusion fails to consider the fundamental rationale which underlies the Department of Education's policy and practice as it relates to budget review and budgetary adequacy. In the ALJ's view, the statutory provision requires that each and every year each and every budget for every school district should be scrutinized to ensure its adequacy to provide a thorough and efficient system of education. Admittedly, such a perception by the ALJ is entirely consistent with what he perceives to be necessary to ensure a thorough and efficient education as he defines it. In the Commissioner's view, however, not only is the ALJ's concept flawed in what he believes must be provided by way of inputs to ensure such a system, so is his concept of the nature of the budgetary review process necessary to achieve

it. Not only would the staff necessary for carrying out such a task be staggering, the knowledge and insight of each individual district and its budget necessary for accomplishing such a task would overwhelm even the largest staff. Instead, the Department has adopted a procedure which justifiably assumes that any district which is certified pursuant to the criteria established in the statewide monitoring process, which is derived from the legislative definition of what constitutes a thorough and efficient education, is presumptively thorough and efficient and its budget is therefore deemed adequate. For those districts which are not certified and in Level II, their budgets are more closely scrutinized for adequacy as defined by their ability to provide any funds necessary for implementation of the corrective action plan. Districts having failed to achieve certification after two levels of monitoring and subsequently in Level III are subjected to the most intense scrutiny both in a fiscal and programmatic sense. It should be further noted that pursuant to the 1987 amendments to the Public School Education Act of 1975, the Commissioner is specifically authorized to certify additional funds on a current year basis to fund any corrective action plan directed by the review team and for which he determines sufficient funds are not available for meeting the provisions of T&E as defined by the Legislature and the State Board. N.J.S.A. 18A:7A-14; N.J.A.C. 6:8-5.1 et seq.

In the Commissioner's view, the process described above is not only realistic and consistent with the principles of local control, but also entirely consistent with the intent of the legislative and constitutional requirements.

While acknowledging that the State of New Jersey ranks third in per pupil expenditure for education, the ALJ notes that the Governor and the Legislature have either by agreement or informal understanding limited the percentage of total state aid provided to a range of between 40% and 42%. In the Commissioner's view, such emphasis particularly as it relates to plaintiffs' districts, significantly undervalues the heavy percentage of aid derived under the formula by property-poor districts. It is to be noted that despite the average percentage in this regard, plaintiffs' districts, except for Irvington and Jersey City which received more than 70%, received in excess of 80% of their total expenditures for education purposes from state aid. I.D. at 67.

The ALJ's findings relative to the policy of "unduplicated count" for compensatory education, while accurate based upon the record before him, creates an impression that poor districts are unable to provide services to students requiring compensatory education in more than one area. The Commissioner, in the interest of updating the record, points out that at his direction as of September 1987 a duplicated count of pupils requiring different compensatory program services has been implemented by the Department of Education in computing the compensatory funding entitlements made available to local school districts. As the record indicates, such duplicated count for limited English proficient pupils (LEP) has been in effect since 1986. I.D. at 76. Nevertheless, based upon

the manner in which compensatory education allocations are made to local school districts and the actual experience of the program, former Assistant Commissioner Calabrese testified uncontradicted on the record that each of plaintiffs' districts annually expends less for compensatory education than the amount of aid provided by the State. See Calabrese 5/18/87 T8:9 to T10:3; see also D-230, Table V.

Additionally, the ALJ found and concluded that the disparities in per pupil expenditures between property-poor urban districts and property-rich suburban districts have since 1980 widened to the degree that such disparities currently are wider than they were prior to the passage of Chapter 212. It is observed the statistical evidence upon which the ALJ's findings and conclusions are made regarding the disparity between per pupil expenditures in property-poor and property-rich school districts was in the form of the highly technical testimony adduced from expert witnesses produced by plaintiffs and defendants.

Also considered by the ALJ was the highly technical debate relative to what methodology of statistical analysis is superior in measuring whether or not there has been a narrowing or widening of the gap between property-rich and property-poor school districts and whether or not day school expenditures, rather than NCEB per pupil, or current expense per weighted pupil should be utilized.

The Commissioner incorporates by reference herein the respective arguments of plaintiffs and defendants which present opposing views with regard to the testimony of their expert witnesses and the methods of statistical analyses they relied upon to support or refute their positions regarding those issues raised above.

The Commissioner, without commenting further upon the validity or accuracy of the highly technical methodologies of statistical analysis employed by plaintiffs' or defendants' expert witnesses, concurs with that finding of the ALJ which concludes that the disparities in per pupil expenditure between property-poor and property-rich districts have widened over the years in question when federal funds are excluded from consideration. Moreover, contrary to the ALJ's finding and plaintiffs' arguments, the Commissioner, on the other hand, concurs with the arguments set forth by defendants that day school expenditures per pupil which include not only categorical aid but also federal aid present a more accurate picture of the funds that plaintiffs' districts have available for expenditure. In so concluding, the Commissioner finds both the rationale of plaintiffs and the ALJ unconvincing as to why such federal funds should not be included in determining the expenditure levels available to plaintiffs' districts. Despite the fact that availability of federal funds must await annual appropriations, the record clearly demonstrates that those funds, the preponderance of which are Chapter I funds, have become a dependable asset which has increased in amount over the last 10 years and therefore there exists no reasonable basis for their exclusion.

Utilizing day school expenditures per pupil as a measure of the actual relationship between funds available for property-poor districts significantly changes the conclusions which must be rendered relative to whether equity between property-poor and property-rich districts has improved or worsened. I.D. at 109; D-311.

The fundamental issue is whether the levels of actual expenditure in plaintiffs' districts and the levels of expenditure to which plaintiffs were entitled under the state aid formula are sufficient to enable these districts to provide the equality of educational opportunity constitutionally required. A practical concomitant of the foregoing issues, assuming adequacy of the formula, is the question of whether the municipalities in which plaintiffs' school districts reside are capable of providing the necessary fiscal support which the funding formula requires.

Plaintiffs have placed total reliance on equality of expenditure as a measure of both equality of educational opportunity and educational effectiveness. The ALJ, for his part, while recognizing to some degree the absence of a one-to-one relationship, nevertheless accepts plaintiffs' contention that the inability of these districts to provide a thorough and efficient system of education can be remedied by scrapping the current funding formula and replacing it with one that will provide equality or near equality of expenditure between property-rich districts and property-poor districts. Characteristically, the ALJ has dismissed defendants' evidence as presented by their expert witnesses as to the absence of the existence of a direct correlation between expenditure and quality of learning both nationally and in New Jersey. While the ALJ acknowledges that he cannot find that there is a link between expenditure and learning because of the current state of social science research, he nonetheless unquestioningly accepts the conclusion drawn by Arthur Wise, plaintiffs' expert witness

> ***that the great weight of public opinion and common sense leads to the conclusion that expenditures and inputs do make a difference in the quality of education provided and in student performance. *** Money is of importance in education, just as it is in other fields.
> (Plaintiffs' Reply Exceptions at 28, citing testimony of Arthur Wise 11/25 T125:16 to 129:7, 149:22 to 150:17)

In the Commissioner's view, it is obvious that the availability of funding is a significant factor in the equation of what constitutes a thorough and efficient education. What is at issue here is not whether money is important, it is. Rather, the issue is whether total equality of programmatic and fiscal inputs is required in order to provide a thorough and efficient system of education and whether plaintiffs have demonstrated that current

level of funding as provided by the funding formula legislated by Chapter 212 is sufficient to assure such a system.

In assessing the degree of sufficiency of funding provided by the formula, the Commissioner notes that 98% of all school districts in New Jersey have succeeded or will shortly succeed in becoming certified school districts and thus thorough and efficient by the standards established by the Legislature and the State Board of Education. The remaining 2% of districts, which admittedly include all but one of plaintiffs' districts, as well as several other of the largest school districts in the State, have not attained such status.

While the Commissioner recognizes that plaintiffs reject the definition of what constitutes T&E as defined by the State and endorsed by the Commissioner herein, he is not convinced that plaintiffs have demonstrated that the failure of these school districts to achieve success by whatever formula may be used to measure T&E can be attributed to funding insufficiency. It is the Commissioner's firm belief that there must be sufficient funds to support a thorough and efficient system of education in all school districts in New Jersey. However, the Commissioner is also convinced that, while money is important, it has not been demonstrated that there is a minimum spending level necessary to provide T & E.

In this regard, the Commissioner notes that former Assistant Commissioner Calabrese has stated categorically on the record that the current funding formula and process is capable, if it had been fully utilized by plaintiffs, of generating sufficient revenues to sustain local goals and objectives. Calabrese 5/11/87 T116:8-11.

The Commissioner also fully endorses Calabrese's view that local districts have an obligation to budget to meet all of their needs and that if such needs cannot be met within the limitations of the budget caps, a cap waiver request should have been requested. It should likewise be noted for the record that the manner in which the maximum permitted budget for succeeding years is calculated, as well as the multiplier effect, permits districts to further increase their revenues and also increases their entitlement to state aid. See generally, Calabrese 5/11/87 T52-53.

While the ALJ does not question that the formula is capable of generating additional funds on the part of plaintiffs' districts, as well as other major urban centers, he attributes the failure to do so to the fact that these property-poor school districts must share their limited tax base with hard pressed municipalities. I.D. at 245. It is interesting to note that both former Assistant Commissioner Calabrese and the ALJ examine the question of why districts such as plaintiffs' districts choose to budget less than that which is permitted; they both point to the impact of the pressure received from the local municipal authorities.

Where the two part ways, however, is in characterizing the nature of such choice. The ALJ concludes that the failure to fully budget to the maximum is not caused by choice at all but by a recognition of the political realities of the fiscal pressure which would be placed upon the overburdened tax rate were the board to seek to budget up to the maximum permitted or to seek a cap waiver. See I.D. at 229-249. Mr. Calabrese's characterization of the same situation is contained in the following testimony on cross-examination:

> Q. Let me try again and see if I can get through the question this time.
>
> Do I correctly state your opinion that high municipal tax rates in urban districts such as those in which Plaintiff's reside constrain their ability to increase taxes for education?
>
> A. I have to say no, it's not my opinion. I think what it is is that political forces in the towns themselves decide that the tax rate has to be at a certain level, then begin to exercise influence on Boards of Education and it's inappropriate for Boards of Education to succumb to that influence so that yeah, I'm sure that the taxes are a certain level encountered by the political forces, but it's our opinion and my position that a Board of Education has to ignore that and develop a budget consistent with their ability to achieve their goals and objectives.
>
> (Calabrese 5/11/87 T119:10-25)

In determining which of the foregoing differences manifested between the ALJ and defendants' witness is more valid in characterizing the situation in the major urban centers under consideration relative to their ability to raise the maximum funds permitted under the formula, it is necessary to consider the issue of what has come to be called "municipal overburden." The ALJ reviews all the arguments and research findings presented by plaintiffs and defendants as to whether or not such a phenomenon is deemed to be valid and thus impact upon the ability of the municipalities to certify a local tax levy sufficient to fund the school budget up to the maximum permitted. Based upon his review, once again the ALJ chooses to place greater weight upon the evidence provided by plaintiffs in concluding "***that plaintiffs' cities and some of the other urban aid cities are so poor by every measure of municipal or educational fiscal ability, that they must levy high tax rates for municipal services and for schools.***" I.D. at 273.

In assessing the validity of the positions set forth regarding the "municipal overburden" issue, the Commissioner does not question the ALJ's finding that the urban areas herein are poor by the measures which he considered; however, the issue in this matter is not whether these cities are poor - the issue is whether under the current T & E formula they have the capability of meeting their requirement to fully fund a school budget sufficient to meet the requirements of a thorough and efficient system of education.

The answer to this issue is "yes" by virtue of the fact that the districts represented by plaintiffs herein are permitted to budget to the maximum under the T & E formula or to seek a budget cap waiver. In the Commissioner's view the failure of plaintiffs' districts to implement these provisions of the T & E formula represents a clear moral failure to meet their sworn obligations under law to the children of their respective school districts in order to serve the practical political interests of the municipal authorities. The primacy which local boards of education and municipalities must afford tax levies for educational purposes has been clearly prescribed by the New Jersey Supreme Court in Board of Education of the Township of East Brunswick v. Township Council of East Brunswick wherein the Court emphasized the constitutional obligation "...to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient...." 48 N.J. 94, 107 (1966). To this extent, therefore, the Commissioner finds and determines that the testimony of former Assistant Commissioner Calabrese, ante, is credible and entirely consistent with the Commissioner's findings set forth above.

There is, however, another dimension to this issue which also bears further consideration by the Commissioner. This is best expressed in the ALJ's conclusion which holds that plaintiffs' districts do not budget to the maximum levels permitted by the T & E formula because they recognize the political realities of the fiscal pressure which would be placed on an overburdened tax rate in their respective districts.

The Commissioner concurs with the ALJ that plaintiffs' districts are subject to political pressures by the municipal authorities not to increase annual school budgets for T & E purposes by reason of the fact that such increases would exacerbate the demands made on the local tax levy and contribute further to municipal overburden.

While the Commissioner must emphasize that it has not been demonstrated that there is a minimum spending level necessary to provide T & E and while he firmly believes (1) that the T & E formula is capable of generating sufficient funds for plaintiffs' districts to budget at higher levels and (2) that plaintiffs' districts should have budgeted to those higher levels permitted under the formula, he nevertheless acknowledges the fact, as did the ALJ, that plaintiffs' failure to budget to higher levels is premised on their belief that political realities and municipal overburden prevent them from budgeting higher.

The remaining question left open and pending is whether the "political realities" of municipal overburden, which have governed plaintiffs' actions are fact or fiction, myth or reality.

In this regard the Commissioner finds and determines that the answer to the "myth or reality" question of municipal overburden does not lie within his jurisdictional authority to determine. Rather, it is a responsibility by virtue of statutory prescription which has been assigned by the Legislature to Mr. Barry Skokowski, Director of the Division of Local Government Services, Department of Community Affairs.

Although the ALJ mentions the testimony of Barry Skokowski and the revenues available to hard pressed municipalities, his response to such testimony is a statement that "[t]here is no doubt that Director Skokowski is supervising the distribution of large amounts of non-education aid in an effort to reverse the economic decline of New Jersey's cities." I.D. at 259.

Entirely missing from the ALJ's consideration of Mr. Skokowski's testimony is the director's unequivocal response to questions relative to the ability of the cities in question to raise the funds necessary to be raised for educational purposes. In response to questions specifically relating to Camden, East Orange and Jersey City, Mr. Skokowski unwaveringly emphasized the responsibility under law for municipalities to give first priority to school taxes and the role that his office has played and can continue to play to assist the municipalities in question in meeting their obligations to fund adequate educational budgets. Testimony of Barry Skokowski 5/27/87 T146:11-25.

Conspicuous by its absence, however, is any finding and conclusion rendered by the ALJ to the effect that Mr. Skokowski was either called upon to determine whether plaintiffs' districts suffer from municipal overburden or whether he had previously reached such a determination through investigative proceedings which may have been conducted on his own initiative.

Consequently, in light of the foregoing circumstances, the Commissioner can only conclude that the "jury is still out" with respect to whether or not plaintiffs' districts do, in fact, suffer from the phenomenon which is called municipal overburden.

This does not, however, mean that the Commissioner is not sensitive to the fact that whether real or imagined plaintiffs' belief system that municipal overburden exists is preventing them from raising their pupil expenditures and that the initial impact of raising the taxes necessary to fund a large increase in the school budget would be considerable.

It is therefore the Commissioner's conclusion that it is necessary to take steps to help ameliorate this condition by affording ratable-poor school districts which are ranked below the

GTB in the existing state school aid formula the means to raise their pupil expenditures without causing a dramatic impact on the local tax rate in any given school year and which takes away reliance on municipal overburden as a justification not to budget at or close to the maximum level permitted in law. The Commissioner therefore recommends that the Legislature consider amending the current law so that all school districts which fall below the average GTB in the state aid funding formula be placed on a current year funding basis for the purpose of allocating state school aid. The theory and rationale for providing current year state aid to these affected school districts is set forth below.

The existing formula provides that state aid for the ensuing school year shall be calculated on the enrollment, budget and equalized valuations of the current year. The lag of one year in the payment of state aid forces local districts to fund any new or improvement programs or unusual budget increase from local property taxes. This increase in property taxes is usually a deterrent in the low wealth districts which already have high tax rates and low spending levels.

The proposed change to current year funding would enable the low wealth districts to raise their spending level and to make educational improvements without an undue or exorbitant rise in local property taxes. Under the proposed current year funding, state aid would be calculated on the estimated budget for the year in which the calculation is made and paid in the same year.

A larger proportion of state aid is distributed to low wealth districts. Since current year funding encourages poor districts to budget higher, the aid increase to these districts under current year funding will be proportionately larger. Because the incentive is for poor districts to budget higher than high wealth districts, the NCEB's of low wealth districts will be significantly increased.

Under such circumstances any increase in the school budget would only impact upon the tax rate up to the local share for that particular district. By way of illustration, if a district were an 80% aid district, any increase in the budget from the previous year would only require the local municipality to raise 20% of the increase through the local tax levy as opposed to the 100% under the present system of state aid distribution.

By way of a more specific illustration the effect of current year funding is demonstrated in the section which follows.

IMPACT OF CURRENT YEAR FUNDING

In order to demonstrate the impact of the proposal to provide current year funding for all districts below the GTB, the Commissioner looked at the 13 year history of plaintiffs' districts since the implementation of the state aid funding formula under

Chapter 212. He utilized known data to extrapolate the impact of both budgeting to cap, which has been suggested by defendants as a solution to plaintiffs' contentions regarding the need for greater revenues and current year funding.

By looking at the maximum permitted NCEB's of plaintiffs' districts at full state funding; the equalization aid such an NCEB would generate under the current state aid formula; the tax levies necessary to fund the maximum NCEB budgets; and the tax rates which would be required and then applying this combination of budgeting to cap with current year funding of state aid, it is possible to provide a picture of how plaintiffs' districts would have fared under such a process. Further, since the aforesaid illustrations can only depict what would have been, rather than what actually occurred, the Commissioner projected the impact of the assumptions of budgeting to cap and current year funding through school year 1991-92 to approximate the manner in which such measures would provide property-poor districts with significantly increased revenues. Those revenues produce tax rates which diminish the arguments raised in this matter relative to the inability of plaintiffs' districts to raise additional revenues due to "municipal overburden."

As of this date there are 382 school districts below the GTB. In addition to plantiffs' districts the Commissioner has selected 6 additional districts of the 382 below the GTB for illustrative purposes. The six districts were selected from different geographic areas of the State. The districts are Bridgeton and Salem from the southern section of the State; Trenton and Asbury Park from the central section; and Newark and Passaic from the northern section. While six were chosen for illustrative purposes, a computer analysis was prepared showing the impact of the Commissioner's proposal on all 382 districts below the GTB. The computer analysis is included as an Appendix to this decision.

The following tables show the impact of both budgeting at the maximum permissible levels allowed by law (hereinafter "cap") and providing current year state aid funding on the net current expense budgets, state equalization aid, tax levies and equalized tax rates of the four plaintiff districts. To assist the reader to follow the tables included to show the impact of the Commissioner's hypothesis, a detailed explanation of Camden's 1980-81 data follows. This detail shows the change in the NCEB, the calculation of equalization aid and the decrease in the tax levy between the present funding method and the proposed current year funding hypothesis of the Commissioner herein.

Camden's 1980-81 data in Table 1, Table 5 and Table 9 illustrate the decline in tax levy. The 1980-81 tax levy with full-funding equalization aid was

NCEB	-	Equalization Aid	=	Tax Levy
$32,051,644 -		$23,136,032	=	$8,915,612
(Table 1, Col. 1)		(Table 5, Col. 1)		(Table 9, Col. 1)

Camden's tax levy for the same year under current year funding with the budget at the maximum permissible level would have been

NCEB at cap -	Curr. Yr. Fund. Equal. Aid	= Tax Levy
$40,313,309 -	$33,254,449	= $7,058,860
(Table 1, Col. 3)	(Table 5, Col. 3)	(Table 9, Col. 3)

The difference in the tax levy represents a decrease of $1,856,752.

The increase in NCEB would have been

NCEB at cap -	Actual NCEB	= Increase in NCEB
$40,313,309 -	$32,051,644	= $8,261,665
(Table 1, Col. 3)	(Table 1, Col. 1)	(Table 1, Col. 6)

The change in equalization aid is based on two factors: 1) the state share percentage and 2) the difference in the current NCEB at cap and the prior year NCEB. Equalization aid under the present formula for 1980-81 is the product of the 1980-81 state share percentage and the 1979-80 NCEB:

State Share %	x	1979-80 Actual NCEB	= Equalization Aid
(.8249)	x	($28,047,075)	= $23,136,032
		(Table 1, Col. 1)	(Table 5, Col. 1)

Equalization aid with the budget at cap and current year funding is the product of the same 1980-81 state share percentage and the 1980-81 NCEB at cap.

State Share %	x	1980-81 NCEB at cap	= Equalization Aid
(.8249)	x	($40,313,309)	= $33,254,449
		(Table 1, Col. 3)	(Table 5, Col. 3)

The increase in equalization aid is therefore

(State Share %) x (NCEB at cap - Prior Year NCEB)	= Increase in Equal. Aid
(.8249) x ($40,313,309 - $28,047,075)	= $10,118,417
(Table 1, Col. 3) (Table 1, Col. 1)	(Table 5, Col. 6)

Because equalization aid increases more than the NCEB ($10,118,417 vs. $8,261,665), the tax levy declines.

Since the tables below are designed to simulate the impact of two variables, budgeting to cap and current year funding, all of the tables have been kept uniform as to the number of columns in each. However, since NCEB (Tables 1-4 and 17-26) is not affected by the current year funding, the tables relating to NCEB demonstrate the impact of only a single variable, budgeting to cap. Consequently, Column 2 (NCEB at Cap) and Column 3 (NCEB as Proposed) are the same and show identical figures. Likewise Column 4 (Increase in NCEB at Cap) and Column 6 (Increase in NCEB at Cap with Current Year Funding)

show the same figures. Column 5 (Increase in NCEB with Current Year Funding) is shown as $0.

NCEB

In the NCEB tables for each district Column 1 shows the NCEB, as found in the state aid files. Column 2 represents the level of each district's NCEB at the maximum permissible level allowed by law if the district budgeted at cap in each year. The "NCEB as Proposed" is the same as Column 2. Since current year funding does not directly affect the level of NCEB, these numbers are identical.

The impact of budgeting at cap and receiving current year funding on the NCEB can be seen in Columns 4 through 6. Column 4 shows the increase in the NCEB over the actual NCEB. Since current year funding has no direct impact on the NCEB, the NCEB does not change with current year funding. This is shown in Column 5. Column 6 represents the combined impact on the NCEB of budgeting at cap and receiving current year funding. Only budgeting at cap has an impact. Thus, the numbers in Column 6 are identical to those in Column 4.

Utilizing Table 1 (Camden) as an example, Column 1 shows the actual NCEB at full funding $27,490,699. Column 2 shows the NCEB as it would be if Camden had budgeted each year to cap, $30,235,008. Column 3 is identical to Column 2 because current year funding does not affect NCEB. Column 4 shows the increase in NCEB for Camden produced by budgeting to cap $2,744,309. Column 5 shows a zero increase and Column 6 depicts same as Column 4. Thus as depicted by the table, Camden by budgeting to cap in each year between 1976-77 and 1988-89 could have had an NCEB of $102,534,359 for 1988-89 as compared to the NCEB of $68,100,194 depicted for 1988-89 in Column 1. The increased NCEB in each of the years shown in the table would have afforded Camden significant additional revenues with which to purchase educational services. Greater availability of resources by budgeting to cap can be seen for each of the plaintiffs' districts.

Table 1

NCEB

Camden

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Increase in NCEB at Cap (Col. 2-Col. 1)	(5) Increase in NCEB with Current Year Funding (Col. 3-Col. 2)	(6) Increase in NCEB at Cap w/Curr. Yr. Fund (Col. 3-Col. 1)
1976-77	$27,490,699	$30,235,008	$30,235,008	$ 2,744,309	$0	$ 2,744,309
1977-78	27,102,447	32,640,660	32,640,660	5,538,213	0	5,538,213
1978-79	27,460,216	34,417,607	34,417,607	6,957,391	0	6,957,391
1979-80	28,047,075	36,825,879	36,825,879	8,778,804	0	8,778,804
1980-81	32,051,644	40,313,309	40,313,309	8,261,665	0	8,261,665
1981-82	37,137,496	45,177,213	45,177,213	8,039,717	0	8,039,717
1982-83	40,019,046	50,619,591	50,619,591	10,600,545	0	10,600,545
1983-84	44,696,799	55,560,737	55,560,737	10,863,938	0	10,863,938
1984-85	47,939,149	60,237,692	60,237,692	12,298,543	0	12,298,543
1985-86	51,747,962	62,719,872	62,719,872	10,971,910	0	10,971,910
1986-87	54,088,204	68,925,051	68,925,051	14,836,847	0	14,836,847
1987-88	63,756,591	82,240,615	82,240,615	18,484,024	0	18,484,024
1988-89	68,100,194	102,534,359	102,534,359	34,434,165	0	34,434,165

NOTE: Current year funding does not affect NCEB. Columns 5 and 6 are displayed here for consistency and comparison with equalization aid and tax tables.

Table 2

NCEB

East Orange

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Increase in NCEB at Cap (Col. 2-Col. 1)	(5) Increase in NCEB with Current Year Funding (Col. 3-Col. 2)	(6) Increase in NCEB at Cap w/Curr. Yr. Fund (Col. 3-Col. 1)
1976-77	$18,170,430	$18,510,893	$18,510,893	$340,463	$0	$340,463
1977-78	20,091,006	20,306,249	20,306,249	215,243	0	215,243
1978-79	22,377,348	22,400,396	22,400,396	23,048	0	23,048
1979-80	22,885,107	24,077,162	22,077,162	1,192,055	0	1,192,055
1980-81	25,283,995	27,406,283	27,406,283	2,122,288	0	2,122,288
1981-82	26,899,688	30,224,200	30,224,200	3,324,512	0	3,324,512
1982-83	28,870,878	34,198,223	34,198,223	5,327,345	0	5,327,345
1983-84	30,207,721	37,597,351	37,597,351	7,389,630	0	7,389,630
1984-85	34,745,020	40,500,455	40,500,455	5,755,435	0	5,755,435
1985-86	38,546,077	43,761,589	43,761,589	5,215,512	0	5,215,512
1986-87	43,775,047	45,649,692	45,649,692	1,874,645	0	1,874,645
1987-88	46,546,312	54,019,524	54,019,524	7,473,212	0	7,473,212
1988-89	52,087,731	64,976,834	64,976,834	12,889,103	0	12,889,103

NOTE: Current year funding does not affect NCEB. Columns 5 and 6 are displayed here for consistency and comparison with equalization aid and tax tables.

Table 3

NCEB

Irvington

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Increase in NCEB at Cap (Col. 2-Col. 1)	(5) Increase in NCEB with Current Year Funding (Col. 3-Col. 2)	(6) Increase in NCEB at Cap w/Curr. Yr. Fund (Col. 3-Col. 1)
1976-77	$10,898,103	$11,784,612	$11,784,612	$886,509	$0	$886,509
1977-78	11,858,546	12,731,836	12,731,836	873,290	0	873,290
1978-79	12,809,150	13,531,936	13,531,936	722,786	0	772,786
1979-80	13,223,388	14,577,764	14,577,764	1,354,376	0	1,354,376
1980-81	14,938,571	16,353,400	16,353,400	1,414,829	0	1,414,829
1981-82	17,062,959	18,806,242	18,806,242	1,743,283	0	1,743,283
1982-83	19,914,025	21,417,767	21,417,767	1,503,742	0	1,503,742
1983-84	22,543,670	23,638,576	23,638,576	1,094,906	0	1,094,906
1984-85	24,845,001	25,863,894	25,863,894	1,018,893	0	1,018,893
1985-86	27,808,977	28,711,587	28,711,587	902,610	0	902,610
1986-87	30,210,585	31,596,535	31,596,535	1,385,950	0	1,385,950
1987-88	38,026,970	39,019,166	39,019,166	992,196	0	992,196
1988-89	40,159,325	49,127,185	49,127,185	8,967,860	0	8,967,860

NOTE: Current year funding does not affect NCEB. Columns 5 and 6 are displayed here for consistency and comparison with equalization aid and tax tables.

Table 4

NCEB

Jersey City

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Increase in NCEB at Cap (Col. 2-Col. 1)	(5) Increase in NCEB with Current Year Funding (Col. 3-Col. 2)	(6) Increase in NCEB at Cap w/Curr. Yr. Fund (Col. 3-Col. 1)
1976-77	$47,194,867	$56,538,628	$56,538,628	$9,343,761	0	$9,343,761
1977-78	51,033,642	60,407,275	60,407,275	9,373,633	0	9,373,633
1978-79	54,605,514	63,559,593	63,559,593	8,954,079	0	8,954,079
1979-80	59,259,166	67,782,401	67,782,401	8,523,235	0	8,523,235
1980-81	65,632,091	73,582,344	73,582,344	7,950,253	0	7,950,253
1981-82	75,584,095	81,678,572	81,678,572	6,094,477	0	6,094,477
1982-83	81,866,047	90,691,477	90,691,477	8,825,430	0	8,825,430
1983-84	91,838,559	97,768,762	97,768,762	5,930,203	0	5,930,203
1984-85	94,928,294	104,728,785	104,728,785	9,800,491	0	9,800,491
1985-86	101,823,527	110,791,627	110,791,627	8,968,100	0	8,968,100
1986-87	114,436,119	124,419,686	124,419,686	9,983,567	0	9,983,567
1987-88	129,901,792	142,727,825	142,727,825	12,826,033	0	12,826,033
1988-89	128,188,342	162,609,728	162,609,728	34,421,386	0	34,421,386

NOTE: Current year funding does not affect NCEB. Columns 5 and 6 are displayed here for consistency and comparison with equalization aid and tax tables.

EQUALIZATION AID

Equalization aid at the full funding level based upon the actual NCEB is presented in Column 1 of the next set of tables. Column 2 shows equalization aid, as calculated under the present funding system based on the prior year and based upon budgets calculated at cap. Equalization aid based upon budgeting at cap and calculated using current year funding is presented in Column 3.

Column 4 shows the increase in equalization aid over the full funding levels resulting when each district budgets to cap. Column 5 shows the increase in equalization aid which accrues due to current year funding. The combined impact on equalization aid of both budgeting to cap and current year funding is found in Column 6.

Tables 5-8 illustrate these impacts on the plaintiffs' districts. Table 5 (Camden) is once again used for illustrative purposes. In 1977-78, equalization aid at full funding as shown in Column 1 is $21,860,604. Equalization aid at cap in Column 2 would have been $24,066,735. (Note that in 1976-77, Column 1 and Column 2 are the same since the prior year's NCEB is the basis for this calculation.) The equalization aid under current year funding with budgets at cap is $25,955,853 as shown in Column 3, consisting of an additional $2,206,131 realized from budgeting to cap as shown in Column 4 and $1,889,118 from current year funding depicted in Column 5 resulting in a total increase in equalization aid of $4,095,249 for the year 1977-78 as seen in Column 6. Again as hypothesized, the combination of budgeting to cap and receiving current year funding would have resulted in equalization aid for 1988-89 of $93,418,722 shown in Column 3 as opposed to the $58,018,498 which is indicated in Column 1, a difference of $35,400,224 as shown in Column 6. The additional amounts of aid generated for the other plaintiff districts, while not as dramatic as those hypothesized for Camden, represent significant increases in the amount of state aid provided.

Table 5

EQUALIZATION AID

Camden

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund	(4) Increase in Equal Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal Aid w/ Current Year Funding (Col. 3-Col. 2)	(6) Incr. in Equal. Aid at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1976-77	$20,884,163	$20,884,163	$23,086,148	$0	$2,201,985	$2,201,985
1977-78	21,860,604	24,066,735	25,955,853	2,206,131	1,889,118	4,095,249
1978-79	21,478,689	25,867,723	27,275,954	4,389,034	1,408,231	5,797,265
1979-80	22,325,156	27,981,515	29,751,107	5,656,359	1,769,592	7,425,951
1980-81	23,136,032	30,377,667	33,254,449	7,241,635	2,876,782	10,118,417
1981-82	27,106,075	34,092,965	38,206,369	6,986,890	4,113,404	11,100,294
1982-83	31,633,719	38,481,950	42,865,729	6,848,231	4,383,779	11,232,010
1983-84	34,976,646	44,241,522	48,574,907	9,264,876	4,333,385	13,598,261
1984-85	39,771,212	49,437,944	53,599,498	9,666,732	4,161,554	13,828,286
1985-86	42,963,065	53,985,019	56,209,549	11,021,954	2,224,530	13,246,484
1986-87	46,868,129	56,805,388	62,425,419	9,937,259	5,620,031	15,557,290
1987-88	49,479,889	63,025,067	75,200,819	13,545,178	12,175,752	25,720,930
1988-89	58,018,498	74,892,564	93,418,722	16,874,066	18,526,158	35,400,224

Table 6

Equalization Aid

East Orange

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/. Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$10,294,484	$10,294,484	$10,762,233	$0	$467,749	$467,749
1977-78	11,739,915	11,959,888	13,119,867	219,973	1,159,979	1,379,952
1978-79	13,748,275	13,895,566	15,328,591	147,291	1,433,025	1,580,316
1979-80	15,693,234	15,709,398	16,802,684	16,164	1,093,286	1,109,450
1980-81	16,941,845	17,824,323	20,288,871	882,478	2,464,548	3,347,026
1981-82	19,590,039	21,234,388	23,417,710	1,644,349	2,183,322	3,827,671
1982-83	21,468,641	24,121,934	27,077,693	2,653,293	2,955,759	5,609,052
1983-84	23,515,330	27,854,453	30,637,999	4,339,123	2,783,546	7,122,669
1984-85	26,467,385	32,587,477	33,602,477	6,120,092	1,015,000	7,135,092
1985-86	29,112,852	33,935,331	36,667,835	4,822,479	2,732,504	7,554,983
1986-87	32,459,651	34,325,334	38,441,606	1,865,683	4,116,272	5,981,955
1987-88	36,902,365	38,478,125	45,533,056	1,575,760	7,054,931	8,630,691
1988-89	38,908,062	45,154,919	54,314,135	6,246,857	9,159,216	15,406,073

Table 7

Equalization Aid

Irvington

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$4,335,156	$4,335,156	$4,822,263	$0	$487,107	$487,107
1977-78	5,021,846	5,430,349	5,866,830	408,503	436,481	844,984
1978-79	6,001,610	6,443,582	6,848,513	441,972	404,931	846,903
1979-80	6,925,907	7,316,717	7,866,000	390,810	549,283	940,093
1980-81	7,815,022	8,615,458	9,664,859	800,436	1,049,401	1,849,837
1981-82	9,574,130	10,480,894	12,052,920	906,764	1,572,026	2,478,790
1982-83	11,183,063	12,325,611	14,123,388	1,142,548	1,797,777	2,940,325
1983-84	13,659,030	14,690,447	16,322,249	1,031,417	1,631,802	2,663,219
1984-85	16,105,198	16,887,399	18,477,166	782,201	1,589,767	2,371,968
1985-86	18,509,526	19,268,601	21,390,133	759,075	2,121,532	2,880,607
1986-87	21,031,929	21,714,573	23,896,460	682,644	2,181,887	2,864,531
1987-88	23,201,729	24,067,081	29,720,899	865,352	5,653,818	6,519,170
1988-89	29,018,381	29,775,526	33,514,794	757,145	3,739,268	4,496,413

Table 8

Equalization Aid

Jersey City

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$31,478,652	$31,478,652	$34,409,409	$0	$2,930,757	$2,930,757
1977-78	30,020,655	35,964,221	38,425,068	5,943,566	2,460,847	8,404,413
1978-79	33,809,788	40,019,820	42,108,230	6,210,032	2,088,410	8,298,442
1979-80	37,093,526	43,176,032	45,714,940	6,082,506	2,538,908	8,621,414
1980-81	42,014,749	48,057,723	52,169,882	6,042,974	4,112,159	10,155,133
1981-82	48,502,115	54,377,352	60,360,465	5,875,237	5,983,113	11,858,350
1982-83	56,809,006	61,389,615	67,504,200	4,580,609	6,114,585	10,695,194
1983-84	61,358,602	67,973,262	73,323,098	6,614,660	5,349,836	11,964,496
1984-85	69,824,856	74,333,589	79,625,295	4,508,733	5,291,706	9,800,439
1985-86	71,120,278	78,462,806	83,005,087	7,342,528	4,542,281	11,884,809
1986-87	74,402,451	80,955,442	90,913,465	6,552,991	9,958,023	16,511,014
1987-88	78,892,260	84,194,802	96,583,919	5,302,542	12,389,117	17,691,659
1988-89	84,501,116	92,844,450	105,777,628	8,343,334	12,933,178	21,276,512

TAX LEVY

The tax levy tables illustrate the tax levies within each district under each phase of this simulation. Column 1 shows each district's tax levy if the district's actual NCEB was supported by full funding equalization aid under the current funding system. Column 2 represents the tax levy necessary to fund each district's NCEB budget at cap when state aid is based on prior year budgets. The tax levy necessary to fund each district's budget at cap if the districts received state aid based upon current year funding is found in Column 3.

The increase or decrease in tax levy resulting when each district budgets at cap under the current funding system can be found in Column 4. Column 5 shows the decrease in tax dollars if current year funding is applied, while Column 6 shows the potential increase or decrease in the tax levy if the districts both budgeted at cap and received current year funding.

Tables 9-12 depict the impact upon the tax levy required to be raised by each of plaintiffs' districts in order to fund the NCEB's projected in Tables 1-4 and based upon the receipt of the equalization aid projected in Tables 5-8. Table 9 (Camden) is again used for illustrative purposes. The 1976-77 amount of $6,606,536 shown in Column 1 is the tax levy required to fund the Camden actual NCEB budget based upon full funding of the current funding system. The Column 2 amount of $9,350,845 is the tax levy required to fund the 1976-77 NCEB budget for Camden, had that budget been at cap, and is based on the current state aid funding system. The tax levy with NCEB spending at cap and current year funding is $7,148,860 as shown in Column 3. Note that budgeting to cap would have resulted in the necessity to raise the additional tax levy amount $2,744,309 shown in Column 4. However, this is partially offset by the Column 5 reduction of $2,201,985, due to current year funding. The result is that Camden would have raised only the additional $542,324 in taxes shown in Column 6. Similar data may be observed for each of plaintiffs' districts in Tables 10, 11 and 12.

By viewing Column 6 for each of plaintiffs' districts, budgeting to cap is significantly facilitated by the expedient of providing current year funding. In most years the increased taxes necessitated by the increased expenditure levels are more than offset by current year funding thus resulting in net reductions of the amount of local tax levy. Where increases are demonstrated as having resulted, those increases were in most instances relatively modest. Those aberrational circumstances such as the $6,413,004 increase shown for Jersey City for 1976-77 and the $13,144,874 increase projected for 1988-89 in Table 12 are due to the large increase in NCEB (Table 4) necessitated to get that district up to cap level.

Table 9

Tax Levy

Camden

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$6,606,536	$9,350,845	$7,148,860	$2,744,309	-$2,201,985	$542,324
1977-78	5,241,843	8,573,925	6,684,807	3,332,082	-1,889,118	1,442,964
1978-79	5,981,527	8,549,884	7,141,653	2,568,357	-1,408,231	1,160,126
1979-80	5,721,919	8,844,364	7,074,772	3,122,445	-1,769,592	1,352,853
1980-81	8,915,612	9,935,642	7,058,860	1,020,030	-2,876,782	-1,856,752
1981-82	10,031,421	11,084,248	6,970,844	1,052,827	-4,113,404	-3,060,577
1982-83	8,385,327	12,137,641	7,753,862	3,752,314	-4,383,779	-631,465
1983-84	9,720,153	11,319,215	6,985,830	1,599,062	-4,333,385	-2,734,323
1984-85	8,167,937	10,799,748	6,638,194	2,631,811	-4,161,554	-1,529,743
1985-86	8,784,897	8,734,853	6,510,323	-50,044	-2,224,530	-2,274,574
1986-87	7,220,075	12,119,663	6,499,632	4,899,588	-5,620,031	-720,443
1987-88	14,276,702	19,215,548	7,039,796	4,938,846	-12,175,752	-7,236,906
1988-89	10,081,696	27,641,795	9,115,637	17,560,099	-18,526,158	-966,059

Table 10

Tax Levy

East Orange

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$7,875,946	$8,216,409	$7,748,660	$340,463	-$467,749	-$127,286
1977-78	8,351,091	8,346,361	7,186,382	-4,730	-1,159,979	-1,164,709
1978-79	8,629,073	8,504,830	7,071,805	-124,243	-1,433,025	-1,557,268
1979-80	7,191,873	8,367,764	7,274,478	1,175,891	-1,093,286	82,605
1980-81	8,342,150	9,581,960	7,117,412	1,239,810	-2,464,548	-1,224,738
1981-82	7,309,649	8,989,812	6,806,490	1,680,163	-2,183,322	-503,159
1982-83	7,402,237	10,076,289	7,120,530	2,674,052	-2,955,759	-281,707
1983-84	6,692,391	9,742,898	6,959,352	3,050,507	-2,783,546	266,961
1984-85	8,277,635	7,912,978	6,897,978	-364,657	-1,015,000	-1,379,657
1985-86	9,433,225	9,826,258	7,093,754	393,033	-2,732,504	-2,339,471
1986-87	11,315,396	11,324,358	7,208,086	8,962	-4,116,272	-4,107,310
1987-88	9,643,947	15,541,399	8,486,468	5,897,452	-7,054,931	-1,157,479
1988-89	13,179,669	19,821,915	10,662,699	6,642,246	-9,159,216	-2,516,970

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Table II

Tax Levy

Irvington

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$6,562,947	$7,449,456	$6,962,349	$886,509	-$487,107	$399,402
1977-78	6,836,700	7,301,487	6,865,006	464,787	-436,481	28,306
1978-79	6,807,540	7,088,354	6,683,423	280,814	-404,931	-124,117
1979-80	6,297,481	7,261,047	6,711,764	963,566	-549,283	414,283
1980-81	7,123,549	7,737,942	6,688,541	614,393	-1,049,401	-435,008
1981-82	7,488,829	8,325,348	6,753,322	836,519	-1,572,026	-735,507
1982-83	8,730,962	9,092,156	7,294,379	361,194	-1,797,777	-1,436,583
1983-84	8,884,640	8,948,129	7,316,327	63,489	-1,631,802	-1,568,313
1984-85	8,739,803	8,976,495	7,386,728	236,692	-1,589,767	-1,353,075
1985-86	9,299,451	9,442,986	7,321,454	143,535	-2,121,532	-1,977,997
1986-87	9,178,656	9,881,962	7,700,075	703,306	-2,181,887	-1,478,581
1987-88	14,825,241	14,952,085	9,298,267	126,844	-5,653,818	-5,526,974
1988-89	11,140,944	19,351,659	15,612,391	8,210,715	-3,739,268	4,471,447

Table 12

Tax Levy

Jersey City

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$15,716,215	$25,059,976	$22,129,219	$9,343,761	-$2,930,757	$6,413,004
1977-78	21,012,987	24,443,054	21,982,207	3,430,067	-2,460,847	969,220
1978-79	20,795,726	23,539,773	21,451,363	2,744,047	-2,088,410	655,637
1979-80	22,165,640	24,606,369	22,067,461	2,440,729	-2,538,908	-98,179
1980-81	23,617,342	25,524,621	21,412,462	1,907,279	-4,112,159	-2,204,880
1981-82	27,081,980	27,301,220	21,318,107	219,240	-5,983,113	-5,763,873
1982-83	25,057,041	29,301,862	23,187,277	4,244,821	-6,114,585	-1,869,764
1983-84	30,479,957	29,795,500	24,445,664	-684,457	-5,349,836	-6,034,293
1984-85	25,103,438	30,395,196	25,103,490	5,291,758	-5,291,706	52
1985-86	30,703,249	32,328,821	27,786,540	1,625,572	-4,542,281	-2,916,709
1986-87	40,033,668	43,464,244	33,506,221	3,430,576	-9,958,023	-6,527,447
1987-88	51,009,532	58,533,023	46,143,906	7,523,491	-12,389,117	-4,865,626
1988-89	43,687,226	69,765,278	56,832,100	26,078,052	-12,933,178	13,144,874

TAX RATE

The tax rate tables show the equalized tax rates necessary to fund the simulation and are expressed in terms of rates per $100 of equalized valuations. The equalized tax rate of each district based upon the actual NCEB spending level and full funding is shown in Column 1. The tax rates if the districts budgeted to cap and received full funding aid under the present formula are shown in Column 2. Column 3 shows the tax rates for each district with budgets at cap and a current year funding system.

The increase or decrease in the tax rate due to budgeting at cap are shown in Column 4. Column 5 shows the decrease in tax rates that results when a district receives current year funding. The full impact of budgeting to cap and receiving funding on a current year basis can be seen in the increases and decreases to the tax rate as found in Column 6.

Tables 13-16 demonstrate the impact on the tax rates of plaintiffs' districts had they budgeted at cap and been provided with current year funding between 1976-77 and 1988-89. Column 1 in Table 13 shows the equalized tax rate of $1.58 for Camden in 1976-77. Column 2 depicts the tax rate, $2.24, necessary to fund the 1976-77 Camden NCEB at cap under the present state aid system. Column 3 shows the tax rate, $1.71, which would have been required to fund the NCEB at cap with current year funding. Column 4 shows the increase, $0.66, resulting from budgeting to cap while Column 5 depicts the decrease, $0.53, produced by current year funding. Column 6 shows the net increase of $0.13 which would have been necessary in 1976-77 for Camden to budget at cap under a current year state aid funding system.

As shown in Table 13, Column 6, if Camden had budgeted to cap and received current year funding, the tax rate would have declined in 9 out of the 13 years. Only in the first 4 years would there have been a need for an increase in the tax rate. By 1980-81 the cumulative impact of current year funding and budgeting to cap would have resulted in state aid sufficient to have lowered taxes.

Tables 14-16 also show declining tax rates for most years. East Orange (Table 14) shows decreases in all but two years, with the increase in those two years being minimal. Irvington shows decreases in 9 out of 13 years.

Jersey City's tax rates (Table 16) for the 13 year period likewise reflect a downward trend. In 1979-80, the tax rate declines until 1988-89 when it rose by $0.19. This increase reflects the impact of rapidly escalating property values in Jersey City. As property values increase relative to the rest of the state, the state share percentage used to calculate state aid decreases. In Jersey City's case this would have resulted in a decrease in the portion of the budget funded by state aid, and an increased need for tax dollars.

Table 13

Tax Rate

Camden

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$1.58	$2.24	$1.71	$0.66	-$0.53	$0.13
1977-78	1.20	1.97	1.53	0.76	-0.43	0.33
1978-79	1.40	2.00	1.67	0.60	-0.33	0.27
1979-80	1.25	1.94	1.55	0.68	-0.39	0.30
1980-81	1.90	2.12	1.50	0.22	-0.61	-0.40
1981-82	1.99	2.20	1.39	0.21	-0.82	-0.61
1982-83	1.71	2.48	1.58	0.77	-0.89	-0.13
1983-84	2.00	2.33	1.44	0.33	-0.89	-0.56
1984-85	1.63	2.15	1.32	0.52	-0.83	-0.31
1985-86	1.66	1.65	1.23	-0.01	-0.42	-0.43
1986-87	1.26	2.11	1.13	0.85	-0.98	-0.13
1987-88	1.93	2.60	0.95	0.67	-1.65	-0.98
1988-89	1.31	3.60	1.19	2.29	-2.41	-0.13

Table 14

Tax Rate

East Orange

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$1.76	$1.83	$1.73	$0.08	-$0.10	-$0.03
1977-78	1.86	1.86	1.60	.00	-0.26	-0.26
1978-79	1.85	1.82	1.51	-0.03	-0.31	-0.33
1979-80	1.52	1.77	1.54	0.25	-0.23	0.02
1980-81	1.76	2.03	1.51	0.26	-0.52	-0.26
1981-82	1.53	1.89	1.43	0.35	-0.46	-0.11
1982-83	1.49	2.03	1.43	0.54	-0.60	-0.06
1983-84	1.36	1.99	1.42	0.62	-0.57	0.05
1984-85	1.63	1.55	1.35	-0.07	-0.20	-0.27
1985-86	1.66	1.73	1.25	0.07	-0.48	-0.41
1986-87	1.70	1.70	1.08	.00	-0.62	-0.62
1987-88	1.10	1.77	0.97	0.67	-0.80	-0.13
1988-89	1.27	1.90	1.02	0.64	-0.88	-0.24

Table 15

Tax Rate

Irvington

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$1.52	$1.72	$1.61	$0.20	-$0.11	$0.09
1977-78	1.57	1.68	1.58	0.11	-0.10	0.01
1978-79	1.51	1.57	1.48	0.06	-0.09	-0.03
1979-80	1.35	1.56	1.44	0.21	-0.12	0.09
1980-81	1.44	1.57	1.35	0.12	-0.21	-0.09
1981-82	1.46	1.62	1.31	0.16	-0.31	-0.14
1982-83	1.60	1.67	1.34	0.07	-0.33	-0.26
1983-84	1.57	1.58	1.29	0.01	-0.29	-0.28
1984-85	1.46	1.50	1.24	0.04	-0.27	-0.23
1985-86	1.46	1.48	1.15	0.02	-0.33	-0.31
1986-87	1.25	1.35	1.05	0.10	-0.30	-0.20
1987-88	1.61	1.63	1.01	0.01	-0.62	-0.60
1988-89	0.99	1.73	1.39	0.73	-0.33	0.40

Table 16

Tax Rate

Jersey City

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1976-77	$1.24	$1.98	$1.75	$0.74	-$0.23	$0.51
1977-78	1.66	1.93	1.73	0.27	-0.19	0.08
1978-79	1.59	1.80	1.64	0.21	-0.16	0.05
1979-80	1.65	1.84	1.65	0.18	-0.19	-0.01
1980-81	1.71	1.84	1.55	0.14	-0.30	-0.16
1981-82	1.89	1.91	1.49	0.02	-0.42	-0.40
1982-83	1.55	1.82	1.44	0.26	-0.38	-0.12
1983-84	1.79	1.75	1.43	-0.04	-0.31	-0.35
1984-85	1.26	1.52	1.26	0.27	-0.27	.00
1985-86	1.28	1.35	1.16	0.07	-0.19	-0.12
1986-87	1.23	1.33	1.03	0.11	-0.31	-0.20
1987-88	1.14	1.31	1.04	0.17	-0.28	-0.11
1988-89	0.63	1.00	0.82	0.37	-0.19	0.19

FUTURE PROJECTION

The foregoing tables simulate the impact on the availability of funds to plaintiffs' districts from both budgeting to cap and providing state aid on a current year basis. While such a simulation can provide a reasonably accurate picture of what might have been, its value to this proceeding is limited by the fact that the events of the past cannot be rectified. The Commissioner, therefore, has taken the same hypothesis, budgeting to cap and providing current year funding to districts below the GTB, and projected the impact over the next three school years. In addition to determining the impact of this hypothesis upon the four plaintiffs' districts, the Commissioner has included in this future simulation six other districts below the GTB. The six districts were selected in order to provide a sample that was geographically representative of the State. The State support ratio (State share) of the six districts selected to illustrate the future projection range from .8806 to .7361 for 1988-89.

In order to make projections for school years 1989-90, 1990-91 and 1991-92 in this study, certain assumptions were made. The methodologies used in making these assumptions were based upon the desirability of maintaining the trends of the last five years applied to 1988-89 data.

MAIN ASSUMPTIONS OF TABLES 17-56:

- Districts below the guaranteed valuation in aid year 1988-89 will budget to the maximum permissible level from 1989-90 to 1991-92.
- Current year funding is based on such budgets.
- Tax levy is defined as the difference between the NCEB and equalization aid.
- NCEB's per pupil, equalized valuations and resident enrollment were projected for each district using the average rate of the last five years.
- The inflation rate for the budget cap calculation was based on the average rate of the last five years.
- Maximum support budgets were recalculated for aid based on spending to cap.
- State guaranteed valuations and minimum guarantees were projected based on the average increase over the last five years.

An analysis of the future projections depicted by the following tables 17-26 shows that all of plaintiffs' districts as well as the other selected districts will have significantly higher NCEB's by virtue of budgeting to cap as depicted in Columns 2 and 3. Again as explained earlier, since current year funding has no impact on NCEB, the amount of increase in NCEB produced by budgeting to cap is shown in both Columns 4 and 6.

Table 17

NCEB

Camden

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col. 1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$74,159,914	$91,977,702	$91,977,702	$17,817,788	$0	$17,817,788
1990-91	$81,000,841	$116,414,168	$116,414,168	$35,413,326	$0	$35,413,326
1991-92	$88,670,907	$140,224,691	$140,224,691	$51,553,784	$0	$51,553,784

Table 18

NCEB

Bridgeton

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col. 1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at CAP w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$14,209,505	$17,848,843	$17,848,843	$3,639,339	$0	$3,639,339
1990-91	$15,394,914	$22,768,392	$22,768,392	$7,373,478	$0	$7,373,478
1991-92	$16,700,795	$27,616,980	$27,616,980	$10,916,186	$0	$10,916,186

Table 19

NCEB

East Orange

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col. 1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$58,137,815	$63,819,073	$63,819,073	$5,681,258	$0	$5,681,258
1990-91	$64,488,877	$76,543,305	$76,543,305	$12,054,428	$0	$12,054,428
1991-92	$71,527,570	$89,154,393	$89,154,393	$17,626,823	$0	$17,626,823

Table 20

NCEB

Irvington

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col. 1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$38,393,305	$43,925,716	$43,925,716	$5,532,411	$0	$5,532,411
1990-91	$42,119,579	$53,915,597	$53,915,597	$11,796,018	$0	$11,796,018
1991-92	$46,015,716	$63,804,951	$63,804,951	$17,789,235	$0	$17,789,235

Table 21

NCEB

Newark

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col.1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$295,090,098	$311,413,590	$311,413,590	$16,323,493	$0	$16,323,493
1990-91	$326,536,154	$360,657,817	$360,657,817	$34,121,663	$0	$34,121,663
1991-92	$361,193,967	$410,998,592	$410,998,592	$49,804,625	$0	$49,804,625

Table 22

NCEB

Jersey City

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col. 1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$137,238,103	$154,664,582	$154,664,582	$17,426,479	$0	$17,426,479
1990-91	$147,907,081	$183,589,000	$183,589,000	$35,681,918	$0	$35,681,918
1991-92	$159,555,003	$212,009,490	$212,009,490	$52,454,487	$0	$52,454,487

Table 23

NCEB

Trenton

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col. 1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$68,748,889	$75,411,929	$75,411,929	$6,663,040	$0	$6,663,040
1990-91	$74,675,146	$88,471,836	$88,471,836	$13,796,690	$0	$13,796,690
1991-92	$81,339,034	$101,336,488	$101,336,488	$19,997,454	$0	$19,997,454

Table 24

NCEB

Asbury Park

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col. 1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$16,167,615	$17,139,755	$17,139,755	$972,139	$0	$972,139
1990-91	$17,983,008	$19,982,463	$19,982,463	$1,999,456	$0	$1,999,456
1991-92	$20,135,336	$22,983,696	$22,893,696	$2,758,361	$0	$2,758,361

Table 25

NCEB

Passaic

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col. 1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$38,939,788	$45,117,497	$45,117,497	$6,177,709	$0	$6,177,709
1990-91	$42,919,446	$55,631,612	$55,631,612	$12,712,166	$0	$12,712,166
1991-92	$47,376,904	$65,976,071	$65,976,071	$18,599,168	$0	$18,599,168

Table 26

NCEB

Salem

School Year	(1) NCEB	(2) NCEB at Cap	(3) NCEB as Proposed	(4) Incr. in NCEB at Cap (Col. 2-Col. 1)	(5) Incr./ in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 2)	(6) Incr./in NCEB at Cap w/ Curr. Yr. Fund (Col. 3-Col. 1)
1989-90	$4,600,007	$5,897,175	$5,897,175	$1,297,167	$0	$1,297,167
1990-91	$5,019,810	$7,538,524	$7,538,524	$2,518,713	$0	$2,518,713
1991-92	$5,463,144	$9,113,495	$9,113,495	$3,650,351	$0	$3,650,351

EQUALIZATION AID

Since the state aid percentage is applied to a district's NCEB or maximum support budget to determine equalization aid, increasing a district's NCEB increases its equalization aid. Under the present system each of plaintiffs' districts, as well as the other representative districts selected for this simulation, would therefore have significantly greater amounts of funds to meet educational needs as shown in Column 2 of Tables 27-36. Current year funding would generate even greater equalization aid as shown in Column 3. Column 4 shows the increased equalization aid provided by budgeting to cap, while Column 5 depicts the increased aid due to current year funding. Column 6 represents the total increase in equalization aid generated by budgeting to cap with current year funding.

Table 27

Equalization Aid

Camden

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$63,060,780	$63,060,780	$85,171,352	$0	$22,110,572	$22,110,572
1990-91	$69,154,120	$85,769,207	$108,556,212	$16,615,087	$22,787,005	$39,402,092
1991-92	$75,970,689	$109,184,848	$131,516,738	$33,214,159	$22,331,890	$55,546,049

Table 28

Equalization Aid

Bridgeton City

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$11,583,837	$11,583,837	$15,717,691	$0	$4,133,854	$4,133,854
1990-91	$12,718,928	$15,976,499	$20,379,988	$3,257,571	$4,403,489	$7,661,060
1991-92	$13,972,424	$20,664,593	$25,065,171	$6,692,169	$4,400,578	$11,092,747

Table 29

Equalization Aid

East Orange

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$43,488,047	$43,488,047	$53,282,544	$0	$9,794,497	$9,794,497
1990-91	$48,731,117	$53,493,147	$64,158,598	$4,762,030	$10,665,451	$15,427,481
1991-92	$54,048,128	$64,150,944	$74,720,297	$10,102,816	$10,569,353	$20,672,169

Table 30

Equalization Aid

Irvington

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$26,660,934	$26,660,934	$33,506,536	$0	$6,845,602	$6,845,602
1990-91	$29,735,615	$34,020,467	$41,757,630	$4,284,852	$7,737,163	$12,022,015
1991-92	$32,840,636	$42,037,991	$49,748,720	$9,197,355	$7,710,729	$16,908,084

Table 31

Equalization Aid

Newark

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$223,772,549	$223,772,549	$260,123,772	$0	$36,351,223	$36,351,223
1990-91	$246,488,759	$260,123,772	$301,257,475	$13,635,013	$41,133,703	$54,768,716
1991-92	$271,971,963	$293,941,997	$335,443,669	$21,970,034	$41,501,672	$63,471,706

Table 32

Equalization Aid

Jersey City

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$69,234,524	$69,234,524	$83,534,341	$0	$14,299,817	$14,299,817
1990-91	$66,052,699	$74,440,063	$88,361,386	$8,387,364	$13,921,323	$22,308,687
1991-92	$58,926,181	$73,141,858	$84,464,581	$14,215,677	$11,322,723	$25,538,400

Table 33

Equalization Aid

Trenton

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$50,382,371	$50,382,371	$59,854,448	$0	$9,472,077	$9,472,077
1990-91	$54,950,987	$60,276,755	$70,715,539	$5,325,768	$10,438,784	$15,764,552
1991-92	$59,911,870	$70,980,954	$81,302,264	$11,069,084	$10,321,310	$21,390,394

Table 34

Equalization Aid

Asbury Park

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$10,790,396	$10,790,396	$12,616,574	$0	$1,826,178	$1,826,178
1990-91	$11,726,371	$12,431,464	$14,493,280	$705,093	$2,061,816	$2,766,909
1991-92	$12,737,365	$14,153,579	$16,215,605	$1,416,214	$2,062,026	$3,478,240

Table 35

Equalization Aid

Passaic

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$26,941,560	$26,941,560	$34,347,950	$0	$7,406,390	$7,406,390
1990-91	$29,718,846	$34,433,674	$42,458,046	$4,714,828	$8,024,372	$12,739,200
1991-92	$32,545,816	$42,185,451	$50,029,655	$9,639,635	$7,844,204	$17,483,839

Table 36

Equalization Aid

Salem

School Year	(1) Equal Aid at Full Funding	(2) Equal Aid at Cap w/ Present Form	(3) Equal Aid at Cap w/ Curr. Yr. Fund.	(4) Increase in Equal. Aid at Cap (Col. 2-Col. 1)	(5) Increase in Equal. Aid w/ Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Increase in Equal. Aid at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$3,772,742	$3,772,742	$5,156,490	$0	$1,383,748	$1,383,748
1990-91	$4,086,646	$5,239,050	$6,697,225	$1,152,404	$1,458,175	$2,610,579
1991-92	$4,507,789	$6,769,595	$8,183,919	$2,261,806	$1,414,324	$3,676,130

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TAX LEVY

The increased equalization aid provided by budgeting to cap would alleviate the burden of funding the higher NCEB's with the overall tax levies being reduced in most cases as depicted in Column 6 in Tables 37-46. The increase in tax levy required to budget to cap as shown in Column 4 is offset in most instances by the dramatic decrease in tax levy made possible by current year funding as indicated in Column 5.

Only Irvington and Passaic, in the last year of the three year simulation, and Jersey City in all three years show overall tax increases despite current year funding. In both Irvington and Passaic, budgeting to cap with equalization aid based upon current year funding is not sufficient to fund the full third year increase in this simulation; however, the relatively small tax levy increases shown in Column 6 for Irvington ($881,151) and Passaic ($1,115,329) support increases in NCEB of $17,789,235 in Irvington and $18,599,168 in Passaic.

Since Jersey City has a history of budgeting far below cap, it would have to increase its NCEB dramatically in order to budget at cap. At the same time Jersey City property values are escalating, a trend which is expected to continue. Under the formula for calculating state aid, increasing property values produce a decrease in the state share of funding for a school district. Consequently, as Jersey City's property wealth moves closer to the GTB even current year funding is not sufficient to fully fund the budget to cap and thus tax levy increases are necessitated.

Table 37

Tax Levy

Camden

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$11,099,134	$28,916,922	$6,806,350	$17,817,788	-$22,110,572	-$4,292,784
1990-91	$11,846,721	$30,644,961	$7,857,956	$18,798,239	-$22,787,005	-$3,988,766
1991-92	$12,700,218	$31,039,843	$8,707,953	$18,339,625	-$22,331,890	-$3,992,265

Table 38

Tax Levy

Bridgeton City

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$2,625,668	$6,265,006	$2,131,152	$3,639,339	-$4,133,854	-$494,515
1990-91	$2,675,986	$6,791,893	$2,388,404	$4,115,907	-$4,403,489	-$287,582
1991-92	$2,728,371	$6,952,387	$2,551,809	$4,224,017	-$4,400,578	-$176,561

Table 39

Tax Levy

East Orange

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$14,649,768	$20,331,026	$10,536,529	$5,681,258	-$9,794,497	-$4,113,239
1990-91	$15,757,760	$23,050,158	$12,384,707	$7,292,398	-$10,665,451	-$3,373,053
1991-92	$17,479,442	$25,003,449	$14,434,096	$7,524,007	-$10,569,353	-$3,045,346

Table 40

Tax Levy

Irvington

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$11,732,371	$17,264,782	$10,419,180	$5,532,411	-$6,845,602	-$1,313,191
1990-91	$12,383,964	$19,895,130	$12,157,967	$7,511,166	-$7,737,163	-$225,997
1991-92	$13,175,080	$21,766,960	$14,056,231	$8,591,880	-$7,710,729	$881,151

Table 41

Tax Levy

Newark

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$71,317,549	$87,641,041	$51,289,818	$16,323,493	-$36,351,223	-$20,027,730
1990-91	$80,047,395	$100,534,045	$59,400,342	$20,486,650	-$41,133,703	-$20,647,053
1991-92	$89,222,004	$117,056,595	$75,554,923	$27,834,591	-$41,501,672	-$13,667,081

Table 42

Tax Levy

Jersey City

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$68,003,579	$85,430,058	$71,130,241	$17,426,479	-$14,299,817	$3,126,662
1990-91	$81,854,382	$109,148,937	$95,227,614	$27,294,554	-$13,921,323	$13,373,231
1991-92	$100,628,822	$138,867,632	$127,544,909	$38,238,810	-$11,322,723	$26,916,087

Table 43

Tax Levy

Trenton

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$18,366,518	$25,029,558	$15,557,481	$6,663,040	-$9,472,077	-$2,809,037
1990-91	$19,724,159	$28,195,081	$17,756,297	$8,470,922	-$10,438,784	-$1,967,862
1991-92	$21,427,164	$30,355,534	$20,034,224	$8,928,370	-$10,321,310	-$1,392,940

Table 44

Tax Levy

Asbury Park

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$5,377,219	$6,349,359	$4,523,181	$972,139	-$1,826,178	-$854,039
1990-91	$6,256,637	$7,550,999	$5,489,183	$1,294,363	-$2,061,816	-$767,453
1991-92	$7,397,971	$8,740,117	$6,678,091	$1,342,147	-$2,062,026	-$719,879

Table 45

Tax Levy

Passaic

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$11,998,228	$18,175,937	$10,769,547	$6,177,709	-$7,406,390	-$1,228,681
1990-91	$13,200,600	$21,197,938	$13,173,566	$7,997,338	-$8,024,372	-$27,034
1991-92	$14,831,088	$23,790,620	$15,946,416	$8,959,533	-$7,844,204	$1,115,329

Table 46

Tax Levy

Salem

School Year	(1) Tax Levy	(2) Tax Levy at Cap w/ Present Form	(3) Tax Levy at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Levy at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Levy with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Levy at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$827,265	$2,124,433	$740,685	$1,297,167	-$1,383,748	-$86,581
1990-91	$933,164	$2,299,474	$841,299	$1,366,309	-$1,458,175	-$91,866
1991-92	$955,355	$2,343,900	$929,576	$1,388,545	-$1,414,324	-$25,779

TAX RATE

Tax rates for each of plaintiffs' districts in this simulation as well as those of the selected districts as shown in Tables 47-56 demonstrate the same trend as that displayed for tax levies, namely reduction in all three years for all districts except Irvington and Passaic, where reductions were limited to the first two years, and increases for Jersey City in all three years and for the same reasons provided earlier.

Table 47

Tax Rate

Camden

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$1.31	$3.42	$0.80	$2.11	-$2.61	-$0.51
1990-91	$1.26	$3.25	$0.83	$2.00	-$2.42	-$0.42
1991-92	$1.20	$2.93	$0.82	$1.73	-$2.11	-$0.38

Table 48

Tax Rate

Bridgeton

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$1.00	$2.40	$0.82	$1.39	-$1.58	-$0.19
1990-91	$0.95	$2.42	$0.85	$1.47	-$1.57	-$0.10
1991-92	$0.90	$2.28	$0.84	$1.39	-$1.45	-0.06

Table 49

Tax Rate

East Orange

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$1.21	$1.68	$0.87	$0.47	-$0.81	-$0.34
1990-91	$1.09	$1.59	$0.86	$0.50	-$0.74	-$0.23
1991-92	$1.00	$1.43	$0.83	$0.43	-$0.61	-$0.17

Table 50

Tax Rate

Irvington

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$0.91	$1.34	$0.81	$0.43	-$0.53	-$0.10
1990-91	$0.82	$1.32	$0.81	$0.50	-$0.51	-$0.02
1991-92	$0.74	$1.22	$0.79	$0.48	-$0.43	$0.05

Table 51

Tax Rate

Newark

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$1.35	$1.66	$0.97	$0.31	-$0.69	-$0.38
1990-91	$1.26	$1.58	$0.94	$0.32	-$0.65	-$0.33
1991-92	$1.15	$1.51	$0.98	$0.36	-$0.54	-$0.18

Table 52

Tax Rate

Jersey City

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$0.73	$0.92	$0.77	$0.19	-$0.15	$0.03
1990-91	$0.65	$0.86	$0.75	$0.22	-$0.11	$0.11
1991-92	$0.57	$0.78	$0.72	$0.22	-$0.06	$0.15

Table 53

Tax Rate

Trenton

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$1.11	$1.51	$0.94	$0.40	-$0.57	-$0.17
1990-91	$1.03	$1.47	$0.93	$0.44	-$0.54	-$0.10
1991-92	$0.96	$1.35	$0.89	$0.40	-$0.46	-$0.06

Table 54

Tax Rate

Asbury Park

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$1.07	$1.26	$0.90	$0.19	-$0.36	-$0.17
1990-91	$0.99	$1.19	$0.87	$0.20	-$0.33	-$0.12
1991-92	$0.91	$1.08	$0.82	$0.17	-$0.25	-$0.09

Table 55

Tax Rate

Passaic

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$0.88	$1.34	$0.79	$0.45	-$0.54	-$0.09
1990-91	$0.79	$1.27	$0.79	$0.48	-$0.48	-$0.00
1991-92	$0.72	$1.16	$0.78	$0.44	-$0.38	$0.05

Table 56

Tax Rate

Salem

School Year	(1) Equalized Tax Rate	(2) Tax Rate at Cap w/ Present Form	(3) Tax Rate at Cap w/ Curr. Yr. Fund.	(4) Incr./Decr. in Tax Rate at Cap (Col. 2-Col. 1)	(5) Decrease in Tax Rate with Curr. Yr. Fund. (Col. 3-Col. 2)	(6) Incr./Decr. in Tax Rate at Cap w/ Curr. Yr. Fund. (Col. 3-Col. 1)
1989-90	$0.85	$2.19	$0.76	$1.34	-$1.42	-$0.09
1990-91	$0.88	$2.17	$0.80	$1.29	-$1.38	-$0.09
1991-92	$0.83	$2.04	$0.81	$1.21	-$1.23	-$0.02

In conclusion, while the Commissioner has concluded earlier that plaintiffs have not met their burden of proof that the current funding mechanism prevents them from providing a thorough and efficient education, the simulation of budgeting to cap combined with current year funding of state aid illustrated in the preceding tables clearly provides a means of removing the spectre of "municipal overburden" from plaintiffs' lexicon. What the foregoing simulations illustrate is the ability of plaintiffs' districts to meet their moral responsibility of budgeting to a level which is appropriate without resorting to tax levies and tax rates which they have convinced themselves are politically unrealistic and fiscally unattainable.

In recommending as he has done above relative to current year funding for districts below the GTB, the Commissioner notes that precedent already exists for such recommendation in the 1987 amendments to N.J.S.A. 18A:7A-14 which authorize the Commissioner to recertify sufficient funds on a current year basis for any district in Level III wherein he determines that additional funds are necessary in order to fund a corrective action plan. Additionally, N.J.S.A. 18A:7A-52(b) provides that a State-operated school district's budget should likewise be funded on a current year basis.

The Commissioner, in recommending to the Legislature the proposed changes to current year funding for school districts which fall below the average GTB in the existing T&E funding formula, wishes to emphasize that he deems the existing T&E funding formula to be constitutional. Moreover, as the Commissioner has repeatedly stated on several occasions herein, it has not been demonstrated that there is a minimum spending level required to provide a thorough and efficient education. However, while the Commissioner rejects the finding and conclusion of the ALJ which holds that the existing funding system for providing a thorough and efficient system of education is constitutionally invalid, he nevertheless recognizes that there are significant disparities between property-poor districts and property-rich districts in local tax ratables. It is undisputed that some districts, such as plaintiffs herein, have adopted the belief that the political realities of municipal overburden prevent them from raising sufficient local taxes to budget at higher levels.

Therefore, as indicated previously, the Commissioner has recommended current year funding to all districts below the GTB so that they may budget at higher levels absent the perception that they are prevented from doing so because of the "political realities of municipal overburden."

MISMANAGEMENT AND EFFECTIVE SCHOOLS RESEARCH

An additional element that must weigh heavily in any consideration as to whether the educational deficiencies which exist in plaintiffs' districts in particular are attributable to lack of sufficient funds, either wholly or in part, is the issue of mismanagement. While the ALJ acknowledges the fact that gross mismanagement, illegality, and political intrusion in East Orange

and Jersey City have been demonstrated on the record, he determines that there is very little evidence in the record to conclude that mismanagement is typical of all urban, property-poor districts. Despite having reached such a conclusion, the ALJ goes on to acknowledge between pages 342 and 346 of his initial decision further examples of fiscal irregularities, inefficiencies and political interference in such urban districts as Hoboken, Newark, Paterson, Garfield and the Hudson County Vocational and Technical High School. In so acknowledging, the ALJ tends to dismiss examples of fiscal errors and audit exceptions in urban districts as not being proven unique to such districts. As the measure of what constitutes significant evidence of mismanagement, the ALJ uses East Orange and Jersey City as the yardstick and therefore dismisses lesser examples as not representative of substantial proof.

Ultimately, the ALJ concludes that even if mismanagement, inefficiency and political interference were eliminated in property-poor districts, elimination of those inefficiencies would not result in sufficient monetary savings or redirecting of funds to alter existing funding disparities. I.D. at 366

In concluding as he has relevant to the mismanagement issue, the ALJ further reveals what the Commissioner believes is the fundamental flaw in the entire initial decision in this matter. The ALJ has succumbed without question to plaintiffs' contention that the reason for all of New Jersey's educational ills is the absence of sufficient funds and, thus, whatever deficiencies exist can be remedied by the simple expedient of providing funding equity among all districts.

The Commissioner agrees that the failure of plaintiffs' districts to reach acceptable educational standards or to remedy significant problems cannot be attributed solely to mismanagement. There is no doubt that our urban districts operate under the enormous pressures of profound social and economic problems which immeasurably increase the difficulties of providing the students of those districts with an equal educational opportunity as required by law and constitution. See I.D. at 15-44.

However, to attribute the shortcomings found in plaintiffs' districts solely to the absence of sufficient funding and to discount the impact of mismanagement and political interference upon the way in which educational services are delivered is to deny logic and enthrone naivete.

In this regard the Effective Schools Research base provides an excellent example of the importance non-fiscal factors exert in planning for and achieving school improvement. Moreover, Effective Schools Research serves well to demonstrate that positive change can be realized without the infusion of large sums of monies. Upon review of the record, the Commissioner firmly believes that the ALJ has failed to accord appropriate weight to this very important research base which springs from the studies done by such reseachers as Ron Edmonds from Harvard University, Larry Lezotte and Wilbur Brookover, Michigan State University, to name a few who rejected the conclusions of the 1966 Coleman report that in essence

stated that schools do not make a difference. These researchers examined and gathered data on characteristics of urban schools which were recognized as being effective.

In concluding that the ALJ has not sufficiently accorded appropriate weight to defendants' arguments regarding the Effective Schools Research, the Commissioner has examined at great length and detail both the testimony of the expert witnesses presented by the parties as well as the literature and exhibits which dealt with various initiatives for implementing that research. Moreover, the Commissioner has considered carefully all the arguments raised by expert testimony which deal with both the positive and critical aspects of that research. Based upon that thorough examination and his own knowledge, experience and insight, the Commissioner concludes that the Effective Schools Research and the programs that it has fostered represent the best and most effective tools which we have at our disposal to diagnose the ills of ineffective schools and to create a process for their ultimate transformation into effective educational institutions within the framework of the existing funding formula in New Jersey. In so concluding, the Commissioner considers that six characteristics which Edmonds, Brookover and Lezotte have identified, namely strong instructional leadership; a school climate that is safe, orderly and conducive to learning; high teacher expectation of students; efficient methods for ongoing assessment of student progress; strong relationships between home and school; and a clear school mission of academic achievement for all children are unarguably essential components of <u>any</u> effective school, be it elementary or secondary, public or sectarian.

The Commissioner wholeheartedly agrees with defendants' witness, Dr. Maehr, that there is research on effective schools which is good, hard-nosed research. Maehr 4/16/87 T4:16-39. Even those who raise methodological criticisms of Effective Schools Research unequivocally recognize the importance and promise that Effective Schools Research offers. For example, one of the criticisms levied is that there is little or no general applicability of Effective Schools Research to secondary schools; yet plaintiffs' principal witness, Mr. Corcoran, concludes on cross-examination in a publication he coauthored in 1985 entitled "Reaching for Excellence" that "...the effective school movement is a positive development and offers great promise for the improvement of secondary education...." Corcoran 1/21/87 T140:16-18.

Furthermore, it cannot be overemphasized that the Effective Schools Research has been and is being conducted in <u>poor urban</u> schools. It has been and is being implemented in <u>poor urban</u> schools. Moreover, it has brought about and is bringing about substantial positive school improvement in <u>poor urban</u> schools throughout the United States (see D-180, D-183). Further, the efficiency of Effective Schools Research is supported by the fact that it has been adopted for implementation by a significant number of local districts and state departments of education. Moreover, the Effective Schools Research has in the Commissioner's view withstood the test of time, given the current availability of longitudinal data resulting from multiyear effective schools initiatives. D-180, D-183.

In placing credence and reliance on Effective Schools Research, the Commissioner has given careful consideration to those portions of the testimony which critique certain methodological aspects of early research efforts in this field of study. In regard to the allegation of lack of longitudinal data, such alleged shortcomings in the Commissioner's view can no longer be considered valid in light of the long-standing implementation of initiatives as referenced above. Not only does he believe that such criticism lacks validity at this point in time, the Commissioner also believes that the experiences of those states and localities which have implemented Effective Schools Research, as well as the experience derived from New Jersey's pilot programs, provide a significant knowledge base regarding how the characteristics associated with effective schools may be developed. He likewise finds the criticism that Effective Schools Research has focused exclusively on basic skills to be without merit. It cannot be overemphasized that a focus on basic skills is a legitimate, appropriate and necessary step when the needs of a given school dictate that proficiency in basic skills must be raised. He is fully supportive of defendants' witness Dr. Bloom who points out that basic skills should be considered as a continuum not limited to reading, writing and simple computation but as including higher level skills such as problem-solving and critical thinking. Bloom 5/28/87 T217. It has been New Jersey's experience in addressing basic skills proficiency that the mastery of higher order skills discussed by Dr. Bloom can be accomplished through systematic "raising of the bar" once the lower order skills have been mastered as illustrated by the evolution of the MBS test giving way to 9th grade HSPT which has given way to the recent establishment of the 11th grade HSPT.

As to the so-called "outlier" argument that Effective Schools Research has relied upon comparing the most ineffective with the most effective, the Commissioner finds endorsement of such criticism by plaintiffs in this matter somewhat ironic insofar as plaintiffs have consistently drawn comparisons to alleged programmatic and fiscal disparities between the richest and the poorest with no comparison being made with the average or typical school.

Critical to the issues in this decision are the reservations raised by plaintiffs and the ALJ (I.D. at 445) relative to defendants' assertion that Effective Schools Research can be implemented at little or no new cost. Plaintiffs' challenge to the claims raised by defendants are largely the outgrowth of the testimony of their witness Corcoran who testified that the effective schools researchers did not look at the issue of resources because the research was school, rather than district, specific. Corcoran 12/17/86 T46-47. See also P-225.

Plaintiffs relentlessly attempt to interpret Corcoran's testimony and expert witness report as providing proof that implementation of Effective Schools Research requires significant additional funding. However, a close examination of both the testimony and the report reveals that Corcoran never makes specific assertions of that nature. Rather he provides a listing of what he believes the literature identifies as the characteristics of

effective schools. From this, Corcoran concludes that considerable doubt is cast on defendants' assertions that little or no additional funds are needed and he suggests that "more careful examination" is required of those assertions. This does not, however, provide proof positive that implementation of Effective Schools Research requires significant infusion of funds. First, it must be emphasized that the characteristics cited are not those most commonly identified by the seminal researchers in the area of effective schools, namely Edmonds, Lezotte, Brookover, upon whose research the effective schools initiatives rely. Second, at best all that Mr. Corcoran is doing is expounding on his own beliefs as opposed to citing concrete specific studies which reach a conclusion that infusion of significant funds is necessary to implement Effective Schools Research.

Ultimately, the documented experiences of the effective schools initiatives which are part of this record, as well as those in New Jersey, speak for themselves and need no interpretation. The record is clear that significant infusion of additional funds is not necessary to achieve school improvement.

SUMMARY

In concluding as he has in this decision, the Commissioner does not dismiss the fact that individual districts which have failed to meet State standards might need additional funds to help them to overcome their deficiencies. In this regard, however, the Commissioner must agree with defendants that the existing state aid funding formula, combined with the appropriate administrative action capable of being exerted through the monitoring process, and the Commissioner's existing authority under law and regulations and an ongoing and aggressive program of research and development all combine to provide the best assurance that all children in this State receive a thorough and efficient system of education. Where additional funds may be necessary, those funds are capable of being provided but appropriately targeted to meet demonstrated needs.

Additionally, as an added inducement for urban districts to fully budget up to their full needs and to cushion the municipalities against the impact of large tax levy increases in a single year, the Commissioner, as indicated earlier in this section, is prepared to recommend current year funding of state aid to all districts below the guaranteed tax base. Furthermore, the Commissioner has herein recommended a method of state aid distribution that would ameliorate the impact on districts below the GTB of any failure to fully fund the formula by ensuring that reductions fall more heavily upon minimum aid districts than upon property-poor equalization districts.

Consequently, and in light of the foregoing, the Commissioner finds and determines that plaintiffs have failed to demonstrate that the funding formula as provided under Chapter 212 and as applied is inadequate to provide the students of plaintiffs' districts and all other similarly situated students with a thorough and efficient system of education.

PART III

PROCEDURAL PROCESS - MONITORING

While the Supreme Court in Abbott v. Burke cites with approval the Robinson V Court's concern for demonstrating that an adequate tax base is necessary for providing a thorough and efficient system of education, the Court also acknowledges that "...in considering plaintiffs' claim under the thorough and efficient education clause, the Court's analysis of the 1975 Act's financial provisions as applied cannot be separated from its analysis of the statute's educational goals, components and procedural processes." Abbott, supra at 293. In that regard, the Court emphasized "...that a constitutional attack upon the funding provisions of the 1975 Act cannot be fully addressed without a concomitant examination of whether the statutory and regulatory scheme suffices to cure any discovered educational inequities in particular school districts." Id. at 283.

In applying this test set forth by the Court, the Commissioner notes that the 1975 Act defines the State's obligations in N.J.S.A. 18A:7A-5 by setting forth ten general standards by which a thorough and efficient system of education is to be measured. These ten standards, if provided with adequate fiscal support, were deemed by the Robinson V Court to satisfy the constitutional requirement. To effectuate the standards established by law, the Legislature directed the State Board of Education in consultation with the Commissioner to establish goals and standards applicable to all public schools

> ***including uniform Statewide standards of pupil proficiency in basic communications and computational skills at appropriate points in the educational careers of the pupils of the State, which standards of proficiency shall be reasonably related to those levels of proficiency ultimately necessary as part of the preparations of individuals to function politically, economically and socially in a democratic society***. (N.J.S.A. 18A:7A-6)

Additionally, the Legislature empowered the State Board to establish rules for evaluating the effectiveness of schools in meeting the goals and standards established. N.J.S.A. 18A:7A-6 to 7A-12. The ALJ's initial decision at pages 390-406 traces the history and development of the "monitoring process" set in place in response to the legislative mandate.

While none of the parties disputes the accuracy of the chronology of events, plaintiffs and the ALJ reach vastly differing conclusions relative to the effectiveness of the process in achieving the result for which it was established, although the ALJ does acknowledge the administrative process as constituting a good faith effort. I.D. at 415.

The ALJ, while acknowledging the Department of Education's good faith effort and refusing to characterize that effort as representing mismanagement, nevertheless states:

> My approval of the overall process, however, should not be misunderstood. I also believe that the manner in which monitoring has been implemented, or what is actually being monitored, raises serious problems and renders the system an ineffective remedy for the defects proved by plaintiffs. (I.D. at 416)

In support of the foregoing conclusion, the ALJ makes the following findings:

> [1.] I FIND that the county monitors do not focus on comparable needs of children within the county or the State but instead isolate their evaluation to conditions within particular districts. (Id. at 418)
>
> [2.] I FIND that no part of the monitoring system attempts to determine whether a district has properly evaluated its educational needs. (Id.)
>
> [3.] I also FIND that the monitors do not evaluate whether children with similar abilities are being provided substantially comparable programs and services no matter where they may attend school. (Id.)
>
> [4.] I FIND the monitoring process focuses on external indications of good schools and generally avoids the more difficult and costly education issues. (Id. at 420)
>
> [5.] I FIND that monitoring will not disclose any non-State-mandated courses, programs and services that districts eliminate for budgetary reasons. (Id.)
>
> [6.] I FIND and both parties agree that monitoring Levels I and II do not evaluate the quality of a district's judgment or the quality of any program offered by a district. (Id. at 421)
>
> [7.] I FIND that the Department has not specifically addressed any of the priorities established for urban districts in 1975 other than basic skills. (Id. at 422)

[8.] I FIND also that monitoring seems to have confirmed urban educational needs which were already known at least as early as 1976 and possibly even known as early as 1965 when the federal government enacted the Elementary and Secondary Education Act. Little actual progress appears to have been made toward addressing these needs, since the state of urban education seems not to have significantly improved. (Id.)

[9.] Furthermore, the Department has incorporated the local planning process into a single monitoring requirement and three annual objectives to improve instruction. Because planning is now subsumed within monitoring, it has become decentralizing and isolated within districts. I FIND that the initial Department interpretation of the Chapter 212 planning requirement by which all districts were to assess their student needs and move toward achieving the State T & E goals (N.J.A.C. 6:8-2.1) is deemphasized by this action. Instead of districts planning toward common State goals, each district now focuses only on meeting its own educational needs.

If any district's corrective action plan requires expenditures, it "is anticipated that the funds necessary to implement the corrective action plan can be obtained through budget transfers or through the use of the district's free balances." (Exhibit D-216 at p. 21.) First year financing of any district improvements required under monitoring is therefore the exclusive responsibility of the local district, according to the Department. Thus, monitoring does not consider whether a district has the resources to meet certification requirements, in addition to funding other needs. I FIND that relying on local district funding for monitoring improvements is subject to the previously described systemic limitation I believe confronts urban districts sharing property poor tax bases with municipalities. (See findings in Part III.) (Id. at 423-24)

[10.] I FIND further that the existing monitoring system permits some districts to have better schools than others. In fact, the entire education system in New Jersey expects and thereby condones vast variations in educational quality among school districts. (Id. at 425)

[11.] Additionally, I have FOUND in Part III that political manipulations occur in some urban districts. However, the record is also clear that the Department of Education has known for some time about these political manipulations. Yet, the record reflects no action taken by county superintendents, even in one instance when Superintendent Ross asked the County Superintendent for help after the political firings of seven assistant superintendents. (See discussion in Part III.) After considering all of the county superintendent witnesses and their testimony, I FIND that political manipulation and intrusion in some school districts has been tolerated by some county superintendents and that the monitoring system as established by the Department of Education does not address this problem. (Id. at 426)

[12.] I CONCLUDE that monitoring as currently implemented does not address and therefore cannot cure resource, expenditure and educational program disparities and will not ensure that the actual needs of all of the State's students are being met. The focus of monitoring is limited and not directed toward curing these problems. I have FOUND that monitoring is district or school specific and does not consider whether the district has properly assessed its educational needs. No comparisons are made between districts. Monitoring does not attempt to assess either a particular district's budgetary inadequacies or expenditure disparities between districts. Monitoring as presently implemented does not encourage broadening academic offerings and does not include any educational input standards. Input suggestions are made only sporadically by individual monitors without any rules establishing program quality

> requirements. Monitoring appears to emphasize basic skills achievement and does not capably assess the quality of any district's educational program or the quality of teaching that is occurring in any district. If quality considerations are reached in Level III, they are limited by what is necessary for the district to achieve certification, which most often relates to basic skills and facilities.
> (Id. at 424)

For their part, plaintiffs argue that the entire monitoring process as established by regulations is mismanaged. In support of such position, plaintiffs cite what they allege to be numerous examples of inconsistency, confusion, errors, excessive intrusiveness and heavy-handedness on the part of Department of Education personnel in implementing the criteria. Plaintiffs' Proposed Findings of Fact at 197-200.

Defendants contest the characterization of the administrative monitoring process set forth by plaintiffs. Defendants see the monitoring process established by the State Board of Education and the Commissioner as one which has developed and evolved from its inception in the immediate post-Public School Education Act of 1975 period to its present status. That evolution has occurred, say defendants, as a consequence of changing circumstances in local school districts and in conformity with the greater demand for accountability occasioned by simultaneously greater infusions of money and declining student achievement. Beginning in 1984, defendants contend, the monitoring process has become increasingly more systematic and stringent by virtue of the State Board's adoption of ten essential elements (N.J.A.C. 6:8-4.3) which all districts must meet in order to be certified and, thus, classified as being thorough and efficient. Under that monitoring process, defendants further contend, 98% of the school districts in the State have achieved or will shortly achieve certification.

As a consequence of the fact that 98% of the districts have achieved or will achieve certification, the monitoring process permits the State resources and efforts to be concentrated upon the 2% which have failed to reach a thorough and efficient status. Ultimately, the current monitoring system, contend defendants, has been provided by legislative action with additional authority and means to accomplish the task of bringing deficient districts to a certified status through direct State intervention. Thus, it is defendants' position that the present administrative structure has proven its effectiveness and has the means of making the deficient districts succeed. See Defendants' Proposed Findings of Fact at 114-128; see also Chapters 398 and 399, Laws of 1987.

In assessing the validity of the conflicting perceptions as to the effectiveness of the monitoring process, the Commissioner

notes that such conflicting perceptions derive from the parties' differing views as to what constitutes a thorough and efficient education.

The differences may readily be summarized by pointing out that defendants essentially perceive a thorough and efficient educational system as being one which has achieved certification pursuant to the regulatory scheme established by the State Board of Education in N.J.A.C. 6:8-1.1 et seq. for purposes of achieving the ten general standards embodied in N.J.S.A. 18A:7A-5. Districts which achieve certification, in the State's view, are presumptively thorough and efficient; those which do not, are not. In the view of defendants, the effectiveness of the monitoring system must be judged by whether it effectively guides, or is capable of guiding, all districts to certified status. Plaintiffs and the ALJ for their part perceive T&E to be achieved only upon demonstration of equality of inputs--fiscal, programmatic and qualitative. In their view, if the regulatory scheme does not guarantee such equality, it is deficient.

The Commissioner must reject the ALJ's conclusion. In the Commissioner's view, the ALJ's finding that monitoring is district specific and fails to address comparable needs across district lines completely misses the mark both as to what T&E requires and what the monitoring process is designed to achieve. The goal of the Public School Education Act as set forth in N.J.S.A. 18A:7A-4 is

> ***to provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society.

Neither the statute nor the Supreme Court requires

> "the legislature to provide the same means of instruction for every child in the state." Landis, 57 N.J.L. at 512 (quoted in Robinson I, 62 N.J. at 514). The configuration of educational services "that will produce a sufficiently fine educational opportunity in one district, will inevitably be different from that required in others." Robinson V, 69 N.J. at 459. (Abbott, supra at 291)

The ALJ's emphasis upon interdistrict uniformity extends to the absurd length of questioning why the monitoring system does not criticize the absence of swimming pools in one district if a neighboring district which has swimming pools for some of its pupils is criticized for not providing swimming to all similarly situated pupils in its own district. The answer in the Commissioner's view

is obvious. If a given district exercises its local option to provide swimming in its program, that program should be provided to all like students in that district. However, if a neighboring district does not adopt such an option and use of its available revenues, it should not be required by the State to do so and such choice should not detract from the determination of whether the district is providing a thorough and efficient system of education. To require every district to provide everything that any other district may provide would lead either to an educational structure which would collapse under the weight of its own lack of fiscal restraint or shrink to a bare minimum of offerings that all could afford.

The ALJ's criticism of the monitoring process' alleged failure to determine whether a district has properly evaluated its educational needs must in the Commissioner's view likewise be rejected. While such a contention is asserted, no citation to the record is provided to demonstrate its validity. On the other hand, a review of the evidence in the record, as well as the testimony of witnesses, emphatically refutes the ALJ's contention. The planning process required of all districts as delineated in Element 1 of the Manual for the Evaluation of Local School Districts pursuant to the Public School Education Act of 1975, January 1984, Revised August 1984, P-290 at 8, has as its specific purpose the identification by the district of its educational needs and the development and implementation of specific objectives to address needs identified through the planning process. Indicator 1.5 within Element 1 specifically requires the district to provide a long-range plan for program evaluation. Manual at 9. Further, an entire section of the Manual is devoted to describing the process to be utilized by individual districts for identifying educational needs and developing objectives and action plans for meeting those needs. See Section Three, Manual at 32-34.

Additionally, Element 5 Facilities requires each district to develop a long-range facilities plan with requirements for implementation, review and revision every 5 years. See Manual at 14-15. Element 6 Professional Staff likewise requires each district to develop and implement a staff development program based upon assessed needs. Manual at 15-16.

Based upon the foregoing, it is difficult to determine upon what basis the ALJ reached his conclusions relative to the alleged failure to identify educational needs. The Commissioner might only surmise that the ALJ's perception was colored by a failure on his part to fully recognize that the monitoring process as designed consists of three levels with each succeeding level resulting in a greater degree of both self assessment and ultimately State assessment of educational needs.

Such a supposition finds support in the finding by the ALJ that monitoring does not evaluate the quality of a district judgment or its programs at Levels I and II. By way of such finding, the ALJ

reveals a misunderstanding of the nature and purpose of Levels I and II which are essentially designed in the first instance to demonstrate a district's thoroughness and efficiency by documenting the degree to which it is able to meet a set of standards established by a committee of educators (Daniels Committee) and, secondly, to remediate through a specific planning process these deficiencies revealed by the first level review. It is precisely at that point where local efforts have failed that the system is intentionally designed to require the State to intervene for purposes of examining district judgments and to make qualitative analyses. The Level III monitoring results in specific findings and directives from an external committee of educational experts and the Department's Compliance Staff on what a district must do to reach a thorough and efficient status. For a full description of the process in operation in one of plantiffs' districts, see the testimony of William H. Kile, Jr., 2/3/87 T72-145.

The ALJ's contention relevant to monitoring being a paper process without examination as to whether a service is being provided is likewise supported in the record only by his own subjective judgment. On the contrary, the monitoring process specifically requires evidence of implementation of the programs which the documentary review indicates are being provided. While the original Manual for the Evaluation of Local School Districts as issued in 1984 was less detailed in the documentation required, the updated version of the Manual requires more specific detail to ensure implementation including teacher schedules, lesson plans, classroom visits and staff interviews. See Exhibit P-291 at 16-25.

The ALJ's conclusion relative to a lack of criteria to assess program comprehensiveness is, in the Commissioner's view, a further manifestation of his perception that T&E requires a sameness of program among all districts. While the ALJ's perception relative to the alleged "enormous variety" of offerings in science, social science, art and music existing between districts is discussed at greater length elsewhere in this decision, the Commissioner must comment at this juncture that his own perception of what is required to demonstrate a thorough and efficient education in terms of "***breadth of program offerings designed to develop the individual talents and abilities of pupils," required by N.J.S.A. 18A:7A-5d does not extend to the same lengths as demanded by the ALJ in this matter. While all schools must meet the course offering requirements mandated by statute and regulation and demonstrate that these required areas are articulated from grades K-12 in such a manner as to assure the ability of all students to take and successfully pass those subjects required for high school graduation, he does not accept, nor does the law require, that the comprehensiveness of offerings of one school district of necessity match the comprehensiveness of its neighbor. The ALJ's assertion on page 419 of the initial decision that Level II monitors did not criticize the failure of Pleasantville to offer science instruction in grades 7, 8 and 9 would be accepted by the Commissioner as a valid criticism; however, the Commissioner finds not one scintilla

of evidence in the record that Pleasantville does not offer science instruction at grades 7, 8 and 9. The only reference to Pleasantville's science program the Commissioner could find in the record, after exhaustive research trying to determine from what evidence the ALJ could have arrived at his conclusions about the Pleasantville science program, was a gratuitous afterthought in direct testimony by Mr. Thomas Corcoran, Director of Local School Improvement Services at Research for Better Schools:

> Q. In addition to observations which are already a matter of record from your testimony this morning, concerning some of the deficiencies you have observed in the Pleasantville schools, do you have any additional comments to make concerning problems in the Pleasantville schools?
>
> A. It is hard for me to remember what I said this morning. But --
>
> Q. You spoke of self contained classrooms.
>
> A. Yes, I think some of the major issues [have] to do with the use of self contained classrooms in the 7th and 8th grade, maybe 6th, 7th and 8th grade where you were asking one teacher to teach all of the subjects, science, language arts, social studies, the whole ball of wax, mathematics, all being taught by a single teacher which clearly the staff feel is that impossible task. They don't feel that they -- they don't all feel competent to do that. They don't all feel that they can handle that many preparations. I mean different subject matters every day. So, some things are sacrificed. Science in particular, people would tell us in interviews, it was simply not taught, or rarely taught. There were one or two classrooms where that was an exception. Social studies was taught a couple of times a week, and touched on, but not uniform[ly] across the classes.
>
> (Corcoran T217-218)

The Commissioner finds inappropriate the ALJ's having converted a comment made in passing, without having educed reliable evidence, into a conclusion that science is not taught at Pleasantville in grades 7, 8 and 9. Apparently the ALJ accepted Plaintiffs' Proposed Finding of Fact #1383. However, the evidence cited by plaintiffs for that proposed finding includes testimony from Dr. R.M. O'Shea, Coordinator of Math and Science Education at Fairleigh Dickinson University, who has no direct knowledge of the monitoring process or of Pleasantville High School, and Mr. Corcoran, whose testimony in this regard is discussed above.

Another such sweeping, unsubstantiated comment at pages 142-143 of Mr. Corcoran's direct testimony suggesting that the State does not adequately monitor for science education is likewise dismissed as being without merit or accuracy.

Similarly, the Commissioner finds no support in the record for the ALJ's finding that monitoring does not disclose any non-State mandated courses, programs and services that districts eliminate for budgetary reasons. His conclusion relative to the lack of monitoring of art and music programs is a conclusion based upon his belief that an art and music program at the elementary level is present only when it is offered in an art or music room or when it is specifically taught by a specialist as opposed to a person who is elementary certified. For further discussion of this matter, see Part I of this decision.

The ALJ's finding on page 420 of the initial decision that the "***monitoring process focuses on external indications of good schools and generally avoids the more difficult and costly education issues" is reflective of both the ALJ's failure to recognize the multileveled nature of the monitoring process and his misplaced perception of the degree to which the State monitoring process, or any monitoring process, can easily solve the environmental, cultural and social ills of urban life which contribute to student absenteeism. To the degree that boredom and poor teaching contribute to absenteeism, these factors are capable of being addressed through the monitoring process at appropriate levels of depth within the process. Root causes that derive from social ills can never hope to be ameliorated through monitoring. Monitoring, at best, can only be responsible for creating an in-school environment which attempts to offset the myriad negative influences which exist beyond the confines of the school. "Effective Schools Research" as extensively considered elsewhere in Part II of this decision has demonstrated the ability of schools under appropriate leadership to create effective learning environments; however, the presence of such leadership cannot be assured merely through monitoring.

As has been noted elsewhere in this decision, the Legislature has provided the Commissioner and the State Board of Education through the latest amendments to N.J.S.A. 18A:7A-1 et seq. with the means of replacing ineffective leadership at both the district and school levels when it has been demonstrated through the various levels of the monitoring process that such leadership is lacking and that State intervention is required. Consequently, it is only through the monitoring process being permitted to be carried to its ultimate conclusion, that the "root causes" referred to by the ALJ may be addressed.

The ALJ's assertion that the monitoring system does not directly address how to improve student learning once again misconceives what any monitoring process can be expected to accomplish. The monitoring process, however, can and does identify problem areas which need to be addressed by local districts and

through a variety of other State-sponsored programs, such as those provided by the RCSU's and the Academy for the Advancement of Teaching and Management, can and does provide assistance to local districts on dealing with the issues of how to improve student learning. See Exhibits D-214d, e, f, j, k, l, m, n, o, p, q.

In support of the contention that Level III monitoring does indeed concern itself with making specific qualitative judgments relative to programs, reference is made to Mr. Shelton's testimony on specific findings occurring as a result of Level III monitoring in Camden. See Shelton 3/23/87 T81-102. While admittedly many of the findings deal with compliance issues, many also specifically address deficits in the manner in which the program was being implemented which impact upon the quality of the program being provided.

In addition to the foregoing contentions, the ALJ determines that the Department of Education fails to address the priorities, other than basic skills, identified for urban districts in 1975 and concludes that little progress has been made in addressing those needs or in significantly improving urban education. In considering such contention, the Commissioner finds the ALJ's conclusions to be entirely subjective and unsupported by the record. Initially, it should be pointed out that 1975 priorities referred to by the ALJ in his initial decision and contained within Exhibit P-242 are those priorities which were established as State educational goals pursuant to N.J.A.C. 6:8-2.1. Each district is required by regulation to adopt written educational goals consistent with the intent of the State goals. N.J.A.C. 6:8-4.3(a). The curriculum of the individual school district is a reflection of those district goals as adopted with staff and community participation. The district's planning process which is one of the ten elements required for achievement of certification is assessed upon the basis of the degree to which the district identifies deficiencies and develops and implements measurable objectives to achieve the stated goals. In reaching his conclusion, the ALJ fails to fully accept the fact that monitoring is meant to be a district specific process designed to assist districts to meet statewide requirements.

While the ALJ accords little success to the efforts of the Department of Education in improving urban education, the record would indicate otherwise. The ALJ fails to consider that of the 56 urban districts in the State of New Jersey the overwhelming preponderance of districts classified as such have been or are in the process of becoming certified. While plaintiffs' districts in this matter are, with the exception of Irvington, uncertified and represent a significant portion of the State's students, the record since 1975 clearly shows progress even if one were to only consider gains made in the basic skills area. The record clearly demonstrates year-to-year growth in the percentage of urban students passing the Minimum Basic Skills test (MBS) and similar progress is projected for the number of urban students passing the more

difficult HSPT. See Koffler 2/26/87 T180-189; also P-313, P-314 and I.D. 434.

While the Commissioner recognizes that the ALJ conceives emphasis upon basic skills development to be an excessive preoccupation of both Department of Education policy and the monitoring process, the fact that the establishment of statewide standards in communication and computation is the one specific area of performance standards mandated by N.J.S.A. 18A:7A-6 that makes it a highly significant area in which educational progress must be demonstrated.

The ALJ's conclusions relative to the alleged inability of the monitoring process to address local district funding problems and program disparities are issues addressed elsewhere in this decision. Additionally, the ALJ's contention relative to inconsistencies between counties and between individual monitors need only be addressed to the extent that the Commissioner recognizes that some individual disparities might result from 21 separate county offices and dozens of monitors. Such inconsistencies, if they do exist, hardly require the scrapping of an entire process but would merely argue for the tightening of the procedure as it continues to grow and evolve. Moreover, it has been the specific goal of the Department of Education to reduce such inconsistencies to the absolute minimum. A primary means of ensuring consistency of monitoring has been the program established by the three coordinating county superintendents to provide uniform training for all members of the county office staffs responsible for monitoring. See Scambio 2/9/87 T41-42.

Further, consistency in reporting is a goal the Commissioner has continued to strive for in monitoring since its inception. During the first cycle of monitoring, which took place from January 1984 through December 1986, Assistant Commissioner McCarroll introduced a process for monitoring monitors. An audit team comprised of State Department of Education employees visited all twenty-one counties in the company of the monitoring team assigned to conduct a monitoring investigation for any given district. The team's function was to observe the extent to which that monitoring team's performance conformed with the State criteria. A report followed which Dr. McCarroll reviewed with the county superintendent of the monitored district. Scambio 2/9/87 T42:5-10.

In this the second monitoring cycle, an additional review system has been initiated. The monitoring findings are submitted first to Dr. McCarroll, who then reviews the findings with the county superintendent of the monitored district. Thereafter the report is subject to further, more comprehensive review by all 21 county superintendents before the monitoring findings are finalized to assure consistency county to county. See generally 2/9/87 T120:2-7 testimony of County Superintendent Dr. Elena Scambio, who indicates that her belief, too, is that different districts are not monitored differently.

Moreover, every district and school is encouraged by the Commissioner to report any perceived irregularity or comment faulting the monitoring process to his office through Dr. McCarroll and his staff. It is important to note here that the monitoring process does have an appeal process in place. N.J.A.C. 6:8-3(e)-(g). A district can appeal the findings of a monitoring investigation to the county superintendent and to Dr. McCarroll. It warrants noting that no such appeals at Level I have occurred and remarkably few concerns have been reported from individuals or boards since the program's inception. Of particular note relative to an assessment of the monitoring process is the following excerpt from a study of the Level II monitoring process conducted by the New Jersey School Boards Association:

> Failure of the Level I monitoring process has negative consequences, but it can also spur a district to action. Perhaps less expected is the degree of agreement by administrators with the findings of the monitoring teams and the little dissatisfaction they have with the administration of the process.
> (Exhibit D-284 New Jersey Level II Monitoring Process: Local District Perceptions p. 22.)

Finally, the Commissioner concurs with the ALJ's finding that the monitoring process permits some districts to have better schools than others. However, even if one were to assume a State system of education which was entirely uniform by way of financing, program offerings, staffing, etc., does anyone truly believe that there would still not be some schools better than others?

In light of the foregoing, the Commissioner finds and determines that the monitoring process has been designed to ensure that the constitutional mandate for providing a thorough and efficient system of education as defined by State law and regulation is accomplishing or has the ability to accomplish the purpose for which it was designed. Inasmuch as this process has been an evolving one from its inception in 1976, it has demonstrated its ability to identify areas of need and to direct the energies of local school districts toward addressing those needs. In those districts which have been unable to conform to the State standard for certification, the total administrative process, as it has evolved and continues to evolve, can not only ensure the identification of those areas which must be addressed in order to become thorough and efficient, it also has the capability of providing sufficient financial support to accomplish this task.

PART IV

FACILITIES

N.J.S.A. 18A:7A-5 requires that a thorough and efficient system of free public schools shall include as a major element

"[a]dequately equipped, sanitary and secure facilities...." N.J.S.A. 18A:7A-5(b).

The ALJ reached a number of findings on the issue of facilities as summarized below:

1. Uniplan indicates that there are substantial unmet facilities needs in New Jersey. (I.D. at 486)

2. There exists significant overcrowding in plaintiffs' school districts and other poor urban districts such as Newark and Paterson. (I.D. at 499)

3. The size of most urban districts makes it most difficult, if not impossible, to provide personal attention to all students who could benefit from such attention. (Id.)

4. Plaintiffs' districts along with other poor urban districts have significant facilities needs that create substantial planning and fiscal pressures for the districts. (I.D. at 502)

5. Plaintiffs' districts cannot be found to have mismanaged their facilities improvement problems simply by comparing what they planned for in 1979 with what they actually accomplished during the next five years. (I.D. at 501)

6. The implication that plaintiffs' districts willingly forfeited capital outlay aid is rejected since state aid reimburses each district in the year subsequent to the districts' expending capital outlay funds through their own devices. (I.D. at 503)

7. There is no statewide program which seeks to renovate and modernize school buildings on a regular basis nor any plan requiring replacement. (I.D. at 516)

8. Facilities needs of plaintiffs' districts appear overwhelming to address within the existing financing system. (I.D. at 513)

9. Unaddressed statewide facilities needs cannot be efficiently handled under the existing system. (I.D. at 517)

Defendants agree with the finding that there are unmet facilities needs but contend that the ALJ ignores the record which demonstrates not only that the facilities needs of plaintiffs' districts are being met but also that the current system of funding facilities can provide the dollars requisite to meet the needs. Moreover, they urge that the ALJ's suggestion that New Jersey

implement the Maryland School Construction Program is without foundation and should be rejected.

Defendants point to the Garvin Act which requires that substandard classrooms be eliminated, a result of which is that all districts with such classrooms have adopted a plan to upgrade or abandon substandard classrooms. Also, at the time Camden (the only district to present cost data) developed its plan it had, through state and local funds, all but $200,000 of the monies needed.

Defendants also aver that it is not only clear but uncontested on the record that the general facilities needs of plaintiffs' districts are being or will be met, the specific basis of which is incorporated herein by reference.

Plaintiffs, of course, urge that the ALJ is correct in finding that facilities needs cannot be met under the present financing system. They argue that defendants make assertions outside the record when stating that facilities needs will be resolved in the future and that disagreement with the ALJ's findings conflicts with the testimony of Assistant Commissioners McCarroll and Calabrese, the former of whom stated that large urban districts' facilities problems are beyond the ability of urban districts to handle themselves and require access to a funding mechanism to address inadequate facilities (T37:1 to 38:4) and the latter of whom testified that it was questionable whether East Orange or Irvington could address their facilities needs over the next five years.

Plaintiffs urge that defendants' promises of future remedies under the current system are impossible, citing to the ALJ's point that there is a major distinction between facility defects that can be cured with routine maintenance and serious facility defects which are beyond what many urban districts can handle. I.D. at 509-510. As to the Garvin Act, it is pointed out that no funding is made available to assist districts in replacing or improving substandard rooms.

Lastly, plaintiffs aver that defendants' exceptions carry little weight against the proofs of dramatic differences in facilities which house children in New Jersey's poor and affluent districts. They also urge that defendants' attempt to discredit Dr. Stenzler's testimony on the Maryland School Construction Program is irrelevant as the merits of the plan are clearly established in the record and the ALJ's findings.

COMMISSIONER'S DETERMINATION

Upon review of the record in this matter and careful consideration of the arguments advanced by the parties and the findings and conclusions reached by the ALJ, it is abundantly clear, and even defendants do not challenge, that there are significant unmet facilities needs not just in plaintiffs' districts but statewide. Such needs and deficiencies have been widely recognized

by any number of studies undertaken to determine the scope of school facilities problems throughout the State.

The facilities issue is not one that can be easily resolved. It is a problem far broader than one of lack of funding for poor urban districts, although the situation is frequently exacerbated in urban areas by the age of facilities and, in part, by years of neglect and lack of proper maintenance and managerial ineptness in planning for and taking action on gross facilities problems; for example, the ALJ determines that

1. East Orange's facilities problems were caused partly because it chose not to maintain its buildings rather than cut instructional expenditures which in turn has resulted in serious deterioration of existing school facilities; (I.D. at 506)

2. Much routine maintenance is not handled well in Jersey City either because of ineptitude or because there is too much else either going on for anyone to keep on top of maintenance; (I.D. at 509) and

3. Assuming, however, that Jersey City caused many of its own facilities problems by inadequate maintenance and that in the past they improperly paid contractors, were slow in appropriating funds, improperly charged maintenance expenses against capital outlay and have a Superintendent who is unfamiliar with the complete facilities plan, all of this confirms and I FIND that Jersey City has substantial facilities needs. (I.D. at 509)

Facilities upgrading and replacement is a statewide problem that is an outgrowth of decades of "finger in the dike" maintenance and neglect, a manifest reluctance on the part of local citizenry and voters to commit resources for capital expenses and replacement and the failure of the State to pursue aggressively a comprehensive program for improvement of facilities deficits.

While agreement exists on the stark presence of unmet facilities needs, there is marked disagreement between the parties as to the ability of the current funding mechanisms to timely address facilities deficits. Careful examination of the record does not support defendants' contentions that the current system of financing facilities improvement through bond referendum is adequate. It is clear that the State's monitoring process is capable of and has identified serious ongoing facilities deficiencies and that through that process and through efforts of the State itself significant ameliorative activities have been undertaken. However, the record makes it unequivocally evident that

facilities problems are systemic and widespread statewide and can only be addressed by a specific, concerted, coordinated effort at the State level which would infuse sufficient amounts of funds into this area above and beyond that which may be reasonably expected to be raised by the existing funding mechanisms.

More specifically, N.J.S.A. 18A:7A-5 mandates that a thorough and efficient system of education include adequately equipped, sanitary and secure physical facilities and adequate materials and supplies. In the cycle of monitoring running from January 1984 through December 1986, there were four indicators addressing the facilities mandate - 5.1 regarding long-term maintenance, 5.2 health and safety, 5.3 substandard classrooms; and 5.4 long-range facilities plan. If a district failed 5.4, it could not be certified; as to the other indicators, certification was not denied if one of the non-mandatory elements was not met, but a corrective action plan and local objectives had to be developed within 60 days and approved by both the district board of education and county superintendent. Follow-up by the county office occurred to assure progress toward meeting the non-mandated criteria. Eighty percent of the districts achieved certification at Level I on this first cycle of monitoring with 98% achieving certification by the end of that cycle. All certified districts which failed to meet the non-mandatory indicators have corrected identified health and safety deficiencies, as such deficiencies have not gone, nor will they be allowed to go, uncorrected.

Serious health or safety factors have resulted in prompt remedial steps and, if remediation is not possible, school closing or abandonment of substandard facilities is directed such as described by Dr. Johnson in terms of Camden's closing of two elementary schools (6/1/87 T58-60). Additionally, the Manville School District in 1984-85 was ordered to close an elementary school where prompt remedial steps with respect to safety concerns could not be achieved. Non-certified districts have developed corrective action plans for remediating facilities deficiencies which are in progress with the exception of Jersey City which is currently subject to State intervention pursuant to N.J.S.A. 18A:7A-34 et seq. Moreover, in keeping with the evolving concept of T&E, all facilities indicators have become mandatory commencing September 1988.

Upon thorough examination of the record in this matter, the Commissioner finds and determines that the unmet facilities needs that exist in this State are not attributable to the current system of funding education. The record has in no way demonstrated that the existing funding formula is either incapable of generating or inadequate to generate sufficient funds for facilities maintenance and minor capital improvement. Rather what is clear is that a very serious facilities problem exists statewide, not just in plaintiffs' districts, which has been spawned by age, i.e. buildings 70, 80, even 100 years old, and by deferred preventive maintenance. Aged buildings have been subject to short-term, stop-gap patching up when

the needs called for long-term solutions. The facilities problem with respect to the renovation, modernization or replacement of such buildings is enormous and it must be emphasized that it predates the enactment of Chapter 212 by many decades.

The allocation of very costly financial resources required to move beyond the repairs and maintenance of today to address the long-term building needs of tomorrow has been militated against by the aforementioned reluctance of residents to approve bond referenda and Boards of School Estimate and governing bodies to commit such resources for facilities improvement given their beliefs about municipal overburden and the fact that the first year's cost must be raised through local taxation.

While the Commissioner does have the authority to direct the issuance of bonds in individual cases where he deems capital projects and building replacement or expansion needs endanger the health and safety of students and/or impair the ability to provide a through and efficient education, he considers such an option as untenable as a solution to the enormous statewide facilities needs as indicated herein. See In the Matter of the Application of the Board of Education of Upper Freehold Regional School District, Monmouth County, 86 N.J. 265 (1981) and Peter B. Contini v. Board of Education of the Southern Gloucester County Regional High School District, Gloucester County, decided by the Commissioner, March 31, 1986. In conceding the aforesaid authority to the Commissioner, the New Jersey Supreme Court was careful to point out the limited nature of this authority by stating: "When proceeding in the face of voter rejection, the Commissioner should exercise restraint in authorizing the issuance of bonds. Any order of the Commissioner or State Board authorizing the issuance of bonds would be subject, of course, to judicial review." Upper Freehold, supra at 280. Thus, the Supreme Court's language as well as the scope of the problem clearly establishes limitations upon the Commissioner's ability to direct an administrative remedy.

Other remedies such as the $100 million which was made available in 1978 from the building acts for emergency state building was a step in the right direction but impacted only on a small portion of the need. The aid from that legislation as well as the Garvin Act for elimination of substandard classrooms can, and has, helped but these measures have proven to be insufficient to overcome the effects of the 50, 75 and 100 years of neglect and inefficient maintenance. Therefore, the Commissioner believes that only a concerted comprehensive statewide legislative bond referendum initiative can produce the necessary funds to provide the long-term solution to the existent serious facilities deficits, a solution which he has unsuccessfully attempted to bring into being.

The facilities situation as it now stands is akin to year in and year out pouring money and effort into getting a 1932 Chevrolet ready for motor vehicle inspection when in fact replacement of the car is the more appropriate long-term solution to

the transportation need. In many districts in this State a point of diminishing return has been reached maintenance-wise such that it is foolhardy to keep pumping good money after bad. In the long run it is fruitless and inefficient to spend millions upon millions of dollars maintaining over and over what ought to be modernized either through major renovation or new construction.

It is the Commissioner's firm belief that just as T&E must by its very nature be an evolving concept, so too must New Jersey's legislative provisions for assuring sufficient funds for addressing major school facility renovation and replacement.

Simply put, the Commissioner can state that the demands for safe facilities are being met in our schools. But in the long term it shall prove fruitless, myopic and inefficient for the State not to adopt a major legislative initiative to remedy serious facility/construction needs. He has been and shall continue to be aggressive in seeking the implementation of such an initiative to the school facilities problems so that districts may continue to meet the provisions of a thorough and efficient education tomorrow, not just today.

The Commissioner is, however, recommending, as he did in regard to current expense, that current year funding for capital outlay and debt service be made available to those districts below the Guaranteed Tax Base (GTB). This is recommended both as an immediate means of encouraging those projects necessary to maintain health and safety and as a future means of ensuring that the devastating effect of past neglect does not repeat itself once a solution to the major problem has been addressed. Thus, a district which receives 80% state aid would be required to raise only 20% of an increase in its capital outlay budget thereby permitting it to meet facilities needs with a lesser tax effort than under the current system and it would be able to accelerate the retirement of its debt service. The benefits of current year funding explained so extensively in Part II of this decision are applicable to capital outlay and debt service as well.

Further, the Commissioner passes no judgment on the ALJ's recommendations with respect to the Maryland School Construction Program. The task of fashioning a remedy for the facilities deficiencies of the State's public schools rests with the Legislature and will require in-depth analysis of an array of options to address this critical area of reform.

PART V

WHAT IS A THOROUGH AND EFFICIENT EDUCATION AND HOW IS IT MEASURED?

Much of the initial decision in this matter grapples with the definition and meaning of a thorough and efficient education. Vigorous arguments are presented by the parties as to what the

inputs and outputs of a thorough and efficient education are and what should be relied upon to measure whether a T&E education is being delivered to pupils in poor urban districts represented by plaintiffs and similarly situated pupils.

The ALJ has defined inputs as programs, courses, equipment, facilities and other resources related to delivering an educational program, while outputs are seen to be the results of the educational program upon the students as measured by such diverse things as the High School Proficiency Test (HSPT), student socialization skills, and job market competitiveness. I.D. at 518-519. By way of summary, it is the defendants' position that the Legislature and State Board have specified the minimum inputs of a thorough and efficient education in terms of courses, programs and services, as well as output standards in the form of high school graduation requirements and the HSPT. Further, they believe that passing the State's monitoring criteria indicates presumptive compliance with the T&E mandate and that equalization of educational inputs is not required. Thus, T&E is to be measured by an output goal such that if a district has achieved certification status or is making reasonable progress toward attainment of the output standards, then the district's inputs are presumed to be adequate.

Plaintiffs, on the other hand, reject the student achievement measure as it is limited to reading, calculation and mastery of basic skills and urge that financial resources and program offerings are the appropriate standard for measuring whether compliance with T&E is being realized. Thus, they contend that equalized financial resources are necessary so that children with similar educational needs, regardless of where they live, have similar resources to support their educational programs. Defendants, however, rebut this position by urging that research has not proven that increased spending is significantly related to student learning.

After hearing the various witnesses and a review of the evidence, the ALJ found that educational research does not confirm that any educational input is consistently and positively related to student achievement. Notwithstanding this, he declined to find that there is no link between expenditure and learning, finding instead that such a link cannot be established in accordance with acceptable social science principles given the statistical measurement problems associated with trying to establish such a link. The ALJ concludes that the research is relatively primitive and does not compel the rejection of input equalization or input comparison between and among districts. I.D. at 536.

As to the meaning of T&E, the ALJ contends that it is not up to either the Legislature or the Department to define what is required of T&E but, rather, it is a judicial function. He perceives the equal opportunity standard as focusing on students' needs, thus requiring that T&E be a balanced system which pays undue attention to neither inputs nor outputs.

The ALJ states that inputs alone do not measure T & E; rather, the determining factor is whether sufficient inputs are applied to address all student needs so that successful outputs can reasonably be expected. I.D. at 548. In assessing whether the current system of education in New Jersey is thorough and efficient, the ALJ rejects defendants' argument that monitoring is key to evaluating T&E because "plaintiffs have convincingly proven the presence of several systemic defects and that monitoring, as it has been implemented by the Department of Education, does not address the serious educational problems that have been caused by the systemic defects." I.D. at 550. Monitoring is criticized, inter alia, because it is district-specific with no comparisons among districts being made and because no effort is made to determine whether each district is meaningfully meeting its students' needs, i.e. comprehensiveness and quality are not part of the analysis except possibly Level II and III districts, but even here the focus is on basic skills improvement. The ALJ also finds that the record contains evidence that students from urban high schools are not properly prepared for meaningful employment (I.D. at 552) and that students from poor urban districts are not adequately prepared for college. I.D. at 553. Moreover, the ALJ finds that the Department has not assured that students failing the HSPT receive instruction in social studies, science, art, music, and other subjects not tested by the HSPT but nonetheless important.

Defendants take exception to the ALJ's entire findings and conclusions on inputs and outputs averring he is in error when concluding that the record does not compel rejection of the input equalization or input comparisons between and among districts. It urges that no proof was established that an education meeting State standards cannot be provided with one teacher and 30 students or that, even with lower teacher-student ratios, superior education is provided. More specifically, defendants contend that plaintiffs have not proven that equalization of per pupil expenditure, staffing ratios, library books and class size will assure that all districts are providing or can provide education meeting State standards.

Defendants aver that there is overwhelming evidence that costly inputs are not related to student achievement, particularly the testimony of Hanushek 5/4/87, T20-24 to T43-3, D-237 and Walberg 4/27/87 T34-16 to T35-8; T53-4 to T58-16, D-219. They urge that plaintiffs have presented no evidence of similar stature to contradict the proofs they present; thus, the Commissioner should reject the input equalization position.

Plaintiffs urge rejection of defendants' assertion that equal educational opportunity does not refer to equal per pupil expenditures but is defined as an output goal and that State required HSPT test and graduation standards assure achievement of that goal. They point to the State Supreme Court's recognition in Abbott that a measure of local educational expenditures in terms of dollar input per pupil is plainly relevant. As to proof in the record on the relevance and importance of resources, plaintiffs

point to pages 540-543 of the initial decision wherein the ALJ cites to budget appeals decided by Commissioners Burke and Cooperman which recognized the importance of inputs in a T&E system, as well as Dr. Guthrie's testimony on the more effective use of additional resources being targeted for low achieving pupils versus high achievers.

Plaintiffs aver that the input definition of equal educational opportunity is generally accepted by educators. They point to the testimony of defendants' witness Walberg that the majority of educators aim for equal opportunities for students to learn and that the only reasonable expectation is for mastery of basic subject matter (4/28 T121-5 to 18, 4/28 T117-10 to 118-14, 123-18 to 124-22) as opposed to that of other witnesses such as Wise (11/25 T162-5 to 164-10), Williams (4/23 T54-25 to 55-15, 4/23 T20-13 to 21-21), Reock (10/2 T175-16 to 176-9) and Leppert (T225-20 to 229-18), each of whom testified to the importance of equal access to financial resources. Moreover, they assert that it is far easier for the State to define educational opportunity in terms of educational programs and of a financial infrastructure than to establish a concept of educational needs based on outcomes. According to plaintiffs it is likewise easier to regulate equality because equality has a quantitative numerical component in contrast to the more cumbersome and probably impossible task to mandate improvements, in quality of education through law. Wise 11/25 T13-3 to 17, 14-5 to 15, 15-6 to 16-10, 17-20 to 18-5; P-245a at p. 2.

Plaintiffs further reject defendants' position on the output goal of producing students who can function as citizens and compete in the labor market being achieved by students who meet HSPT and graduation standards.

Finally, plaintiffs contend that defendants are wrong in urging that no finding can be made that graduates are not prepared to compete because the first graduates under the HSPT standard will not graduate until June 1989. They point to pages 552-554 of the initial decision, as well as plaintiffs' Proposed Findings of Fact at 2295-2322 and direct the Commissioner's attention to the Supreme Court requirement that violations of both the T&E and equal protection clauses will have occurred if "after comparing the education received by children in property-poor districts to that offered in property-rich districts, it appears that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children." Abbott, supra, at 296.

COMMISSIONER'S DETERMINATION

Initially, the Commissioner would point out that the ALJ erred in his determination that the definition of what constitutes a thorough and efficient education is a judicial rather than a legislative function. Based upon the Court's finding in Robinson I, supra, it was precisely to the Legislature that the Court directed

the responsibility for defining what constitutes a thorough and efficient education and to which the Legislature responded with the passage of Chapter 212. It is the function of the Court to determine whether or not the efforts of the Legislature in designing such a thorough and efficient system and the executive branch in implementing it have done so in a manner consistent with the requirements of the Constitution. In this instance the Court has found in Robinson V, supra, that the definition of T&E as laid down by the Legislature is constitutional, if sufficiently funded. The purpose of the Abbott challenge is to determine if its implementation is likewise constitutional.

Upon a most careful examination of the record and deliberation over the complex and difficult issues of inputs and outputs, the meaning of thorough and efficient and equal educational opportunity, the Commissioner is firmly convinced that the ALJ erred in determining that T & E is not that which has been defined by the Legislature and the State Board and that it is not measured by the output standards of HSPT and the results of monitoring. Moreover, the Commissioner reiterates his conclusion that the ALJ erred when determining that the current system for financing public education in New Jersey fails to meet the State's constitutional requirements. The Commissioner likewise believes that there is the ability to fashion remedies for any inadequacies in program delivery through existing administrative and statutory mechanisms. Defendants characterize this point well when stating the following:

> ***[T]he administrative law judge simply did not understand how the existing educational system is intended to work and how it is to be made to work. It is not a perfect system. No system devised by man can be perfect. It is not working properly in every single district in this State. It is working properly, however, in the overwhelming majority of districts, and in those districts in which it is not working as well as it might, the cure resides in administrative modifications and greater diligence on the part of all concerned. The cure is most assuredly not to trash the existing system in favor of some other system, a system which, as the testimony in this case graphically demonstrates, will predictably have its own shortcomings. The cure is not to force upon the people of this State a system which inevitably will produce greater State bureaucratic control and a lessening of the power of the local district to tailor its programs to the needs of its own students. A perfect system does not and cannot exist. The remedy for whatever problems the public schools in New Jersey face is, consequently, to accept the educational system chosen by the Legislature and to use it

> properly, at all levels of government, to make certain that the system will function the way the Legislature wanted it to function. (emphasis supplied) (Defendants' Exceptions at 6)

Moreover, the Commissioner is firmly convinced that infusion of additional funds is a simplistic solution, attractive on the surface but shallow in terms of affecting long-term systemic change. He rejects Dr. Arthur Wise's position that even if increased expenditures cannot be demonstrated to be positively related to increased achievement and learning, the common sense approach is to increase inputs. While he would never argue that the research on inputs and outputs in education is flawless, the literature overwhelmingly demonstrates that expenditure per pupil is not related to pupil achievement as testified to by Walberg, 4/27/87 T34 to 35, T53-58, D-219, D-304, D-305; Hanushek 5/4/87, T20 to 43, D-237 and Fowler 5/18/87 T107, D-230, D-231.

This is not to say by any stretch of the imagination that inputs are not important. It would be absurd to argue that $1,000 per pupil is adequate to meet the educational needs of pupils in any area of the State today, just as it would be absurd to argue that 50 or 60 students per class is a desirable standard. However, money alone is not the answer as may be seen when examining differences in pupil expenditures statewide in districts that spend below the state average and yet have satisfactory performance, whether it be in the higher socioeconomic status (SES) designations (DFG categories F-J) or the lower SES designations (DFG categories A-E). As evidenced by Exhibit D-232, Clifton City (DFG-F) in 1983-84 spent $3,199 per pupil or $538 below the statewide average, yet achieved above State standards on all sections of the HSPT. Other examples of low spending/high achieving districts include Middletown Township (Monmouth, DFG-H) spending $3,295 or $422 below the average; West Windsor - Plainsboro school district (Mercer, DFG-I) $3,357 or $380 below average; and Hillsborough (Somerset, DFG-I) spending $3,346 or $391 below average, each of whom met or exceeded State standards.

Also of importance is the issue of low wealth districts spending higher than average. As reported by Dr. Fowler (Exhibit D-234), in 1983-84 Greater Egg Harbor Regional had a per pupil property wealth of $156,800 (DFG-B) and yet spent $4,958 per pupil or $1,221 above the average. Similarly, Rancocas Valley had a per pupil wealth of $110,993 (DFG-D) yet spent $5,307 (+$1,570); Newark (DFG-A) with per pupil property wealth of $34,435 spent $3,809 (+$72); Jersey City (DFG-A) with per pupil property wealth of $53,476 spent $3,864 (+$127); Trenton (DFG-A) with $49,184 per pupil property wealth spent $3,947 (+$210). This also serves to illustrate that even when spending at a higher amount than average, achievement is not guaranteed given the large numbers of students failing to meet HSPT standards in Newark, Jersey City and Trenton.

Likewise enlightening is Walberg's analysis of pupil expenditure and achievement on the writing section (multiple choice)

of the 1983-84 HSPT which shows that, when looking at average scores, Englewood City's student achievement was matched by Bayonne and West New York, yet Bayonne had $3,775 in day school expenses per pupil and West New York had $3,214 versus Englewood's $4,854. Similarly, students in Morris Township achieved an average score matched by Cedar Grove, Caldwell-West Caldwell, West Essex Regional and Sparta, each of whom spent from $764 to $1,411 less per pupil. Exhibit D-305.

As correctly determined by the ALJ, both this Commissioner and his predecessor acknowledge the importance of educational inputs to a T&E system. I.D. at 543. Numerous decisions on budget appeal attest to this. Inputs are only part of the equation, however, and must be balanced against the output standards defined in law and code. Increased inputs are to be driven by specifically identified areas in need of corrective action. The Commissioner does not believe that a blanket infusion of monies without change of budgeting and management behaviors will serve to increase student achievement or increase opportunity. Dr. Larkin's testimony concerning the infusion of compensatory education monies in Newark in the late 1970's confirms this belief, as well as other examples of monies being used for tax relief as opposed to program growth and expansion. Larkin 12/2/86 T40-44.

While the ALJ rejects any intimation that monitoring results are the measure of whether a district is T&E, the Commissioner finds that this is the appropriate means in law to make such assessments.

Article II of Chapter 7A, Public School Education Act of 1975, delineates not only the goals standards and guidelines of a thorough and efficient education, but also the procedures for evaluating T & E and enforcing those standards. It is in this and the State Board's regulations in N.J.A.C. 6:8-1.1 et seq. that the definition and meaning of T & E is found and the measures to be used to assess if T & E is being provided. Contrary to the position the Robinson Court faced, dollar input is no longer the sole criterion of T & E that is available to assess whether the constitutional promise of a thorough and efficient education is being delivered to the pupils of this State.

The goal of T &E bears repeating here:

18A:7A-4. Goal of free public schools

> The goal of a thorough and efficient system of free public schools shall be to provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society.

The major elements and guidelines for reaching that goal are defined by the Legislature as follows:

18A:7A-5. Major elements; guidelines

A thorough and efficient system of free public schools shall include the following major elements, which shall serve as guidelines for the achievement of the legislative goal and the implementation of this act:

a. Establishment of educational goals at both the State and local levels;

b. Encouragement of public involvement in the establishment of educational goals;

c. Instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills;

d. A breadth of program offerings designed to develop the individual talents and abilities of pupils;

e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;

f. Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies;

g. Qualified instructional and other personnel;

h. Efficient administrative procedures;

i. An adequate State program of research and development; and

j. Evaluation and monitoring programs at both the State and local levels.

Each of these major elements of a thorough and efficient education will now be reviewed by the Commissioner.

* * *

ELEMENT A: ESTABLISHMENT OF EDUCATIONAL GOALS AT BOTH THE STATE AND LOCAL LEVELS

ELEMENT B: ENCOURAGEMENT OF PUBLIC INVOLVEMENT IN EDUCATIONAL GOALS

The Commissioner has already briefly addressed in the program disparities part of this decision the establishment of educational goals at the State and local level as well as element b which is interrrelated since it calls for encouragement of public involvement in the establishment of such goals.

In 1976, State educational goals were developed pursuant to N.J.S.A. 18A:7A-6 after consultation with the Commissioner and review by the Joint Legislative Committee on the Public Schools. Local districts in turn went through an elaborate detailed planning process involving the community and staff to develop local goals and objectives consistent with the State goals.

Prior to 1982-83, the monitoring process required districts to submit annual planning reports and action plans to the County Superintendent by July 1 of each year. The reports were reviewed and approved by county offices. Reports on accomplishments were contained in county superintendents' June progress letters to districts.

When the Commissioner took office in 1982, he was not satisfied with the local planning process as it did not appear to be resulting in specifically defined objectives, thus hindering the Department of Education program assistance efforts to districts based on needs identified through a clear assessment process. Consequently, steps were taken to develop a local planning process that fostered effective results-oriented educational planning. A decentralized planning model was developed which fixed responsibility on school districts to annually plan and assess the achievement of educational objectives. As explained previously, local districts were required to create a minimum of three educational objectives based on student outcomes. Moreover, the objectives had to include standards, timelines and evaluative measures. The planning model thus addressed element a but also the requirement of element j for local level evaluation. In addition, it served to satisfy the State's comprehensive needs assessment requirement pursuant to N.J.S.A. 18A:7A-9 as explained previously.

In this regard, the local district planning model required the following:

- Each county superintendent had to review and approve all local district objectives.
- County superintendents analyzed objectives and developed summaries of the most pressing county needs in priority order.
- The county priorities were submitted to the regional curriculum service units (RCSU's) for review and regional priority needs analyzed.

- Based on this review and analysis, significant educational needs were identified for the three regions of the State. A comprehensive overview of statewide needs was then formulated.

- In 1983-84, the three regions collaborated to develop plans to meet the statewide needs. The resultant plans contained the level and kinds of assistance to be provided to local districts. In 1984-85 and 1985-86, the Department of Education, through its educational reform initiatives, began to respond directly to statewide needs with a variety of products, training workshops and services.

- During this time, local district needs identified through the process of setting yearly objectives and the Department's educational reform agenda began to converge. A high correlation emerged between needs identified by local districts and State needs identified by the Department.

- In all cases, information, publications, conferences, training programs, institutes and other services developed by the various divisions of the Department of Education were made available to the RCSU's for delivery to school districts to assist them in meeting their needs.

In 1984 the administrative code for T&E, N.J.A.C. 6:8-1.1 et seq., underwent review pursuant to sunset provisions of Executive Order 66. Public hearings were conducted statewide as well as public comments being sought through the New Jersey Register. The State's educational goals were readopted consistent with the requirements of N.J.S.A. 18A:7A-8.

Moreover, N.J.A.C. 6:8 underwent review yet again in 1986 including the State's educational goals and objectives, thus providing for public input twice in a two-year period. As of January 1987, local district goals and objectives were required to be consistent with the State's and a monitoring indicator was developed relative to this which districts must meet when evaluated by the Department.

In the Commissioner's opinion, the process for establishing educational goals and objectives is highly responsive to needs at both the State and local levels. The very process itself serves as the linchpin for several other components of T&E specified in N.J.S.A. 18A:7A-5, namely public involvement, element a; a State program of research and development, element i; and evaluation at the local and State levels, element j.

In summary, not only are local districts required to review local goals, revise if necessary and readopt every five years but

they must on an annual basis adopt measurable planning objectives which lead to the accomplishment of these outcome goals. Districts which are certified as T&E are thus encouraged to move beyond compliance/ certification performance levels to higher levels of achievement.

ELEMENT C: INSTRUCTION INTENDED TO PRODUCE ATTAINMENT OF REASONABLE LEVELS OF PROFICIENCY IN BASIC COMMUNICATIONS AND COMPUTATIONAL SKILLS

Without equivocation, the Commissioner is able to state that extraordinary progress has been made in this aspect of the provision of thorough and efficient education in New Jersey which goes beyond both the letter and spirit of the law.

One of the first actions of this Commissioner when assuming duties in July 1982 was to "condemn the tyranny of minimums" and to raise the level of mastery expected of our high school students before being allowed to receive a State endorsed diploma. Movement from minimum basic skills (MBS) to High School Proficiency Testing was swift and successful and it signified a commitment to education well beyond the threshold requirement of reasonable levels of proficiency. The skills under communication and computation were expanded to include writing, with New Jersey being one of the first states in the nation requiring a writing sample, and demonstration of thinking and problem solving skills both in communication and mathematics. The purpose of this was to have skills assessed that were more applicable to today's job market and post-secondary education needs.

Two years later the Commissioner undertook steps necessary to convince the Legislature to enact an 11th grade high school proficiency test which were successful. Implementation is already scheduled to move New Jersey even further beyond the "reasonable" proficiency standard.

Enormous increases in funding for compensatory education were not only provided by the Legislature to meet the needs of students to pass the higher level proficiency examinations but this money was forward funded in the first year so as to be available immediately for program implementation. Bloom 5/25/87 T70-71.

An extensive and highly diverse series of programmatic initiatives were undertaken by the Department of Education directed to raising the skills and proficiencies of instructional staff responsible for teaching students who were in need of remediation to meet the increased standards for high school graduation.

Beginning in July 1985, the Department has conducted a series of High School Proficiency Test (HSPT) Institutes in reading, mathematics and writing. I.D. at 451-452, Solomon 4/6/87 T35-39, Bloom 5/29/87 T87. The main purpose of the institutes was to familiarize classroom and basic skills teachers with the content of

the HSPT, as well as teaching strategies, to improve test performance. In addition to individual subject area instruction, each institute provided training to teachers in critical thinking, test-taking skills and classroom management techniques. Fifty-five of the 56 urban districts have sent representatives to participate in the institutes. There have been a total of 2,324 urban teachers trained which is 52.6% of the total number of teachers trained in 1985-1987.

Moreover, special sessions of the institutes have been held on-site for most of the large urban districts including Newark, Jersey City, Paterson, Orange, Trenton, Plainfield, Camden and Atlantic City.

In addition, numerous publications and training aids have been produced by the Department for dissemination to districts to help achieve maximum gains in meeting element c.

As many school districts in this State have had to place a high priority and instructional emphasis on attaining high school proficiency mastery as a necessary and legitimate focus of their educational programming, so too has the State Department of Education been required to muster its resources to guide and assist districts in this critical educational mission.

Other initiatives relative to element c include:

- Effective Demonstration Schools which evolved from a three-year grant program established by the Legislature in 1985 to help schools apply effectiveness research to school improvement planning, the focus of which is to improve student performance on the HSPT. 17 districts including the urban districts of Atlantic City, Elizabeth, Hamilton Township, Jersey City, Lakewood, Linden, Montclair, Newark, Orange and Perth Amboy participate in the program. (The Effective Schools Research has been discussed in Part II of this decision.)

- Educational Technology Training Centers established under the direction of the Department's three RCSU's have provided training for more than 5,000 teachers, approximately 2,500 of whom are teachers from urban districts, in the instructional use of technology for developing basic skills and proficiencies. Reece 3/21/87 T9, 22; Solomon 4/6/87 T29-30.

- Basic Skills Training has been provided by each of the three RCSU's since 1983 for classroom teachers and administrators, the primary focus of which has been to improve instruction in basic skills through such strategies as "Writing in the Content Areas," "Integrating Reading and Writing," and "Aligning Curriculum to the HSPT." See D-214j and t, D-302.

- Math teacher retraining has been funded jointly by the Department of Education and the Department of Higher Education (DHE) through a project with Trenton State College. The purpose of the project is to enable teachers who successfully complete 24 credits of graduate study to obtain an endorsement to teach mathematics. Since June 1985, 61 teachers (32 from urban districts) have completed the training. A Program to Retrain Teachers in Mathematics, Trenton State College.

- New Jersey Algebra Project is another joint project with the DHE to improve the teaching and learning of algebra statewide. Since its inception, 123 middle and high school teachers have been or are currently being trained. Presently, there are 264 algebra project classes in 33 public school districts in New Jersey. The Algebra Project, Rutgers University, Smith Hall, Newark, N.J.

ELEMENT D: A BREADTH OF PROGRAM OFFERINGS DESIGNED TO DEVELOP THE INDIVIDUAL TALENTS AND ABILITIES OF PUPILS

Numerous and diverse initiatives which target not just gifted and talented pupils but also those who have dropped out of school have been undertaken statewide to further this component of T&E.

The Urban Dropout Centers initiative, a nationally recognized project, provides academic instruction, vocational and personal counseling and community service employment, the goal of which is to earn a GED and to secure full-time employment. Reece 3/11/87 T66-68.

"10,000 Graduates...10,000 Jobs" is a vocational education initiative geared to urban high school students who are not in academic programs or formal vocational training programs. A 40-hour employability skills course and guaranteed employment upon high school graduation is provided to students. By 1992, 10,000 students will have graduated and been employed through the project. Participating districts receive funding for a business-community liaison/job developer to help place eligible students. Eligibility is maintained through the student's meeting attendance, curriculum, and HSPT requirements and by graduating from high school. Department of Education Annual Report 1986-1987, at 17.

The Department of Education developed a comprehensive State plan for gifted education in July 1987 which identified major initiatives it would undertake over the next several years to assist local districts in designing educational programs to meet the needs of intellectually and academically gifted students. Gifted Education: A State Plan for New Jersey, July 1987. The needs

addressed in the State plan were identified through a variety of sources such as research conducted by experts in gifted education, national and State reports and the recommendations and observations of the Commissioner's Advisory Council for Gifted Education.

A series of booklets entitled Guidelines in Gifted Education have been developed for use by local districts on a variety of critical issues in gifted education. Competitive grants to local districts are awarded on an annual basis for the development, identification and replication of gifted education programs. Such an approach encourages districts to research and develop options for providing programs and services to gifted students which may be adopted or adapted by other districts. Approximately $200,000 each year has been awarded since fiscal year 1983-84 for this project.

A very important component of the State plan for gifted education is the training and dissemination element which provides training for school personnel statewide and training materials in gifted education on such issues as identification procedures, the differentiation of curricula and evaluation models. In addition to numerous professional development activities being conducted by the Regional Curriculum Service Units (RCSUs), an annual State forum in gifted education is conducted which offers local district personnel the opportunity to hear and interact with nationally recognized experts on issues related to gifted education.

The State plan also calls for (1) the establishment of a clearinghouse of resources for educators and parents of gifted children through the RCSU's; (2) an annual survey of local districts concerning gifted education to assist the Department in updating and revising information regarding services to gifted students statewide; and (3) networking between and among school districts and the Department including establishment of consortia and cooperative efforts.

In addition to a comprehensive State plan for gifted education, there are a variety of initiatives that exist with the express purpose of providing increased program offerings to gifted and talented pupils including the Governor's School for the Arts, one of a few such schools in the nation, which provides art, music, political science, science and math experiences for hundreds of our brightest students. The New Jersey School for the Arts likewise provides hundreds of talented high school students with a summer arts education program in dance, music, theater and playwriting funded by the Governor's Challenge for Excellence Grant and administered by Montclair State College. Department of Education Annual Report 1986-1987, at 51.

ELEMENT E: PROGRAMS AND SUPPORTIVE SERVICES FOR ALL PUPILS ESPECIALLY THOSE WHO ARE EDUCATIONALLY DISADVANTAGED OR WHO HAVE SPECIAL EDUCATION NEEDS

Special education programs and services have increased tremendously statewide since the Robinson decisions were rendered. In 1981 the Legislature enacted a statute requiring programs and services for pre-school handicapped youngsters ages 3-5 and established a funding structure for the implementation of programs and services to handicapped infants birth to age 3 and their families. New Jersey was one of the first states in the nation to enact such laws. Early Intervention Programs for handicapped infants and their families are now provided to over 2,500 infants with approximately $13 million in state funds provided.

The Department of Education has over the past three years implemented the Secondary Special Education Initiative which is designed to define effective secondary school special education programs which are aimed at increasing employment, decreasing drop-out rates and increasing basic skills achievement. It is now developing a publication on effective practices in the transition from school to work for handicapped individuals. Moreover, the Department has developed a comprehensive plan to improve special education programs and services entitled the Plan to Revise Special Education in New Jersey. The Plan is being piloted in 13 school districts statewide and has been hailed nationwide as a comprehensive program that will significantly improve programs for pupils with learning problems, both handicapped and non-handicapped. Department of Education Annual Report 1986-87, at 19-20.

Publications, training sessions and grant projects far too numerous and diverse to discuss in full here have been developed by the Department toward improved programming and services to students with special needs such as disruptive students, disaffected students, teen pregnancy, curriculum and grants for drug and alcohol education and alternative education program options have also been developed as school-based youth services programs which are closely coordinated with the Departments of Health and Labor. It has been designed to augment and coordinate provisions of services for teenagers facing problems such as high teenage unemployment rates, family breakup, suicide, pregnancy, drop-out rates and health care problems such as alcohol and drugs. At the other end of the spectrum, a pilot program for pre-kindergarten urban children has been developed to encourage early intervention programs for young urban children.

Other measures to meet the requirements of element e include such initiatives as:

- The recently enacted legislation mandating that each district of this State establish a comprehensive substance abuse intervention, prevention and treatment referral program which requires a broad-scoped

education program including substance awareness coordinators and linkages to supportive health services. N.J.S.A. 18A:40A-1 et seq.

- Collaborative efforts with the Department of Human Services on "latchkey" strategies involving before and after-school programs for children.

- Interagency Task Force on "At Risk" children on which the Commissioner serves.

- "10,000 Graduates...10,000 Jobs" described previously.

- HSPT Summer/School Year Program - Since 1986 approximately 2,500 urban high school students per year who have not passed the HSPT in grade 9 have participated in a six-week intensive summer remediation program. Students have also been provided with a paid summer employment experience which is integrated into the instructional component. From September to April summer participants receive follow-up supervision, instruction and motivational support. Reece 3/11/87 T68-80; I.D. at 451.

- Operation School Renewal (OSR) - As part of the Urban Initiative Program (1984-85 to 1987-88) three urban districts (East Orange, Trenton, and Neptune Township) comprised of 50 schools and 30,000 pupils received sustained assistance and funding to accomplish five objectives and to foster school based planning teams. Districts focused on improving student attendance, academic performance and employment opportunities, reducing disruptive behavior and improving principal effectiveness. During the program, districts received in excess of $10 million dollars. Reece 3/11/87 T5-61; I.D. at 453-455.

- Broad Based Component (BBC) - Another part of the Urban Initiative Program (1985-86 to 1988-89), BBC provided an array of pilot projects, grants and services in nine program areas to approximately 40 of the State's 56 urban districts. Districts could choose to have their students and teachers participate in reading, math, writing, bilingual, computer, disruptive youth and drug and alcohol pilots, dropout or secondary special education demonstration projects or vocational and technology services. Reece 3/11/87 T7-10; I.D. at 455-456.

- "Twelve Together" - For the 1989-90 school year the Department will offer districts funding and assistance to implement a dropout prevention program based on peer counseling guided by adult volunteer

facilitators. The "12-T" program developed in Detroit, Michigan will annually serve 600 grade nine students in New Jersey. Governor's Budget Message and Taxpayers Guide FY 1989-90, at 63.

- "Summer Enrichment" - In the summer of 1989 or 1990 urban elementary students entering grades five through eight will have an opportunity to participate in a special six-week summer school program. The three day a week, four hour per day program will provide language enrichment experiences based on state-developed curriculum materials. Weekly classroom work will relate to a topic in the natural sciences, humanities, commerce or culture. Each week's lessons will culminate in a field trip to the site which students have studied. Through this enriched learning experience, participants will sustain progress made during the school year and will develop improved communication skills. Governor's Budget Message and Taxpayers Guide FY 1989-90, at 63.

ELEMENT F: ADEQUATELY EQUIPPED, SANITARY AND SECURE PHYSICAL FACILITIES AND ADEQUATE MATERIALS AND SUPPLIES

This element has been dealt with previously in this decision and need not be addressed here.

ELEMENT G: QUALIFIED INSTRUCTIONAL AND OTHER PERSONNEL

New Jersey has the distinction of being the only State in the nation to have eliminated emergency certificates for instruction K-8, academic subjects and special subject endorsements of art, music, etc. The State's efforts to achieve the expectation expressed in element g are tied to (1) the monitoring of school districts' staffing practices, (2) comprehensive initiatives to increase the supply and quality of instructional staff, (3) the Teacher Quality Employment Act which established a minimum teacher salary of $18,500 beginning with the 1985-86 school year and (4) initiatives to recognize outstanding teachers.

Every district in the State has undergone monitoring which included among other things a credential check of every teaching staff member to assure that he or she held certification appropriate to the assignment (Indicator 6.1 of the monitoring guide). In addition, districts have been and continue to be monitored to assure that the district observes and evaluates tenured and nontenured teaching and administrative staff pursuant to law and code and that the requirement for a professional improvement plan for tenured teaching staff members is being carried out (Indicator 6.5).

Districts were required to remove staff who were identified as lacking appropriate certification and a corrective action plan developed to assure compliance with the requirements for staff evaluation.

A major initiative to address the quality of teachers in this State is the Provisional Teacher Program, more commonly referred to as the "Alternate Route" to teacher certification. I.D. at 449-50. It is intended to enlarge the pool of teacher candidates while also attracting highly qualified individuals to teaching. The initiative, as previously indicated herein, has resulted in New Jersey being the only State in the nation to accomplish virtual elimination of emergency certification. The Provisional Teacher Program addresses in a much more rigorous manner the circumstances under which a district may employ a person who did not have an education major in college. The program provides local districts the means with which to employ talented liberal arts graduates who would otherwise have teaching foreclosed to them and to provide them with intensive training and supervisory assistance to enable them to use their subject knowledge and talent as teachers. The Provisional Teacher Program, New Jersey State Department of Education, December 1984, at 10.

The State has benefited greatly from the Provisional Teacher Program as it has succeeded in attracting many outstanding candidates from the most respected colleges and universities in this country with majors in a wide array of subjects and disciplines. Candidates must successfully pass a State certification test in the subject area(s) they seek to teach and complete an intensive year-long instructional program at regional centers coordinated by the Department of Education. The district employing the candidate must be approved by the Department for training provisional teachers and it must make a commitment to provide the resources necessary for the rigorous supervisory experience the candidate must undergo while teaching under provisional certification. The Provisional Teacher Program, December 1984, at 1.

There have been concerted efforts made by the Department to assist urban districts to recruit provisional teacher candidates with much success realized to this end. A total of 1,084 provisional teachers have been hired statewide since September 1985 with 460 being in urban districts of which 41% (190) are minorities. The Mellon Foundation provided grant monies during 1988 to hold two urban job fairs which provided seminars for urban administrators on the recruitment and training of teachers through the Provisional Teacher Program and gave those administrators the opportunity to interview top-quality candidates. The three-day job fairs were cosponsored by Princeton University.

The Provisional Teacher Program has been exceptionally successful in attracting truly outstanding minority candidates who are graduates of the leading universities of this country. These candidates, moreover, have a higher National Teacher Examination

Score than those who graduate with education majors (traditional college preparation). Annual Report on Certification Testing, New Jersey State Department of Education, February 1988, at 9.

21% of provisional teacher candidates over the period September 1985 - September 1988 have been minorities, yet minorities represent 11% of the teaching force in New Jersey. Thus, the provisional program is achieving a recruitment rate nearly twice that of the teacher force as a whole. The Provisional Teacher Program, Fourth Year Report, December 1988, at 7.

Another initiative to attract minority candidates to the Provisional Teacher Program this past year has been the Minority Teacher Fellowship Program wherein the Department of Education requested and received a State appropriation of $40,000 to provide individual fellowship of $1,500 to pay the training costs of 27 of the best minority provisional teacher candidates employed this past year. Such a program is intended to encourage high-quality minority candidates to consider teaching and local districts to consider hiring them. It is hoped this fellowship program will expand. Commissioner's Memorandum to State Board of Education, February 1, 1989, at 4.

Emphasis on the employment of minority teachers is motivated by the awareness of the importance of proportional representation of talented minorities among teachers and the fact that competition among employers for minority college graduates is greater than ever given the decline of such students nationally. Memorandum, at 1.

In addition, 65 Geraldine R. Dodge Foundation Teaching Fellowships have been awarded since 1985. The fellowships are $5,000 scholarship grants to provisional teachers for further study in their academic field. The Provisional Teacher Program, Fourth Year Report, at 24.

Another initiative to increase the quantity and quality of instructional staff is the Governor's Teaching Scholars program which is intended to attract outstanding high school students to teaching through a scholarship loan program. Since 1986 more than 400 high school graduates with high academic achievement have been selected to participate in the program and have received scholarship loans up to $7,500 per year, up to four years. Reece 3/11/87 T81-82. The loans will be completely forgiven as the students fulfill the promise to teach for a specified number of years in New Jersey public schools. Added incentives exist for these bright and talented students to teach in urban centers.

Another major initiative by this State to increase the quantity and quality of our teacher pool in New Jersey has been the Teacher Quality Employment Act of 1985 (N.J.S.A. 18A:29-5.1 et seq.) which has provided more than $125 million in funds to establish a minimum teacher salary of $18,500. This act is intended to make the entry level salary for teachers competitive with other careers.

In 1984 the State Board adopted teacher certification standards that are among the highest in the nation. In 1985, a test requirement for certification was implemented following a validation study of subject tests of the National Teacher Examination which was conducted in cooperation with the Educational Testing Service. Three panels of college professors and teachers reviewed the specialty area tests and the general knowledge test and recommended cut off scores for New Jersey. For each of the succeeding three years, the cut-off scores have been raised consistent with the effort to assure the quality of teachers entering the profession in this State.

More recently, certification for principals underwent a very rigorous process of reform resulting in a major restructure of the training of individuals seeking certification in that area.

The new system for principal certification replaces one that had virtually remained unaltered for over 50 years. The prior system essentially permitted any teacher with three years' school experience and a master's degree in any field to be certified as a principal. Although 24 credits of preparation were mandated, the topics were so broadly and inadequately defined that three-quarters of all principals earned certification without ever enrolling in a program specifically defined to prepare principals.

The new system N.J.A.C. 6:11-10.8 was researched carefully for more than a year and was subject to two years of public debate and numerous hearings. The plan requires that each candidate for a principal's certificate earn a master's degree in an approved administrative field and pass a test in that area, the content standards of which were established as a result of deliberations of a panel of nationally recognized scholars from the fields of education, public, and business administration.

Candidates must also undergo an assessment of their ability to perform basic tasks of the principalship, including an evaluation of skills in teaching and curriculum. A report of a candidate's strengths and weaknesses will be generated from such assessment which is intended to serve as a means of focusing continued training of the individual and which will be available to local districts wherein the candidate seeks employment. Once offered employment, candidates must complete a two to four month pre-residency requirement.

Upon employment, candidates will serve a residency of one to two years under the supervision of a mentor who must be a licensed and accomplished school administrator who has completed a mentor-training program.

An important element of the new requirements is that under a three-year pilot-project 50 talented and outstanding candidates with degrees and experience in fields other than education will be permitted to undergo training as principals. Candidates who are not

educators must not only meet the same criteria as candidates who are, but they will also be required to teach full time for two months before assuming the duties of a principal and for one class period a day thereafter during a two-year probationary period.

All candidates for licensing as principal whether they be from an education background or other field, must satisfactorily complete a probationary period prior to obtaining a standard certificate.

As may be seen, the criteria for licensing as principal are far more stringent than previously, thus assuring that element g is being met even more rigorously than ever before.

At the present time, the certification requirements for chief school administrators and school business administrators are being examined and will also be subject to substantial reform.

There is an aggressive set of initiatives put into place to recognize and reward outstanding teachers throughout the State through such measures as (1) the Teacher Grant Program which awards grants of $15,000 each to individual teacher or groups of teachers who have designed innovative and effective classroom strategies which may be shared with other teachers throughout the State (81 grants to 133 teachers have been awarded thus far); (2) the Governor's Teacher Recognition Program which has recognized and commended approximately 4,700 fine teacher from more than 450 district at the Annual Governor's Convocation on Excellence in Teaching since 1986 and has awarded $1,000 grants to each teacher's district to be used for educational purposes specified by the teacher, Reece 3/11/87 T82-83; and (4) the Commissioner's Symposium for Outstanding Teachers which enables 100 of these outstanding teachers each year to attend a three-day summer symposium to share ideas, exchange information and to meet and interact with their colleagues and educational leaders.

Lastly, an extensive and comprehensive system of in-service training opportunities exists to up-grade and hone the skills and abilities of teaching staff through such means as the Academy for the Advancement of Teaching and Management, the three Regional Curriculum Service Units (RCSU's), the four Educational Technology Centers and other professional development programs described under the section dealing with element i.

ELEMENT H: EFFICIENT ADMINISTRATIVE PROCEDURES

At the State level, administrative code and procedures have the sunset provision wherein they must be reviewed and readopted or revised every five years. This provision thus helps assure that administrative code and procedures be responsive to the current needs and that public comment be sought periodically regarding them.

Local policies and procedures are in turn driven by the State level administrative procedures. When new requirements come into being which mandate that districts have policies and procedures for a given issue or topic such as the evaluation of teaching staff members or new accounting procedures, districts are not only informed of the requirement but training sessions are conducted statewide.

Monitoring is understandably an integral part of assuring that element h is being addressed. County superintendents clearly inform each district exactly what policies and procedures will be reviewed during monitoring so that districts may be fully aware of precisely what requirements must be met.

ELEMENT I: AN ADEQUATE STATE PROGRAM OF RESEARCH AND DEVELOPMENT

When he assumed office in 1982, the Commissioner decentralized the research, planning and evaluation function of the Department and placed research and development responsibilities with each individual division. All program initiatives, projects products, and publications were required to be research based and all programs and projects were required to have evaluation procedures specified and implemented.

The Department performs two types of research and development activities. These activities generally lead to the development of education initiatives and/or expansion of already existing initiatives and programs.

First, the Department, based upon clearly identified needs such as improved mastery of basic skills by urban students, conducts basic research as to what policies, strategies and/or programs work in response to the identified needs. At times, specific solutions to the needs are found. For example, a policy of statewide basic skills testing tied to (1) graduation requirements, (2) district certification, and (3) public reporting of results has led to improved basic skills performance, particularly for low-achieving students. Based upon this research, a new testing initiative requiring increased levels of mastery, the HSPT, was designed, implemented and evaluated, leading to yet an even more rigorous testing initiative.

At other times, research points us in a direction that appears to offer a promising solution to a particular need. For example, research on chronically disruptive students frequently cited alternative education as a possible solution to address the needs of this school population. A pilot program in different settings statewide was planned and implemented to examine if such programs appeared to be effective and under what conditions. This research and planning effort resulted in the implementation of the alternative education initiative.

Second, the Department engages in evaluative research. As indicated above, all initiatives must have an evaluation component the purpose of which is to determine: (1) did the initiative achieve the planned objectives; (2) how and why was the initative successful or unsuccessful; and (3) how can we expand the initiatives, where needed, if successful. The Department also seeks to determine what additional policies, strategies and/or programs are needed based upon the findings of the evaluation.

Such research and development activities combine the resources of Department staff, the expertise of local educators, and external objective evaluators.

The Academy for the Advancement of Teaching and Management represents one of the Department's major responses to the requirement for the continuous development of teaching staff members statewide. D-9 at 4. The goals of the Academy are to:

- provide professional growth opportunities for teachers and administrators;
- develop/select programs that translate theory into practice;
- incorporate relevant research and practices into programs;
- promote networking opportunities among educators, educational institutions and states; and
- encourage community support for the professional development of educators.

Since 1985, 4,000 educators have received training through the Academy. One of its recent initiatives is the Staff Development Leaders program which encourages interested school districts to appoint local staff development leaders and commit 50 percent of their time to working with local teachers and administrators to help improve instructional, supervisory, leadership and management skills. Department of Education Annual Report 1986-87, at 3.

Delivery of curriculum services to local districts has been a major goal of the Department of Education since 1982. In response to this goal the Regional Curriculum Services Units (RCSU's) were created to serve as a vital link between the Department and local school districts for the provision of high quality curriculum assistance in a well-planned, systematic fashion. They play an integral role within a comprehensive strategy (1) to identify what issues, problems and needs exist; (2) to establish priorities among those needs; and (3) to plan and implement appropriate training, products and services to meet the identified needs. As previously explained, the RCSU's respond primarily to local districts needs that are regional in nature based upon review of the local district

planning objectives submitted to the county superintendent on an annual basis. Statewide and local needs are also addressed.

In addition to needs identification resulting from review of local planning objectives, curriculum needs are identified through review of local district test data, input from educators, research, State and national reports, State Board directives, as well as State and federal legislation.

There are three regional units, each of which serves seven counties. The services delivered by the RCSUs include training; curriculum planning, adaptation and development; dissemination of curriculum materials and information; and networking successful programs and practices.

A review of Exhibits D-214j and t provides an excellent example of the diverse training opportunities offered by the regional units. RCSU Central during the period September 1986 through January 1987 (D-214j) offered training ranging from 1 to 4 days in such topics as computer technology from beginner to advanced levels; classroom management; behavior management; science; reading; math; child abuse and neglect; alcohol and substance abuse training; special education; physical education; bilingual education; nutrition; problem solving; development of student codes of conduct and program planning and evaluation. All this in addition to numerous HSPT Institute workshops discussed above. Exhibit D-214t chronicles similar diversity and breadth of training. Moreover, as noted by the ALJ on page 207 of the initial decision during the period February 1986-January 1987, 1,669 urban professionals attended RCSU workshops. See also, in general, Solomon 4/6/87 T6-112; Exhibits D-302, D-214d-f, k-r.

A myriad of research and development efforts/initiatives have already been referenced thus far in this decision. There are also many others worthy of mention which cannot be addressed here given the length of the decision. Suffice it to say, however, the State's commitment to excellence in research and development is exceptional.

ELEMENT J: EVALUATION AND MONITORING PROGRAMS AT BOTH THE STATE AND LOCAL LEVELS

Needless to say, ample attention has been given to the issue of monitoring and evaluation. All that needs to be reiterated at this juncture are the mechanisms through which this element is addressed:

- Local District Testing - N.J.A.C. 6:8-6.1 requires that all public school pupils in the State be assessed annually to identify those not meeting State minimum levels of proficiency and is a primary mechanism for local district level evaluation and monitoring.

- Local Planning Process - requires evaluative procedures be specified for assessing district progress in reaching the local objectives it has set.

- High School Proficiency Testing - a major evaluative tool to assess attainment of basic skills proficiency at the high school level.

- State Monitoring of Public Schools - evaluation requirements and procedures delineated in N.J.A.C. 6:8-4.1 et seq.

Enormous resources both fiscal and human have been directed toward the implementation of this element and it is this element that the Commissioner believes is, in fact, the method by which assessment is made to determine if the thorough and efficient requirements of this State are being realized.

This detailed description regarding the major elements/components of a thorough and efficient education has been undertaken to provide an overview of this State's efforts to achieve conformity with those elements. Ultimately, T&E is comprised of those inputs defined by the Legislature and State Board. Moreover, thorough and efficient education is measured through the mechanisms defined by the Legislature and State Board, i.e. successful performance on the High School Proficiency Test at the student level and through successfully meeting the evaluation criteria for achievement of certification delineated in code at the district level.

PART VI

LEGAL CONCLUSIONS

In evaluating the extensive record before him, the Commissioner has considered the evidence under two sets of proofs, one set pertaining to the thorough and efficient claim, one set pertaining to the equal protection claim. The Abbott Court expounded on the difference between the proofs, admitting that there would be overlap:

> The claims may differ, however, in that the thorough and efficient education issues call for proofs that, after comparing the education received by the children in property-poor districts to that offered in property-rich districts, it appears that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children. The equal protection issues, on the other hand, call for proofs that, even if all children receive a minimally thorough and efficient education, the financing scheme engenders more inequality than

is required by any other State interest. (footnote omitted) (100 N.J. at 296)

Recognizing that only the Court may decide these constitutional claims, the Commissioner seeks in this section to offer his insight on the legal issues for the Court's consideration.

As discussed at length in the preceding sections, the Commissioner has rejected the arguments posed by plaintiffs under the T&E proofs. He has rejected the ALJ's conclusion that educational inequities exist systemically under the current funding formula. He likewise has rejected plaintiffs' allegations that significant numbers of pupils in plaintiffs' districts fail to receive a thorough and efficient elementary or secondary education by reason of the operation of Chapter 212. He has further rejected the ALJ's conclusion that the manner in which the Act has been applied either fiscally or programmatically has allowed equivalently qualified students to attend schools providing significantly different program offerings. The Commissioner has concluded, contrary to the finding of the ALJ, that a thorough and efficient education is that which has appropriately been defined by the Legislature and the State Board through law and regulation and, further, that when a school passes monitoring, it is deemed to be presumptively thorough and efficient. Finally, the Commissioner has concluded that children educated in property-poor districts which have attained certification through monitoring are in no way disadvantaged or unable to compete in and contribute to the society entered by the students attending schools in property-rich districts.

In reviewing plaintiffs' equal protection arguments, the Commissioner recognizes, as he has noted earlier in this case, that when the Court reviews the Commissioner's resolution of the factual issues placed before him, it will look to our State Constitution's demand that "***all children in New Jersey, regardless of socioeconomic status or geographic location, [be provided] the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." Id. at 283. As stated heretofore, while endeavoring to assure equal educational opportunity to all the State's children, the Abbott Court conceded that equal opportunity does not equate with equal educational achievement and, further, that "equality of financial support did not necessarily yield equal educational opportunity, because both financial and non-financial factors affect educational quality." Id. at 281, quoting Robinson I at 513, 519-20.

The Commissioner further recognizes that in evaluating Chapter 212, as implemented, the Court will apply a standard of scrutiny to decide whether the State funding formula as applied is providing a thorough and efficient education with equal protection under our laws. Contrary to the conclusion of the ALJ below, the Commissioner believes the Court should employ a rational basis standard of review in doing so. See San Antonio School District v. Rodriquez, 411 U.S. 1, 93 S. Ct. 1278 (1973) (Rational basis, rather

than strict or heightened scrutiny, is the proper standard against which to examine the Texas public school financing system under review). Our own Robinson I case made it clear that strict scrutiny was inappropriate in examining whether our State Constitution's equal protection clause was violated by the State funding formula before Chapter 212. See Robinson I, supra at 492-500. The Commissioner recognizes that Rodriquez was a challenge brought under the federal equal protection clause, while plaintiffs' only remaining equal protection claim is brought under our State Constitution[1]. Notwithstanding this distinction, the Commissioner concurs with the position of the State as embodied in its post-hearing brief at 191 dated March 11, 1988 wherein it states:

> ***Rodriquez is dispositive for purposes of federal equal protection. The minimum rationality standard of judicial review is as applicable to the New Jersey system as it was to the Texas system.

Further, the Commissioner concurs with the State's position that the Public School Education Act of 1975 is reformatory legislation which "'may be sustainable if it is merely rationally related to a legitimate governmental interest, even if it does not go as far as it might,' Abramowitz v. Kimmelman, 203 N.J. Super. 118, 127 (App. Div. 1985), and a statute bearing upon public education will be sustained when it 'was implemented in an effort to extend public education and improve its quality.' San Antonio Independent School District v. Rodriquez, 411 U.S. at 39 ***." (emphasis omitted) Defendants' Reply Brief at 21.

Moreover, the Commissioner observes at the outset of this discussion on equal protection, that it must be borne in mind that the Robinson V court has declared that "the Public School Education Act of 1975 is in all respects constitutional on its face, *** assuming it is fully funded" (Robinson V at 467), and as such bears with it a presumption of correctness. Further, the Supreme Court in Robinson I refused to have the first challenge to the State's educational funding formula turn upon State equal protection. It stated: "[T]he equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act." Robinson I at 492. From this language the Commissioner is compelled to conclude, as did the U.S. Supreme Court in Rodriquez, supra, that anything more than rational basis scrutiny is inappropriate in the Court's consideration of plaintiffs' State equal protection claim. Thus, he dismisses as being without merit the ALJ's reliance on language from Abbott, supra, that refers to education as being a fundamental right to suggest that a heightened level of scrutiny is appropriate. As the

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[1] Plaintiffs withdrew their federal equal protection claim. See cover letter to Plaintiffs' Brief dated March 11, 1988 from Marilyn Morheuser, Esq., to Hon. Steven L. Lefelt, ALJ.

ALJ concluded himself, "such label takes on no talismatic significance." I.D. at 561.

In his review of the record, the ALJ rejects the State's equal protection position that plaintiffs must show invidious discriminatory purpose to establish an equal protection denial. From the ALJ's perspective, the crucial equal protection issue is whether there is an appropriate governmental interest suitably furthered by the differential treatment involved. I.D. at 563.

The ALJ deems the equal protection test to be broader than the T & E test in ensuring that students achieve equally, and he poses a broader equal protection question which reads: "Even if children can compete in and contribute to the same society entered by advantaged children, are there still expenditure or program inequalities proved by plaintiffs which should not be perpetuated, given the State interest involved?" Id. He concludes that the proofs demonstrate that the quality of education is determined by the school district in which the child happens to reside. While acknowledging that different student needs will dictate different educational program balances, he emphasizes that the State must ensure that children of comparable abilities are provided substantially comparable educational opportunities which he concludes has not been done. Program disparities are not found to be matters of local choice or district perference; rather, they are found to be caused by systemic defects in which the funding system operates. Thus, the State's local control, associational rights and efficiency justification are deemed to be outweighed by the educational rights of children residing in poor urban districts. I.D. at 568.

Although the Commissioner agrees with the ALJ that the equal protection test requires "***weigh(ing) the nature of the restraint or denial against the apparent public justification*** Robinson v. Cahill, 62 N.J. 473, 491-492 (1973) (Robinson I)" (I.D. at 561), the Commissioner cannot accept all of the ALJ's other equal protection conclusions. He first rejects the ALJ's conclusion that the equal protection test is broader than the T & E analysis. Under the thorough and efficient proofs the Commissioner has concluded in this decision that plaintiffs have not demonstrated that the system, taken as a whole, fails to provide equal educational opportunity to the children in their districts. As established earlier in this decision, the Commissioner rejects any finding of the ALJ suggesting that funding or programming variation district to district violates either the requirements of T & E or of the equal protection clause because there is no basis in law requiring that expenditures and inputs be equal.

Moreover, because the Commissioner rejects the ALJ's broader definition of what is required to meet the statutory requirement of a thorough and efficient education, he similarly rejects the ALJ's conclusion under a T & E analysis that "***equal opportunity required by T & E measures whether inputs are adequate

to address student needs in a manner which appears reasonably connected to the desired output of competitiveness among all students in a broad array of society's economic, political and social activities." Id. As stated earlier, the Commissioner finds that T&E requires what is set forth in N.J.S.A. 18A:7A-1 et seq. and N.J.A.C. 6:8-1 et seq. and that those requirements are being provided. Since he finds no violation under the Thorough and Efficient Clause of the New Jersey Constitution, he cannot agree with the ALJ's comparison of the T&E and equal protection proofs wherein he states: "(t)he equal protection question, however, explores the State's justification to perpetuate these disparities." I.D. at 562. While the Commissioner recognizes that educational differences exist, he has not found, as did the ALJ, that such expenditure variations are evidential of a failure to provide a thorough and efficient education. Moreover, since the Commissioner rejects the ALJ's heightened standard of review, he finds no reason to respond to the ALJ's search for "an appropriate governmental interest suitably furthered by the differential treatment involved" (id.), since that is an intermediate scrutiny inquiry.

However, the Commissioner has borne in mind the Abbott Court's directive to offer clarification of "the application of equal protection principles to effectuate educational rights" (Abbott, supra at 295-6) while recalling, too, the Robinson I admonition that equal protection must have only limited application to a funding challenge. Thus, the Commissioner has considered carefully those issues related to "actual educational achievement, the achievement's connection to school funding, the funding's connection to property taxes, the taxes' connection to local government autonomy, and the autonomy's importance***." Id. at 296.

In balancing these factors, the Commissioner has considered whether the State funding formula as applied is rationally related to a legitimate State purpose, that is, providing a thorough and efficient education via a shared financial burden borne by the State in conjunction with each municipality while encouraging participation in and control by the local districts. He finds that home rule and local fiscal management are the laudable hallmarks of local school districts which must be balanced against the differences in funding and programming which may exist. He further believes that so long as the Court can find that local school districts are a rational means by which the operation and funding for T & E education can be accomplished, there is a sound basis for permitting such differences to exist.

Applying these standards to a concerted examination of the record in terms of the State interest in local control, the Commissioner believes firmly that the finance mechanism does not generate more inequality than is required by that interest. Because the Commissioner is convinced that the funding formula is rationally related to a legitimate State purpose, he concludes that plaintiffs have not borne the burden of proving that they suffer a deprivation

of educational opportunity significant enough to deny them equal protection, namely, "the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." Abbott, supra at 283.

Last, in reviewing the ALJ's conclusion that plaintiffs have failed to demonstrate racial motivation under the Law Against Discrimination (see I.D. at 571-573 and discussion in this decision which follows), the Commissioner finds implicit the conclusion that plaintiffs have likewise failed to demonstrate either invidious discrimination, as defendants have charged plaintiffs must, or discriminatory impact under an equal protection analysis. The ALJ states on page 573 of the initial decision that:

> I also do not agree with plaintiffs that "a violation of the equal protection clause is [automatically] *** a violation of the [Law Against Discrimination]." The equal protection proofs are not based on discrimination against a "suspect" class.

The Commissioner agrees. However, the ALJ based his conclusion that there was a breach of the Equal Protection clause on his belief that there are expenditure or program inequalities proved by plaintiffs that cannot be justified by the State interest involved. Because the Commissioner has found that a thorough and efficient education is not lacking and because the ALJ himself agrees that plaintiffs have failed to make a racial discrimination claim, the Commissioner dismisses as being without merit plaintiffs' arguments made in reliance upon the equal protection clause. He does so relying on the language of the United States Supreme Court in Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 265, 97 S. Ct. 555 (1977), wherein the Court stated:

> [p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.
> (Arlington Heights, 429 U.S. at 265)

See also Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 392 (1944) wherein the U.S. Supreme Court explained the standard of review for equal protection claims brought against the State:

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.

Thus, the Commissioner dismisses as being without merit plaintiffs' claims of discriminatory impact under the Equal Protection clause. As discussed at greater length later in this decision, this case is not a racial school desegregation case. However, the Commissioner agrees with the ALJ that plaintiffs have failed in their burden of proving racial discrimination under the Law Against Discrimination. He thus finds inapposite any argument that the State either invidiously or through an impact theory has created or sustained systematic racially based discrimination.

As to plaintiffs' Law Against Discrimination claim, the Commissioner has reviewed their exception averring that:

> A VIOLATION OF THE LAW AGAINST DISCRIMINATION SHOULD BE FOUND, BASED ON PROOF OF THE DISCRIMINATORY IMPACT OF CHAPTER 212. (emphasis in original) (Plaintiffs' Exceptions at 19)

Initially, the Commissioner notes defendants' exception to consideration of this issue, claiming

> The Law Against Discrimination, N.J.S.A. 10:5-1 et seq. is not a proper issue in this case since a review of the pleadings indicates that this basis of relief was not pleaded by the plaintiffs. Additionally, the prehearing order does not contain the incorporation of this issue as a part of this litigation.***
> (Defendants' Exceptions at 9)

Defendants further argue that this issue is not part of the litigation because it exceeds the scope of the Abbott remand. Further, defendants contend fundamental fairness requires exclusion of this claim because formal notice was not afforded them until after the close of the hearing, thus depriving them of a full opportunity to defend against this issue.

The Commissioner respectfully calls this exception to the Court's attention and would leave to the Court its prerogative to determine whether it will consider the exception and arguments predicated upon N.J.S.A. 10:5-1 et seq. However, because the Court may decide the Equal Protection Clause claim differently and because the ALJ did address plaintiffs' arguments made in reliance on the Law Against Discrimination, albeit without considering whether the matter was properly pled, the Commissioner will consider the merits of the arguments advanced.

It must again be stated that the Commissioner has concluded, in the course of this decision, that no violation of the Equal Protection Clause of the New Jersey Constitution, Article I, paragraph 5 has occurred in plaintiffs' districts. As is noted in the previous discussions, the ALJ distinguished the right to an education under New Jersey's Constitution from plaintiffs' claim of

racial discrimination under the Equal Protection Clause. The Commissioner agrees with the ALJ's rejection of plaintiffs' racial discrimination claim under Article I, paragraph 5. The Commissioner is in accord with Judge Lefelt's finding that "[n]o proof has been presented that relates expenditure disparities causally to minority status." I.D. at 139. Moreover, as mentioned earlier, the Commissioner agrees with the ALJ's conclusion found in the section of the decision dealing with the Law Against Discrimination, wherein he states:

> I also do not agree with plaintiffs that "a violation of the equal protection clause is [automatically]***a violation of the [Law Against Discrimination]." The equal protection proofs are not based on discrimination against a "suspect" class.*** (I.D. at 573)

The proofs and standards of review under Equal Protection are different from those required to meet a prima facie case under the Law Against Discrimination. The Commissioner finds inapposite the proofs and standards plaintiffs advance predicated on the New Jersey case law developed from school desegregation law such as Jenkins v. Township of Morris School District, 58 N.J. 483, 501 (1971) and Booker v. Board of Education, Plainfield, 45 N.J. 161 (1965). Indeed, plaintiffs admit they "do not seek a remedy to segregation per se.***" (Plaintiffs' Exceptions at 20) If, instead, it is plaintiffs' intention to argue, as they state in exceptions, that "***the funding formula effects discrimination by its inequitable impact on segregated, minority districts" (id.) relying on the Law Against Discrimination, the Commissioner must pose to the Court whether the Law Against Discrimination is intended to resolve such a situation. While broad in jurisdiction over discrimination claims, the Law Against Discrimination is not intended to cover all situations where discrimination might arise. For example see U.A.W. et al. v. Tp. of Mahwah, 119 N.J. Super. 389, 392 (App. Div. 1972) (*** the jurisdiction vested in the division [on Civil Rights] is over particular acts of discrimination", and is not intended to cover such areas as zoning discrimination.)

Moreover, in New Jersey, the Law Against Discrimination has most commonly been advanced in employment discrimination cases or handicapped discrimination cases. Even if analyzed under the Law Against Discrimination there is no question raised that the children in this matter are denied access to schools. Further, the Commissioner's research reveals no instance where the Law Against Discrimination in New Jersey has been applied to a school setting predicated upon an argument of racial isolation. Moreover, this case does not represent such a factual contest. Rather, the matter concerns the totality of components necessary for funding a thorough and efficient education for the State's public schools.

Consequently, because plaintiffs did not formally plead the Law Against Discrimination as a means of redress at the outset of the case (see Defendants' Exceptions and Reply Exceptions on this point, ante) thus failing to provide direction in their reliance upon N.J.S.A. 10:5-1 et seq., and because they fail to advance any proofs under the proper standards of review applicable to the Law Against Discrimination, the Commissioner must question the appropriateness of plaintiffs' advancing this body of law in support of any position relative to this case. Accordingly, the Commissioner cannot recommend to the Court a finding sustaining plaintiffs' claim under the Law Against Discrimination.

CONCLUSION

Accordingly, for the reasons set forth in this decision, the Commissioner believes, contrary to the conclusion of the ALJ, that the Court should find and determine that the children of the State of New Jersey are receiving or can receive a thorough and efficient education under the existing law. The Commissioner recommends that the Court find that Chapter 212, as applied, represents an "eminently reasonable and constitutional" legislative enactment. Defendants' Exceptions at 93.

COMMISSIONER OF EDUCATION

S.Ct. #22,763
EDU #5581-85
C # 37-89
SB # 12-89

RAYMOND ARTHUR ABBOTT, ET AL., :

PLAINTIFFS, :

V. : STATE BOARD OF EDUCATION

FRED G. BURKE, ETC., ET AL., : DECISION

DEFENDANTS. :

:

Remanded by the Supreme Court, July 23, 1985

Decision on remand by the Commissioner of Education, February 22, 1989

Decision on motion by the State Board of Education, March 23, 1989

For the Plaintiffs, Education Law Center, Inc. (Marilyn J. Morheuser, Esq.. of Counsel) (David C. Long, Esq., Elaine M. Song, Esq. and James J. McGuire, Esq., on the brief)

For the Defendants, Peter N. Perretti, Jr., Attorney General (Deputy Attorneys General Alfred E. Ramey, Jr., David E. Powers and E. Phillip Isaac, on the brief)

INTRODUCTION

This case was initiated by plaintiffs as a systemic challenge to the State's plan for funding public education as it has operated since enactment of the Public School Education Act of 1975 (hereinafter the "Act" or Chapter 212"). Plaintiffs sought relief in the form of declaratory judgment that the statutory system for financing public education as applied violated the education clause of the New Jersey State Constitution and the equal protection guarantees of the New Jersey and United States Constitutions.[1]

[1] In these proceedings, Plaintiffs abandoned their claim under the United States Constitution. However, in post-hearing briefs filed with the Administrative Law Judge, plaintiffs raised an additional claim under New Jersey's Law Against Discrimination.

However, as recognized by the New Jersey Supreme Court in remanding the matter to this agency, this case is not solely a funding case. As evidenced by the claims and defenses asserted in these proceedings and by the proofs offered in their support, virtually all aspects of the education system are implicated in this matter. Although the New Jersey Supreme Court has settled that the Public School Education Act of 1975 is, facially, a constitutionally appropriate vehicle for assuring the provision of a thorough and efficient system of public education, plaintiffs have presented a challenge to the basic premises upon which that statutory system rests, and have called into question the adequacy of the substantive educational standards, as implemented, by which the sufficiency of the fiscal resources afforded by the funding provisions of the Act is to be judged.

As reflected in the scope of the proofs offered by the plaintiffs, the potential breadth of this case is even greater. As we have reviewed those proofs that relate to more generalized social ills, we have been sensitive to the fact that they raise fundamental social policy issues. We are both well aware of the educational problems caused by poverty and cognizant of our responsibility to assure the provision of a constitutionally appropriate education to all children of this State. However, we are mindful that the State Board of Education does not possess the expertise to decide how best to ameliorate the far-ranging social ills to which plaintiffs' proofs point, and that neither the Legislature nor the State's Constitution have conferred on us this responsibility. Nor do we believe that the Court has charged us with this task. Rather, although this case requires us to bring our expertise to bear in an examination of virtually all aspects of the education system, the questions to be resolved must relate solely to the education system.

As charged by the Court, it is our responsibility to apply our educational expertise to consideration of the parties' proofs relevant to their constitutional claims and defenses, and to resolve such administrative issues as emerge as we examine those aspects of the education system, both fiscal and non-fiscal, that are the subject of this litigation. Abbott v. Burke, 100 N.J. 269 (1985) (hereinafter "Abbott"). As set forth in this decision, based on our consideration and evaluation of the proofs, we, like the Commissioner, have concluded that plaintiffs have failed to prove that the system for financing public education established by the Public School Education Act of 1975, as it has operated, has created or caused to exist significant educational disparities between "property poor" and "property rich" districts such that urban children have been deprived by operation of the system of the educational opportunity required to enable them to participate and compete in our society.

Our findings with respect to whether plaintiffs in this case have demonstrated a systemic failure of our State's education system may assist the Court in deciding this case. However, we do not believe that these findings alone can discharge our

responsibility. From our perspective, this case is not ultimately about who wins or loses a lawsuit, but rather about which methods of providing educational opportunities will best ensure that every student in this state in fact receives the benefits of a thorough and efficient education. We therefore have carefully analyzed the proofs not only in order to evaluate plaintiffs' specific claims, but also to assess any weaknesses in the existing system.

We have concluded that plaintiffs have not demonstrated a systemic failure of our education system to provide a thorough and efficient education. Nor have they shown that the failure of any district to fulfill its delegated responsibilities has been due in significant part to the funding provisions of the Public School Education Act of 1975. We have not been able to ignore, however, that the districts in which plaintiffs reside, with the exception of Irvington, as judged under the educational standards that we have adopted, are not yet providing the educational opportunity that was anticipated when the Public School Education Act was enacted by the Legislature. Consequently, for the children in these districts, the constitutional promise has not yet been fulfilled.

We believe that it is our responsibility to insure that this agency takes all steps within its power to correct these particular failures, and, equally important, to insure that such failures are not repeated again. Toward that end, we have in this decision directed specific administrative actions to eliminate particular weaknesses in the system that have been revealed by this litigation. Implementation of our directives is as important as the findings that provide the basis for those directives. In order that the full potential of the system adopted by the Legislature may be realized, we accept our responsibility to insure that implementation.

These proceedings have also revealed weaknesses that we believe call for legislative action. We recognize that it is not within our authority to direct such action. Nor would the options that we might select in the context of these proceedings necessarily be those that would most effectively address the problems we have identified. We have, however, specified in this decision those weaknesses which require the attention of the Legislature if we are to improve the ability of the education system to assure that the constitutional promise, as the meaning of that promise evolves, will in fact be fulfilled for children in all districts, and have set forth our recommendations as to how these problems may best be addressed. In so doing, we accept our responsibility as the agency head of the Department of Education to insure that these issues are in fact addressed through the legislative process and that they are resolved in the best interests of the children in this state.

I. THE BACKGROUND OF THIS LITIGATION

In Robinson v. Cahill, 69 N.J. 449 (1976) (hereinafter "Robinson V"), the New Jersey Supreme Court held that the Public

School Education Act of 1975 was, facially, constitutional. The Court, however, recognized that

> ...whether [the Act] may or may not pass constitutional muster as applied in the future to any particular school district at any particular time must await the event. Only in the factual context then presented and in the light of circumstances as they then appear could such a determination be made.

Robinson V, supra, at 455.

Although the claims presented by plaintiffs in this case are systemic, Abbott presents the challenge anticipated by the Court in Robinson V.

The plaintiffs in this case are children residing in and attending school in four school districts: Camden, East Orange, Irvington and Jersey City. In initiating this case, they claimed that New Jersey's school financing scheme, L. 1975, c. 212, as amended, deprived them of their constitutional right to a thorough and efficient education because 1) disparities between the educational resources of "property rich" and "property poor" districts were greater than the disparities existing under the prior legislation, 2) the present resource allocation system failed to visibly gear educational resources to educational factors, 3) the State's system of financing was not visibly geared to providing the resources and educational opportunities required to achieve the legislatively defined major elements of a thorough and efficient education and 4) the State's system of funding did not provide such resources and opportunities. See Complaint, at 2. They also charged that in violation of the equal protection guarantee of the New Jersey State Constitution, the State defendants had knowingly denied them equal educational opportunity by reason of their race or national origin, their families' income levels, their residency, and the characteristics of their school districts. Id.

Defendants conceded the existence of disparities in terms of money expended on public education. Defendants contended, however, that student achievement is affected almost entirely by factors that are not financial in nature.

Defendants asserted that the plaintiffs' school districts had sufficient financial resources available to them to provide their students with a thorough and efficient education as measured by the regulatory standards established under the statutes by the Department of Education, and affirmatively claimed that any existing inequalities in educational opportunity were not caused by the Act's fiscal provisions, but rather by the failures of the administrations in the plaintiffs' districts. Defendants further asserted that any educational deficiencies could be corrected by N.J.S.A. 18A:7A-14, -15, and -16. Insofar as there were disparities in available

financial resources that did not create violations of the education clause, defendants maintained that associational rights and principals of home rule justified retaining the current level of local control over school funding as embodied in the Act.

Abbott presented the Court with the narrow issue of which tribunal should consider "the evidence relevant to the parties' contentions and the facts of the heart of the controversy." Abbott, supra, at 278. However, recognizing the scope and complexity of the matter, the Court found that the merits could not be ignored. Id.

The Court acknowledged that the parties are in conflict as to the basic premises upon which this case will ultimately be decided. Abbott, supra, at 282-83. Although not providing specific guidance as to how this conflict is to be resolved, the Court recognized that the principles enunciated in its prior decisions must provide the framework for evaluating the claims and assessing the voluminous proofs that have been presented in these proceedings. E.g., id. at 282.

As recounted in Abbott, the meaning of the constitutional promise of the education clause and the relationship between fiscal support and the substance of that mandate has received continued attention from the Court. Id. at 290-93. In Robinson v. Cahill, 62 N.J. 473 (1973) (hereinafter "Robinson I"), the Court was forced to consider the meaning of the constitutional guarantee of a thorough and efficient education in the absence of any definition by the State of the educational opportunity that was mandated by the education clause. Without such definition or any other viable criteria for measuring compliance with the constitutional mandate, the Court had no alternative but to decide whether the statutory schemes before it fulfilled the constitutional mandate solely on the basis of discrepancies in the dollar input per pupil. Robinson I, supra, at 515-16.

In contrast, the Court in Robinson V addressed the meaning of the constitutional promise of the education clause on the basis of a legislative proposal that "at once [sought] to define the constitutional promise, identify the components of which it consists, establish a procedural mechanism for its implementation and afford the financial means necessary for its fulfillment." Robinson V, supra, at 456. In this context, the Court clarified that, despite the fact that its examination of the education system had thus far been purely in financial terms, it had been mindful throughout the protracted litigation that "money is only one of a number of elements that must be studied in giving definition and content to the constitutional promise of a thorough and efficient education." Id. at 455 (emphasis added).

Thus, the Court in Robinson V considered the fiscal provisions of the statutory scheme before it "as part of the whole proposal," id. at 463, stating that they were

> to be judged as adequate or inadequate depending upon whether they do or do not afford sufficient financial support for the system of public education that will emerge from implementation of the plan set forth in the statute.

Id. at 464 (emphasis added).

The claims and defenses presented here and the voluminous proofs offered in their support highlight the import of the Court's statement. Ultimately, it is the Court that must judge whether plaintiffs have proven that the fiscal provisions of the Public School Education Act of 1975 have failed to afford sufficient financial support for the system of public education that has emerged from implementation of the statutory scheme. Given the claims and defenses presented here, however, such judgment necessarily implicates questions relating to the adequacy of the substantive educational standards that have been adopted to implement the statutory plan and the operation of the procedural mechanisms designed to guarantee that those standards are met. As reflected in Abbott, ultimate resolution of those questions must lie with the principles enunciated by the Court in its prior decisions wherein it considered the meaning of the constitutional promise of the education clause and the application of equal protection principles in the context of public education.

Thus, although we are mindful that we do not have jurisdiction to decide the ultimate constitutional issues, we have paid careful attention to the decisions of the Court in the antecedent litigation as we have assessed the proofs offered to support plaintiffs' contentions that they suffer educational inequities and that these inequities are derived, in significant part, from the funding provisions of the 1975 Act. Abbott, supra, at 296.

II. THE PROOFS

As presented in these proceedings, plaintiffs' ultimate claims with respect to the education clause and the equal protection guarantees of New Jersey's Constitution rest on their contentions that: 1) property wealth disparities between "property poor" districts and "property rich" districts are great and have grown since enactment of Chapter 212, 2) the funding system for public education relies on widely disparate local property wealth, 3) there is a strong relationship between a district's property wealth and its expenditures, 4) the gap in expenditures between "property poor" districts and "property rich" districts has grown, 5) disparities in expenditure have resulted in disparities between "property poor" districts and "property rich" districts with respect to program offerings; size of classes; experience, education and salaries of teaching staff; and facilities, 6) students in "property poor" districts have demonstrably high educational needs, 7) the system does not provide sufficient resources to meet those demonstrably

high needs and that, therefore, the State is failing to provide the resources to prepare its poor urban children to compete in and contribute to the society entered by its advantaged children. See Complaint, at 2; Plaintiff's Opening Statement, at 3-4.

We have carefully examined the proofs offered by plaintiffs in support of their contentions and those offered by defendants to counter those contentions in order to ascertain whether plaintiffs' contentions are supported by a preponderance of credible evidence. As follows, we find that plaintiffs have failed to prove their case.

A. EDUCATIONAL DISPARITIES

In support of their claims of educational disparity, plaintiffs have offered proofs to provide a basis for comparing various school districts in the state. The essence of plaintiffs' case rests on the validity of those comparisons for purposes of showing that students in the "property poorest" school districts receive a "constitutionally-inadequate" education. See Abbott, supra, at 284. We have found that the proofs offered by plaintiffs for purposes of such comparisons fail to provide a basis upon which such conclusion can be drawn.

As delineated above, plaintiffs ultimate constitutional claims rest on their contentions of disparity between "property poor" and "property rich" districts. The meaning of these classifications is to be found in the litigation antecedent to this case. As defined in that litigation, "property poor" districts are those districts whose actual equalized property valuations are below the guarantee level provided by the statutory scheme, while "property rich" districts are those whose actual equalized valuations are above the guarantee. Robinson v. Cahill, 118 N.J. Super. 223 (Law Div. 1972). See Robinson V, supra, at 479-80 (Conford, P.J.A.D., concurring and dissenting). By casting their claims in terms of these classifications, plaintiffs undertook to prove that significant educational disparities exist between those districts with actual equalized property values below that provided by the guaranteed tax base established by the Public School Education Act of 1975, and those with actual equalized valuations above the guarantee.

The proofs in this case are insufficient to draw such conclusion. Plaintiffs submitted demographical and statistical data relating to seven urban areas: Camden, East Orange, Irvington, and Jersey City, the four districts in which plaintiffs reside, plus Paterson, Newark, and Trenton. Through these proofs, plaintiffs sought to show generalizable conditions in "poor urban districts." Plaintiff's Proposed Findings of Fact, #3-#55. See Roper, 10/6/86, T140:3-9. Plaintiffs' proofs concerning educational programming, however, focus primarily on Camden, East Orange, Jersey City, Irvington and Paterson as compared with South Orange-Maplewood, Montclair, Moorestown, Cherry Hill, South Brunswick, Livingston,

Scotch Plains-Fanwood, Millburn, Princeton, and Paramus (hereinafter "comparison districts"). In addition, plaintiffs offered state-wide statistical data relating educational conditions such as enrollment, HSPT passage rates and dropout rates. P-4, P-285, P-337, P-279, P-239, P-315.

In that there are 578 operating school districts in the State,[2] 336 of which had actual equalized valuations in 1984 that were below the guarantee, we find that the proofs submitted by plaintiffs do not provide a sufficient basis for concluding that significant disparities in educational programming exist between districts below the guarantee as compared to districts above the guarantee. In reaching this conclusion, we cannot ignore that plaintiffs have not included any proofs relating to rural districts, see Robinson I, supra, at 245, and have not established that the districts they have selected for comparison are typical of districts below and above the guarantee.

The districts selected for comparison fall into two broad categories: urban districts and suburban districts. However, the record does not include proofs concerning all urban districts as compared to all suburban districts nor establish that the education provided by the districts selected is typical of that provided by either urban and suburban districts generally, or of urban districts below the guarantee and suburban districts above the guarantee. See, e.g., proofs relating to West New York and New Brunswick.

We find that plaintiffs have not established that the seven cities upon which they focus are in fact "proto-typical" of urban areas in the state or of urban areas below the guarantee. Nor have they demonstrated that the particular disparities in educational programming to which they have pointed typically exist between urban areas below the guarantee and suburban areas above it.

We have, however, assessed the proofs plaintiffs have submitted to show disparities in educational programming for the purpose of evaluating whether those proofs show educational disparity between plaintiffs' districts and the "comparison districts" such as to demonstrate that the students in plaintiffs' districts have been deprived by the operation of the Public School Education Act of 1975 of the equal opportunity to obtain an education such as is needed to equip them for their roles as citizens or as competitors in the market place. See Robinson I, supra, at 515.

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2 There are a total of 616 districts in the state, including 10 Educational Services Commissions, 4 County Special Services School Districts and 24 non-operating school districts.

Plaintiffs' proofs with respect to educational programs show that selected programs are offered in particular ways in particular comparison districts and that these specific programs are not offered or are provided differently in particular plaintiff districts. Specific program offerings as to which evidence has been submitted are limited and primarily relate to program areas such as art, music, physical education, computer education, foreign languages, vocational education, and gifted and talented programs. Plaintiffs also offer proofs with respect to programs that are beyond the scope of the education clause, such as pre-kindergarten programs. The record, however, includes very little evidence concerning the courses and programs offered that are part of the core curriculum.

Not only do plaintiffs' proofs fail to provide an accurate picture of the education offered by districts in the state as a whole, but the selectivity of the proofs relating to educational programming fails to provide a complete picture of the education offered by the districts selected for comparison purposes for this litigation. In focusing on programs that particular comparison districts may offer as compared with those not offered to the extent or in the manner desired by plaintiffs in their districts, the proofs offered by plaintiffs do not permit an assessment of the overall educational programs that are actually offered by plaintiffs' districts.

Further, plaintiffs have not shown that their districts do not offer such programs as art, music and foreign language, but merely that they are not offered to the extent, in the manner or with the variety that plaintiffs would deem adequate. As detailed in the Commissioner's decision, plaintiffs have not shown that art, music and physical education programs are not provided at the elementary and secondary levels, that library skills are not taught, or that any district has failed to provide either science instruction at the elementary level and secondary level or to offer foreign language instruction. Commissioner's decision, at 630-33. Similarly, plaintiffs have not shown that, with the exception of Jersey City, gifted and talented programs are not offered in any district as required by regulation. Commissioner's decision, at 631. Nor, as set forth in the Commissioner's decision, have they shown that facilities' deficiencies that exist in their districts have in fact precluded those districts from offering substantively adequate educational programs. Commissioner's decision, at 632-33.

Moreover, while pre-kindergarten and all day kindergarten programs may be beneficial, and while it might be desirous to eliminate any limitation on the availability of the number of students that can be accommodated in these programs, plaintiffs have not shown that their districts can not offer such programs and, in fact, the record shows that some do provide such programs. Commissioner's decision, at 634-638. Nor have plaintiffs shown that the public schools of all of the "comparison districts" offer pre-kindergarten programs and all day kindergarten programs, or that

demand for placement in such programs where offered by the "comparison districts" does not exceed the number of spaces available.

Likewise, plaintiffs have not shown that there are in fact significant disparities between the quality of the teaching staffs in plaintiffs' districts and in the comparison districts, or between the staffs of "property poor" and "property rich" districts, or between the staffs of urban and suburban districts. In this respect, we find that variations in the salaries offered by the school districts of this state, the percentage of teachers who hold advanced degrees, and the experience level of staff have not been shown to correlate significantly with the quality of the instruction provided by teaching staff members in the public schools of this state.

Under the current system, the quality of the teaching staff in all districts in New Jersey is ensured by N.J.A.C. 6:11-1 et seq., which specify the standards for teacher preparation required for certification, and N.J.A.C. 6:28-3.3, which insures that all staff members are appropriately certified so as to qualify for their employment as teaching staff members as mandated by statute. See N.J.S.A. 18A:26-2. Plaintiffs have not shown the system is failing to operate so as to insure that these standards are met in all districts, including plaintiffs' districts.[3]

B. THE SIGNIFICANCE OF EDUCATIONAL DISPARITIES

In assessing the significance of the educational disparities that plaintiffs have shown, we are mindful that the Constitution does not demand the same means of instruction for each student. Abbott, supra, at 291; Robinson I, supra, at 514. We are equally mindful that the common rights of the students in all districts must be assured. Abbott, supra, at 290; Robinson I, supra, at 515; Landis v. Ashworth, 57 N.J.L. 509, 512 (Sup. Ct. 1895).

Plaintiffs challenge the sufficiency of the State's educational standards with respect to whether those standards provide such education as to equip the plaintiff students for their roles as citizens and competitors in the market place. Robinson I, supra, at 515. It is their view that the sufficiency of educational opportunity for constitutional purposes must be measured by programs offered by the comparison districts, taken as a whole, and the manner in which the comparison districts provide those programs. Plaintiffs have, however, failed to establish that State educational

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3 We note that when monitored, Jersey City and Newark were deficient with respect to staff certification. We further note that, as subsequently discussed, these districts are currently subject to the corrective process as a result of this deficiency, as well as others.

standards are not adequate to assure that students attending public school in any district meeting those standards is provided an education such as to equip them to participate as citizens or to compete in the market place.

In this respect, we emphasize that our current statutory system as implemented by regulation confers upon each local district considerable discretion to choose the particular educational programs it judges best meet the particular needs of its students. The system, however, requires that the options selected by any district must be those which provide a thorough and efficient education to its students, including breadth of educational programming. See Commissioner's decision, at 628-29. Although plaintiffs contend that such programs as computer education and such class sizes and staff ratios as are present in the "comparison districts" should be mandated, plaintiffs have not demonstrated that these particular programs or ratios are educationally necessary in order to provide a thorough and efficient education. Commissioner's decision, at 630-632.

We recognize that what is educationally necessary in order to provide a thorough and efficient education is not static. See Robinson I, supra, at 515. Rather, the very concept of a thorough and efficient education is an evolving concept. Robinson V, supra, at 457-58. This is reflected in the State's educational standards as they have evolved since the Public School Education Act was originally enacted.

While continuing to afford districts considerable discretion in determining how best to meet the educational needs of their students, the statutory scheme has been progressively strengthened since enactment of the Public School Education Act of 1975 so as to provide greater definition of what constitutes a thorough and efficient education and further delineation of the relative obligations of the Department of Education and district boards in insuring that the Constitution's mandate is fulfilled. E.g., L. 1976, c. 97, sec. 1 (1976), N.J.S.A. 18A:7A-2(b)(3)(b) (Legislature specifically accepts responsibility to define uniform statewide standards of pupil proficiency in basic communications and computational skills); L. 1976, c. 97, sec. 2 (1976), N.J.S.A. 18A:7A-6 (State Board specifically required to establish uniform statewide standards of pupil proficiencies in basic communications and computational skills); L. 1979, c. 241, sec. 10 and 11 (1979). N.J.S.A. 18A:7C-1 (Commissioner with approval of State Board required to establish program of standards for graduation from secondary school); L. 1979, c. 241, sec. 2, N.J.S.A. 18A:7C-2 (local boards required to establish standards for graduation pursuant to guidelines established by Commissioner); L. 1979, c. 241, sec. 6 N.J.S.A. 18A:7C-6 (State graduation proficiency test shall be administered to all 9th grade students and all other high school students who had previously failed to demonstrate mastery of its requirements).

Likewise, the substantive educational standards that districts are required to meet in order to achieve certification have become more rigorous. N.J.A.C. 6:8-1 et seq. (as adopted January 5, 1987); N.J.A.C. 6:8-7.1 (as amended April 5, 1989).

The effect of these legislative and administrative enactments has been both to provide further substance to the definition of a thorough and efficient education and to hold each district accountable for providing such education to its students.

We find that plaintiffs have not demonstrated that the State's educational standards as presently implemented are inadequate to assure that each local district fulfills its delegated responsibility to provide a thorough and efficient education to its students. In this respect, we recognize that as the State's educational standards have evolved, greater emphasis has been placed on ensuring that New Jersey's children are proficient in basic skills. See N.J.S.A. 18A:7A-6, -7, -11 (as amended 1976); N.J.S.A. 18A:7C-6 (1979). This emphasis is reflected in the regulations, which both establish standards and require remediation for any pupil who does not achieve those standards. See N.J.A.C. 6:8-6.1; N.J.A.C. 6:8-7.1(b); N.J.A.C. 6:8-4.3(7)(i) and -4.3(8).

We further recognize that for some districts, including plaintiffs' districts, concentration on basic skills has been required in order that their students may achieve the required standards of proficiency. We concur with the Commissioner that although a full curriculum must be provided in all districts, some impact on the breadth of programs the district may offer is both unavoidable and necessary where significant numbers of students require remediation. Commissioner's decision, at 640-42. We therefore reject plaintiffs' contentions that concentration on basic skills in their districts or the number of students enrolled in compensatory education programs shows educational disparity such that students in those districts are deprived of a thorough and efficient education. To the contrary, not only is proficiency in basic skills a prerequisite to advanced education, but mastery of basic skills is essential to functioning politically, economically and socially in our society.

Nor have plaintiffs shown that the monitoring system does not operate so as to identify deficiencies that exist in the State's school districts. Commissioner's decision, 765-778. See Scambio, 2/9/87, T39-40, T41-42. In this respect, we take notice that the MANUAL FOR THE EVALUATION OF LOCAL SCHOOL DISTRICTS (revised October 1988) is both detailed concerning the documentation that must be submitted and reviewed, and ensures classroom visits and staff interviews.

We find that the State's standards as implemented provide for a thorough and efficient education, and that districts meeting those standards, as evaluated under the monitoring system, are presumptively providing a thorough and efficient education to their students. Notwithstanding this conclusion, as a result of these

proceedings, we have been pursuaded that, although our system has been effective in assuring the provision of a thorough and efficient education, certain improvements would provide more direction to local districts which would encourage each district to realize the maximum potential provided for by the Public School Education Act.

It is our view that effective implementation of State and local educational goals established pursuant to N.J.S.A. 18A:7A-5 is central to the effectiveness of our system. We find that the State goals established by N.J.A.C. 6:8-2.1 are goals appropriate to providing all children with an educational opportunity which will prepare them to function politically, economically and socially in our society. See N.J.S.A. 18A:7A-4. We believe, however, that our monitoring regulations can more effectively insure that each district, in fulfilling its delegated responsibilities, will achieve those goals.

In this regard, we have carefully examined N.J.A.C. 6:8-4.3, which requires that districts develop a minimum of three educational objectives relating to standards of pupil achievement and the district's action plans. We find that this regulation does not sufficiently guarantee that each district will in fact develop objectives directly related to achieving, not just some, but all State and district educational goals. It is our conclusion that our regulations should expressly require that such educational objectives be developed by each district, thereby providing each district with an outline of an educational plan that will enable it to meet all State and district educational goals. We therefore direct the Commissioner to propose amendments to the rules that will require each district to develop educational objectives in sufficient number and of such quality as necessary to form the basis of a complete educational plan that will enable each district to meet all State and district educational goals.

Further, while plaintiffs have not shown a systemic failure of the evaluation process to, in fact, monitor adequately for curriculum, we have long believed that the monitoring system should be strengthened to expressly provide for more attention to curriculum and to include more outcome standards with respect to curriculum.

Toward this end, we have adopted regulations proposed by the Commissioner that will establish the core proficiencies that must be provided for by the curriculum of each district. See N.J.A.C. 6:8-1.1 (amended April 5, 1989); 6:8-4.3 (amended April 5, 1989); 6:39-1.1 et seq. (amended April 5, 1989). We recognize that further assessment is required to measure the effectiveness of these measures, and, in adopting these regulations, we have guaranteed that such assessment will be made. N.J.A.C. 6:39-1.1 et seq. (amended April 5, 1989).

C. THE CORRECTIVE PROCESS

In assessing the significance of the educational disparities that plaintiffs have shown between plaintiffs' districts and the "comparison districts," we take notice that, although 98% of the school districts in the state have achieved certification, six out of the seven school districts in the urban areas upon which plaintiffs focused were not certified as meeting State standards at the time of hearing,[4] and that they are currently failing to meet those standards. Although we have found that the particular disparities that plaintiffs have shown are not of such educational significance as to demonstrate that the students in plaintiffs' districts are deprived of a thorough and efficient education, the fact that these districts are not certified as meeting State standards means that, presumptively, they are not providing their students with a thorough and efficient education.

We acknowledge that the responsibility of this agency is not limited to establishing the educational standards that must be met by all districts. Rather, we have also been entrusted with the responsibility of assuring that each district will in fact meet those standards. See Robinson V, supra, at 458-59, 460-61; Robinson I, supra, at 508-9, 513. Consequently, it is our responsibility to insure that the statutory system as implemented operates not only to identify deficiencies, but also to assure correction in each district where such deficiencies have been identified through the evaluation process. See Robinson V, supra, at 459-60; Robinson I, supra, at 513.

Given the scope of the evaluation process, see N.J.A.C. 6:8-1 et seq., a failure to meet the standards required for certification by the State Board of Education does not necessarily mean that the substance of the district's educational program is not such as to equip its students to participate and compete in society. However, the particular deficiencies that were identified in the school districts in six of the seven urban areas focused on by plaintiffs, although varied, were of such nature that by definition significant educational disparities existed between these districts and those meeting certification standards, including the "comparison districts." See McCarroll memo of March 30, 1989.

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4 We take notice that, as of March 30, 1989, the following districts were not certified: Eagleswood, East Orange, Hunterdon Central, Passaic City, Southern Gloucester Regional, Trenton, Asbury Park, Camden, Hoboken, Jersey City, Maurice River, Newark, Orange, Paterson, Pleasantville, Union City and Weehawken. McCarroll memo of March 30, 1989. As evaluated under the monitoring process, all other districts in the state have achieved certification.

That, as evaluated under the monitoring process, these six districts have significant educational deficiencies, such as to indicate that they may not be properly fulfilling their delegated responsibility to provide a thorough and efficient education to their students, does not invalidate the public school education system. It does, however, call for an assessment of whether the procedural mechanisms that provide for the correction of the deficiencies identified by the monitoring process are operating with respect to these particular districts so as to assure that these districts will provide their students the educational opportunity guaranteed them by the education clause.

Like the substantive educational standards established pursuant to the Public School Education Act of 1975, the statutory and regulatory mechanisms for insuring that deficiencies identified through the monitoring process are corrected have been greatly strengthened. L. 1987, c. 398 (1988), N.J.S.A. 18A:7A-14, -15; L. 1987, c. 399 (1988), N.J.S.A. 18A:7A-34 through 52; N.J.A.C. 6:8-5.1 et seq. (1987) (amended April 5, 1989).

We take notice that, as a result of the identification of their particular deficiencies, Camden, East Orange, Trenton, Newark, Paterson, and Jersey City became subject to the corrective process as provided by statute and regulation during 1984 and 1985. None of these districts has yet corrected its identified deficiencies so as to have achieved certification. However, the progress of each with respect to its efforts to correct its educational deficiencies has been varied.

Specifically, we take notice that, as indicated by Walter J. McCarroll, Assistant Commissioner, County and Regional Services, Camden is making reasonable progress in correcting its deficiencies so that its Level III status was extended for 1988-89; East Orange has shown significant improvement, although its efforts continue to be closely monitored to determine whether Level III monitoring will be warranted; Trenton is currently in Level II of the corrective process and has been extended; and Level III reviews for Newark and Paterson have been scheduled for fall and spring of 1989 respectively. McCarroll memo of March 30, 1989. Jersey City, which as shown in the record is in Level III, is currently subject to proceedings requiring it to show cause why a State-operated school district should not be established in the district pursuant to N.J.S.A. 18A:7A-34 et seq., and during the pendency of those proceedings is subject to interim measures as set forth in our decision of December 1, 1988. See McCarroll v. Jersey City, decided by Assistant Commissioner Lloyd Newbaker, August 9, 1988, aff'd with modification by the State Board, December 1, 1988.

Plaintiffs have not demonstrated that the corrective mechanisms provided by statute and regulation as they are operating with respect to these districts do not assure that the deficiencies in these districts will ultimately be corrected. Nor have they pointed to a more effective method for correcting these deficiencies.

We find that correction of the particularized deficiencies identified in each of these districts through the monitoring process called for an individualized approach to correcting them, as provided by the current system. The differences in the remedial steps that have been required in each district and the varying success of the efforts of each to correct their deficiencies reinforce this conclusion. Further, while we cannot definitively determine the underlying causes of the failures of these districts solely on the basis of defendants' proofs, those proofs demonstrate that the deficiencies identifed through the monitoring system were to a significant extent related to the quality of administration. We find that given these circumstances, the individualized approach taken by both the statutes and the regulations is not only proper, but necessary. See Robinson V, supra, at 459.

D. ADEQUACY OF FISCAL SUPPORT

As set forth above, we have concluded that plaintiffs have not shown educational disparities of such nature as to demonstrate that, as it has operated, the Public School Education Act of 1975 has systemically failed to assure that all districts in the state offer a level of education such as to enable their students to participate and compete in our society. Furthermore, as set forth below, we find that they have not shown that the fiscal support provided by the State by virtue of operation Chapter 212 has not been sufficient to enable every district to provide a thorough and efficient education.

The proofs relating to the fiscal aspects of this case are voluminous and in some cases highly technical. In many instances, the conclusions to be drawn depend on acceptance of the methodology and the premises that have been brought to bear in the analysis of the raw data.

Like those proofs pertaining to educational disparities, those relating to plaintiffs' contentions of fiscal disparity do not provide a proper basis upon which to draw the conclusions plaintiffs would like. While the raw data underlying the range analysis developed by Dr. Goertz might permit comparison of the actual equalized valuation of those districts above the tax base guaranteed by the State with those below it, and although comparison of the highest range with the lowest indicates that disparity in actual equalized valuation between those districts in the highest range and those in the lowest has grown, neither of these comparisons is of significance under a guaranteed tax base system such as currently exists in New Jersey.

In this respect, the Court's approval of the facial constitutionality of the Act in Robinson V is directly relevant. In passing favorably upon the appropriateness of the basic concept, assuming the system operated to provide sufficient financial support for the system of public education that would emerge from implementation of the Act, the Court established the standard for

judging the sufficiency of the fiscal aspects of the system as applied. See Robinson V, supra, at 464.

1. ADEQUACY OF FISCAL CAPACITY

Quite simply, under a guaranteed tax base (GTB) system, actual property valuation is irrelevant as a measure of fiscal capacity. Rather, the relevant measure is the tax base guaranteed to each district by virtue of operation of the Act. In the cases of plaintiffs' districts, the guarantee has in fact afforded each a tax base above the state average.

A GTB system is intended to increase the fiscal capacity of districts having actual equalized property valuations that are in a given year below the guarantee by raising the tax base of each of these districts to the level of the guarantee, which has been established at a point such as to provide a tax base intended to enable each district to generate adequate fiscal resources to permit each to meet the State's educational goals. N.J.S.A. 18A:7A-18; N.J.S.A. 18A:7A-3. See Robinson V, supra, at 465. Districts having actual equalized property valuation above the guarantee are not limited in their ability to spend more than would be required to meet those objectives, except to the extent that the CAP provisions limit their ability to increase their spending in a given year. N.J.S.A. 18A:7A-25. See Robinson I, supra, at 499 n.6a, 512. Thus, while designed to insure that the fiscal capacity of all districts is sufficient, equality of expenditure between districts below the guarantee and those above it is neither intended nor required by a GTB system.

By operation of the system, the local effort of districts with actual equalized property valuations below the guarantee generates for each substantially more revenue to support operating costs than would be provided by local effort alone. Additionally, because of the operation of the formula, the amount of aid generated per dollar of local contribution is greatest for districts whose actual equalized property value are lowest. See N.J.S.A. 18A:7A-18.

Although fiscal capacity does not guarantee adequacy of expenditure, defendants have successfully demonstrated that 104 out of 336 districts below the GTB spend more than the state average, Fowler, 5/18/87, T129, D-234; that there is a strong relationship between tax rates and expenditures for districts below the guarantee, although there is no relationship for the state as a whole, Fowler, 6/3/87, T9-T10; and that, for the state as a whole, at most 21% of expenditures are attributable to actual property wealth. Hanushek, 5/4/87, T6-20; Fowler, 5/18/87, T92.

Maximum benefit from the equalization aid that can be provided by operation of the formula in a given district is afforded where a district budgets to the maximum permitted by N.J.S.A. 18A:7A-25, which places a limit on the amount by which a district may increase its spending from the previous year. N.J.S.A.

18A:7A-25 permits a greater increase in spending for those districts below the guarantee than for those above it. Thus, although plaintiffs are correct that equality of expenditure is not provided for by the current system even if all districts below the guarantee budget to their maximums, greater equality of expenditure would result were districts below the guarantee to budget to the maximum.

Further, although the CAP limits the amount by which a district may increase spending in any given year, plaintiffs have not shown that this limitation has ever been applied in any district so as to limit its ability to spend an amount necessary to provide its students with a thorough and efficient education. Moreover, where such increase is necessary, the Commissioner is authorized to approve waiver of the CAP, N.J.S.A. 18A:7A-25, and plaintiffs have not shown that waiver has been denied by the Commissioner or, on appeal, by the State Board where a spending increase beyond the CAP has been necessary to provide a thorough and efficient education in any district.

While it appears that districts below the guarantee, including plaintiffs' districts, have not generally budgeted the maximum permitted, see Fowler, 5/18/87, T111-113, the spending level permitted by the CAP does not represent the spending level required in any district to provide a thorough and efficient education, but the maximum amount that a district may spend without approval by the Commissioner. Consequently, in itself, the fact that plaintiffs' districts or districts below the guarantee did not generally budget to the maximum permitted does not show that they failed to budget an amount sufficient to generate the fiscal resources necessary to provide a thorough and efficient education.

While the amount of equalization aid provided by Chapter 212 has been significant, particularly in plaintiffs' districts during the period relevant to this litigation, it is just one component of the state aid afforded by operation of Chapter 212. Again, equalization aid is aid that is afforded by the system to support current operating costs of those districts whose actual equalized property valuation is below the guarantee without restriction as to how that money is spent. In contrast, categorical aid is aid provided by the State to assure fiscal support such that the special educational needs of all students in the state will be met. This aid is provided on an "additional cost basis" so as to provide the district with the financial resources to pay the difference for every student between what it would cost the district to educate him absent the special need, and the cost resulting from the special need.

By operation of the system, to the extent that the students in plaintiffs' districts have greater educational needs than those in other districts, they have in fact received categorical aid in greater amounts than other districts. E.g., Fowler, 5/18/87, T42. As a result, the fiscal capacity of these districts has been enhanced so as to permit them to expend larger amounts with no accompanying increase in local contribution.

In addition to equalization aid to increase fiscal capacity with respect to current expenses and categorical aid to insure the fiscal capacity to meet the special educational needs of their students, the fiscal capacity of districts below the guarantee is increased by N.J.S.A. 18A:7A-19, which provides aid to those districts for debt service and capital outlay. Plaintiffs have not shown that the capacity afforded by N.J.S.A. 18A:7A-19 is not sufficient to permit districts below the guarantee to meet their needs with respect to debt service and to make minor capital improvements such as would be budgeted as capital outlay.

Additionally, the fiscal capacity of districts below the guarantee is enhanced by transportation aid provided by N.J.S.A. 18A:58-7, 46-23 and 39-15. As subsequently discussed, state aid pursuant to these statutes does not pay for the total cost of approved transportation. It, does, however, enhance fiscal capacity by reimbursing districts for the costs of required transportation and by doing so at a higher percentage than might be provided by equalization aid.

We find that the fiscal capacity that has been afforded by the Public School Education Act is sufficient to permit districts below the guarantee to generate sufficient funds to provide a thorough and efficient education to their students. However, in that state aid as provided by the current system is calculated on the basis of the pre-budget year, districts must generally raise the funds to initiate new programs to expand the breadth and depth of their overall educational programs solely from local property taxes. Although the education clause is not intended to provide taxpayer equality, Robinson I, supra, at 511-12, 513, we cannot ignore that where the costs attending the initiation of new programs are significant, the accompanying tax effort may deter the initiation of such programs. We conclude that, from an educational perspective, it is necessary to enhance the fiscal capacity afforded by our system to districts below the guarantee through current year funding of the equalization aid provided by N.J.S.A. 18A:7A-18 so as to maximize their ability to enhance their existing programs beyond legally required minimums.

2. FISCAL RESOURCES PROVIDED BY THE STATE

After careful examination of the record, we find that plaintiffs have not shown that the funding system has failed to provide districts below the guarantee with the fiscal capacity required to support an education program that will provide a thorough and efficient education, including the fiscal ability to provide a breadth of programming and to meet the special educational needs of their students. Likewise, we conclude that they have not shown that, in implementing those provisions, the State has failed to provide sufficient financial resources to support that capacity.

Plaintiffs have not shown that legislative actions in appropriating less than statutory multiplier for equalization aid provided pursuant to N.J.S.A. 18A:7A-18 have in fact resulted in

less than adequate fiscal resources to support any budget required to provide a thorough and efficient education either systemically or in any given district. In this respect, we emphasize that there is no question that the Legislature may amend statutory amounts through its appropriations acts so long as it continues to appropriate amounts sufficient to enable districts to provide a thorough and efficient education. City of Camden v. Byrne, 82 N.J. 133 (1980); Fairfield Tp. Bd. of Ed. v. Kean, 188 N.J. Super 244 (Ch. Div. 1982). Of course, a different question would be presented were the Legislature to appropriate an amount less than that required to enable the districts to provide a thorough and efficient education. Plaintiffs have not, however, shown that this has ever occurred.

Moreover, while we do not accept the view expressed by the Commissioner that a 1% reduction in any district's budget is necessarily insignificant in terms of that district's ability to provide a thorough and efficient education, But see Board of Educ. v. Deptford Tp., 225 N.J. Super. 76 (App. Div. 1988), certif. granted, 113 N.J. 333 (1988), plaintiffs in these proceedings have not shown that the amount appropriated by the Legislature in any given year had an impact on the budgets of local districts such that adequate financial support was not provided to support an education program required for a thorough and efficient education.

With respect to plaintiffs' contentions concerning the adequacy of the resources provided by the State through categorical aid, we find that they have not shown that the current system is not affording sufficient resources to enable each district to meet the special educational needs of its students. The record establishes that, at this point, aid is provided to support the additional cost to a district of all students enrolled in Bilingual Education Programs, Special Education Programs and Compensatory Education Programs for each program in which they are enrolled. Additionally, the current regulations require that all districts individually assess and provide appropriate remediation, including compensatory education, to every student who performs below State minimums on the High School Proficiency Test, N.J.A.C. 6:8-7.1(b), as well as requiring that districts establish preventive and remedial compensatory education programs. N.J.A.C. 6:8-6.3. State categorical aid is afforded for each pupil who is enrolled in an approved compensatory education program that involves additional cost to the district, and aid is afforded for each such program in which the student is enrolled, without any limitation on the number of students for which the State will provide categorical aid. Thus, there is not an "unduplicated count" or "maximum number" with respect to categorical aid.

Further, we find that plaintiffs have not demonstrated that the fiscal resources that have been provided to districts below the guarantee by the State through operation of Chapter 212 have been inadequate to afford the fiscal support necessary to enable those districts to provide a thorough and efficient education to their students. The mere fact that the State may be directly funding only 40% of the total costs of education in the state cannot alter this conclusion. The State's contribution is not uniformly distributed to all districts, but rather, by operation of the

statutory framework, the greatest proportion of the financial resources provided by the State is allocated to the districts below the guarantee. As a result of such allocation, the State's contribution to the cost of education in plaintiffs' districts has far exceded 40%.[5]

Although we conclude that plaintiffs have not shown that the State has failed to appropriate sufficient financial resources to enable districts below the guarantee to provide a thorough and efficient education, we recognize that both equalization aid and minimum aid have sustained reductions in given years. See Fairfield Tp. Bd. of Ed. v. Kean, supra. Since 1978, minimum aid, like equalization aid, has been calculated on the basis of a statutory multiplier, see L. 1978 c. 158, and we note that in every year that the Legislature has reduced the multiplier upon which equalization aid is calculated, it has similarly reduced the multiplier for minimum aid. See id. However, we cannot ignore that, in contrast to equalization aid, minimum aid distributed to districts above the guarantee pursuant to N.J.S.A. 18A:7A-18 does not represent fiscal support essential to enable those districts to provide a thorough and efficient education. See id. at 249-50.

We find that were the State to face fiscal constraints such that it could not fund equalization aid at a level necessary to ensure that every district below the statutory guarantee would have sufficient fiscal resources to provide a thorough and efficient education and at the same time provide minimum aid to districts above the guarantee, it clearly would be educationally irresponsible to permit allocation of the State's limited resources to minimum aid before allocating the funds necessary to enable districts below the guarantee to meet their constitutional obligations. We therefore concur with the recommendation of the Commissioner that the Legislature develop a formal mechanism to insure that distribution of state aid in the case of a short-fall in revenues will be effectuated in a manner that will have the least impact on districts below the guaranteed tax base. See Commissioner's decision, at 662.

3. THE ADEQUACY OF DISTRICT BUDGETS

As set forth above, we find that the fiscal provisions of Chapter 212 have provided adequate fiscal capacity and resources to support a program providing a thorough and efficient education to the students of every district. However, the State's obligation is not met merely by assuring adequate fiscal capacity and providing sufficient resources to support local budgets without regard to the

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5 In 1984-85, equalization aid alone supported 89% of Camden's net current expense budget, 83% of East Orange's, 76% of Jersey City's and 71% of Irvington's. D-230, p. 2. As of July 31, 1986, it was expected that equalization would fund 92% of Camden's net current expense budget, 84% of East Orange's, 76% of Irvington's and 73% of Jersey City's. Id, at p.2n. 3.

adequacy of those budgets. Rather, the State must provide the mechanism to compel districts to raise the funds required to support budgets that are adequate to provide a thorough and efficient education in each district, and the Commissioner and the State Board must effect changes in local budgets where there is a failure to meet minimal educational standards resulting from a failure of the district to allocate adequate fiscal resources. Robinson V, supra, at 463. Consequently, we must examine the proofs as they relate to whether the system has operated to assure that the fiscal authority delegated to local districts is exercised so that each district in fact allocates and expends the fiscal resources necessary for it to provide a thorough and efficient education in that district.

After careful review of the proofs, we find that plaintiffs have failed to show a systemic inadequacy of expenditure by districts below the guarantee such as to demonstrate that the Public School Education Act of 1975 as implemented has failed to assure adequate levels of expenditure to support a thorough and efficient education in every district.

We find that for purposes of assessing the adequacy of expenditure, all funds actually expended by the district must be considered, regardless of the source from which the funds are derived. Such assessment must include not only local contribution, State equalization aid and various forms of categorical aid, but federal funds as well. In this respect, we emphasize that although federal funds may not be used to supplant State monies, they may be properly used to enhance the district's educational program. Thus, federal monies in fact provide support for a district's overall education program, and must be considered in evaluating whether its overall expenditures have been adequate. As the proofs show, inclusion of federal funds in this assessment would alter the picture with respect to disparity of expenditure between plaintiffs' districts and those above the guarantee, as well as between those districts and the comparison districts. E.g., D-311

However, even considering all expenditures, the record shows that there are differences in levels of expenditure between districts. Plaintiffs, however, have failed to establish the relationship between the disparities in expenditures they have shown and the provision of an appropriate educational program. While the proofs point to disparities in dollar expenditure, they do not relate such dollar expenditures to the budgets of the State's districts. Nor do plaintiffs' proofs relate those dollar expenditures or the budgets supported by those expenditures or to the quality of the educational programs provided by the districts. Without those relationships, the record provides no basis for concluding that it is differences in levels of expenditures that are responsible for any differences in the quality of the educational opportunity afforded to students either in districts below the guarantee or in the plaintiffs' districts.

While the proofs do not support a conclusion that expenditures on a systemic basis have been inadequate to enable

local districts below the guarantee to meet the State's educational objectives, we recognize that the statutory scheme places on the Commissioner the affirmative responsibility to assure that the budget of each district is adequate as to both current expense and capital outlay. N.J.S.A. 18A:7A-28.

> N.J.S.A. 18A:7A-28 provides that:
>
> Annually, on or before January 15, local boards of education shall submit to the Commissioner a copy of their proposed budgets for the next school year. The Commissioner shall review each item of appropriation within the current expense and budgeted capital outlay budgets and shall determine the adequacy of the budgets with regard to the annual reports submitted pursuant to [N.J.S.A. 18A:7A-11].

While the statutes do not mandate either the form of the "reports" or specify the exact manner of review, the express language of N.J.S.A. 18A:7A-28 is clear that the budgets of all districts, whether certified or not, must be reviewed, and that the adequacy of the budgets must be determined in relation to the information required to be reported pursuant to N.J.S.A. 18A:7A-11. cf. Iuppo v. Burke, 162 N.J. Super. 538, 546 (App. Div. 1978).

The record is clear that in the past, this agency has failed to fulfill the responsibility imposed on us by N.J.S.A. 18A:7A-28. Prior to 1986, annual budgets were reviewed by the county superintendents for "accuracy" rather than for "adequacy." McCarroll, 2/21/87, T27. Scambio 2/9/87, T35. Although plaintiffs have not shown that systemically this failure resulted in inadequate budgets for districts below the guarantee, they did show that in the case of Jersey City this defect resulted in approval of at least one budget that the district superintendent believed was inadequate. Ross, 10/28/86, T93-94.

The current review process that was implemented in 1986 provides more assurance that no district will fail to budget adequate resources. The record shows that the focus of the budget review process has shifted. P-289; McCarroll, 2/2/87. T28-T29; Scambio, 2/9/87, T35-T37. The record indicates that the review process now seeks to assure the adequacy of budgets submitted by local districts which are certified by determining whether there is maintenance of effort being continued by the district. McCarroll, 2/2/87 T28-T29. The budgets of those districts that have not achieved certification are not approved unless the county

superintendent is satisfied that the district is budgeting sufficient funds to address its deficiencies identified through the monitoring process. McCarroll 2/2/87, T29.

We, however, cannot ignore that the current review process has not been formalized by regulation. Further, although the record does not permit us to determine whether implementation of N.J.S.A. 18A:7A-11 by the Department of Education is such that the information mandated by that statute is provided by the districts in such form as to permit the Commissioner to determine the adequacy of the budgets with regard to that information, see Defendent's brief, at 39, we can not ignore that the budget review process currently in effect does not expressly require that determination of the adequacy of the budgets be made on the basis of that information.

We find that the failure to review the budgets for adequacy until 1986 does not invalidate the fiscal provisions of Chapter 212. Nor does the fact that the process now in effect has not been formalized through the regulatory process require such result.

However, in that it is the State's responsibility to assure that each district raises the funds required to provide a thorough and efficient education and given that it is the responsibility of this agency to ensure that every district properly fulfills the fiscal responsibility that has been delegated to it, we conclude that it is critical that a budget review process expressly designed to implement the requirements of N.J.S.A. 18A:7A-28 be adopted through the regulatory process. We therefore direct that the Commissioner propose to us rules that provide for "review of each item of appropriation within the current expense and budgeted capital outlay budgets," and for determination of "the adequacy of the budgets with regard to the annual reports submitted pursuant to [N.J.S.A. 18A:7A-11]," as required by N.J.S.A. 18A:7A-28.

We recognize that, as indicated by the Commissioner in his decision, limitations on resources may act to constrain the Commissioner's ability in this area. However, we find that such constraints can excuse neither the Commissioner nor the State Board from fulfilling the responsibilities with which we have been charged by the Legislature. We further find that the effect of such constraints would be ameliorated if all school districts in the state were required to follow a uniform system of budgeting. We therefore direct the Commissioner to establish a uniform system of budgeting to be followed by all school districts, and direct that such system be one that appropriates funds to specific programs supported by those funds. Additionally, we direct that such system expressly insure inclusion in the net current expense budgets upon which aid is calculated pursuant to N.J.S.A. 18A:7A-18, all local contribution for transportation not eligible for state aid pursuant to N.J.S.A. 18A:58-7, 46-23 and 39-15.

Although not part of the Public School Education Act of 1975, we recognize that the budget appeals process also plays a crucial role in assuring the adequacy of expenditure by requiring

that municipalities provide adequate fiscal resources to support a budget necessary to provide a thorough and efficient education where the voters have rejected the budget proposed by the district board. See N.J.S.A. 18A:22-14 et seq. While plaintiffs have pointed to a weakness in the system in that there is no express provision to assure the adequacy of the budget where a municipality reduces the budget and a district fails to appeal, they have not demonstrated that the budget appeals process has not insured that sufficient financial resources are provided where appeal has been taken. See, e.g., Board of Education of the City of Paterson v. City Council of the City of Paterson, decided by the State Board, September 7, 1988.

Given our responsibility to assure that local districts allocate sufficient funds to provide a thorough and efficient education, we direct that the rules proposed by the Commissioner for review of annual budgets also include procedures to provide for review for adequacy of the budget in any case where a municipality reduces the budget, regardless of whether the local board appeals. We further direct that the proposed rules specify the standards that the Commissioner will apply in the event that it is necessary to compel a municipality to raise any additional amounts required.

4. MUNICIPAL OVERBURDEN

As set forth above, plaintiffs have not demonstrated that the expenditures of districts below the guarantee have been inadequate to provide a thorough and efficient education in those districts. Nor have they shown that as a result of other municipal expenses, the municipalities in the seven urban areas focused on by plaintiffs have not had the fiscal ability to adequately support public education. See Robinson V, supra.

Under the current system, all municipalities are obligated to raise taxes to support a budget sufficient to provide a thorough and efficient education, and they must do so before providing tax revenues for the support of other municipal services. Skokowski, 5/27/87, T67. Thus, the effect of any municipal inability to fund through property taxes the local share of an education budget such as is required to enable the district to provide a thorough and efficient education as well as meet municipal expenses is to limit the funds available for municipal services.

The legislatively designed means for addressing the contingency of local fiscal inability to meet municipal needs after providing the required support for education places responsibility for addressing those municipal needs with the Division of Local Government Services, Department of Community Affairs. The record shows that the Legislature has enabled the Department of Community Affairs to address these needs through a variety of programs, Skokowski, 5/27/87, T5-T18, and that plaintiffs' districts have received the benefit of those programs. Skokowski, 5/27/87, T16; T18- T-21, T22- T26, T26-35, T39-40. The record further shows that it has been the practice of the Department of Education to bring to the attention of the Department of Community Affairs situations

arising in the education context that might impact the fiscal ability of municipalities to meet municipal costs and to work cooperatively with that agency to resolve those situations. Skokowksi, 2/27/87, T63- T66.

We find that the legislative means for addressing the contingency of fiscal inability on the part of local municipalities provides an appropriate framework to insure both that the required fiscal support for education can be provided and that municipal needs may be addressed. While it may be advisable for the Legislature to review the adequacy of the measures it has thus far taken to address the non-educational needs of municipalities, assessment of the sufficiency of the support that has been provided by the Legislature for municipal services such as police and fire protection is not within our expertise or jurisdiction.

However, we conclude that where the Commissioner directs an increase in the budget of a local district and the municipality claims that it would not have sufficient resources after meeting its obligation to provide the required fiscal support for education to meet its municipal expenses, this agency has the responsibility to insure that municipal needs are in fact addressed. We therefore direct that the Commissioner develop rules in cooperation with the Department of Community Affairs to expressly provide for this contingency.

III. FACILITIES

In enacting the Public School Education Act of 1975, the Legislature expressly recognized that adequately equipped, sanitary and secure facilities are a major element in a thorough and efficient system of education. N.J.S.A. 18A:7A-5(f). As set forth in the Commissioner's decision, plaintiffs have not shown that the State's standards with respect to facilities as they have operated have failed to assure that the facilities of each district are safe and conform to health requirements. Furthermore, although we agree with the Commissioner that the fiscal capacity of districts below the guarantee to fund capital improvements should be enhanced by current year funding for state aid provided pursuant to N.J.S.A. 18A:7A-19, plaintiffs have not shown that the state aid provisions of Chapter 212 have failed to provide districts with the fiscal capacity to generate the resources to properly maintain their facilities or to make minor capital improvements such as would be budgeted as current expenses or capital outlay. See N.J.S.A. 18A:7A-18 and -19.

We recognize that, as the record shows, East Orange, Camden and Jersey City in fact failed in the past to adequately meet their maintenance needs, and that in Camden such failure was accompanied by a failure to expend monies budgeted for maintenance for that purpose. Johnson, 6/1/87, T63,88; Scambio, 2/9/87, T82; King, 10/8/86, T120-121. However, we find that by mandating that each district implement a comprehensive maintenance plan in order to achieve certification, the regulations now provide assurance that

these failures will not be repeated. N.J.A.C. 6:8-4.3 (5)(i). Moreover, as set forth above, N.J.S.A. 18A:7A-28 requires the Commissioner to review both current expense and capital outlay budgets submitted by the districts in determining the adequacy of the budgets, and plaintiffs have not shown that the budget review process as currently effectuated is not ensuring that districts budget adequately with respect to maintenance.

We, however, fully concur with the Commissioner that districts throughout the state are now faced with meeting facilities needs of enormous magnitude. Although the genesis of the State's facilities problems might predate enactment of Chapter 212, and regardless of whether the facilities problems we now face have been exacerbated by years of neglect and failures to properly maintain existing facilities, Chapter 212 was not designed nor is it capable of generating the funds necessary to permit the capital expenditures which will be required to renovate, modernize and replace existing facilities throughout the state.

We also agree with the Commissioner that the problem is of such magnitude that a major legislative initiative is required to resolve it, and that in-depth analysis of various options will be necessary in order to remedy the facilities deficiencies now existing in the public schools throughout the state. We, like the Commissioner, recognize that responsibility for determining which option among those available, including a state-wide bond referendum, will best address the problem lies with the Legislature. However, we believe that we are not without responsibility in initiating the analysis that will be required, and therefore, pursuant to N.J.S.A. 18A:7A-11(h), we direct that the Commissioner require each district to submit a facilities survey, including current use practices and projected capital needs, and that he transmit the results to us, along with his report concerning the implications of the results of those surveys for the State's public school system.

IV. LEGAL CONCLUSIONS

We recognize that neither the Commissioner nor the State Board of Education has jurisdiction to decide the constitutional claims in this case. E.g., Abbott, supra; Paterson Redevelopment Agency v. Schulman, 78 N.J. 378 (1979), cert. denied, 444 U.S. 900, 100 S.Ct. 210, 6 L.Ed.2d 136 (1979); Reed By & Through Reed v. Attorney General, 195 N.J. Super. 172 (App. Div. 1984). As set forth above, we have reviewed the claims and proofs presented as they relate to statutory and regulatory requirements, and, as directed by the Court, have made administrative determinations we believe necessary for proper disposition of this matter. Abbott, supra. See Parents for Student Safety v. Morris Bd. of Ed., decided by the State Board, February 5, 1986, aff'd, Docket #A-3257-85-T7 (App. Div. 1987).

In fulfilling the terms of the Court's remand, we have not however been able to ignore that the constitutional claims which the Court will be called upon to evaluate directly bear upon the educational entitlements of the children of the state. Given our role in assuring that these children are provided an educational system that meets constitutional requirements, we are obligated to address those issues. We concur with the Commissioner that it is both the function and the responsibility of the Legislature to provide definition to the constitutional promise of the education clause, subject to judicial review. Robinson V, supra; Robinson I, supra. By the legislative scheme as currently enacted, we believe that the Legislature has fulfilled that function.

As the administrative agency responsible for the supervision and control of the public schools of this state, it is our responsibility to assure that the legislative plan has been properly implemented. As set forth in this opinion, we have found that the plaintiffs have not demonstrated that the educational standards that we have established by regulation are inadequate to assure that the public school system will provide an education such as to equip the children of this state for their roles as citizens or competitors in the market place. Nor have plaintiffs shown that the system as it is operating is failing to assure that local districts fulfill their responsibility to in fact provide such education.

We recognize, as did the Court in Abbott, that resolution of the question of whether equal protection guarantees have been met requires a separate inquiry. Although the Court has not revisited the application of equal protection principles in the context of the public education system since its decision in Robinson I, we recognize, as did the Court in Abbott, that the principles enunciated in that decision are directly relevant to this case.

We are sensitive that, in the context of the case before it in Robinson I, the Court recognized that our State Constitution could be more demanding than the United States Constitution with respect to the protection afforded by our equal protection guarantees. Robinson I, supra, at 490. Thus, while the court did not find the concept of "fundamental rights" helpful, it articulated a standard to be applied under our State Constitution involving services as vital as education that calls for more careful assessment of whether State action is arbitrary than that required under the federal Constitution. Robinson I, supra, at 491-92. As expressed by the Court:

> Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification and decide whether the State action is arbitrary. In the process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.

Id. at 492. Cf. Taxpayer Assn. of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 42-44 (1976).

While acknowledging that education is vital, the Court, however, was equally sensitive that equal protection "may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis under which the State must act," id. at 492, and recognized that even the provision of essential services like police and fire protection varies with local decision, as does the amount paid by residents to support those services. Id. at 493-98. Nor can we ignore that the Court rejected the contention that the fact that the State is obligated to furnish the service means that the service must be provided uniformly or that the burden must fall equally throughout the state. Id. at 497-98.

As set forth above, we find that the system of public education provided by the statutory and regulatory scheme provides for a thorough and efficient education, including breadth of programming, and has operated to provide the fiscal capacity to permit and assure an expenditure level in each district to support that system. We do not find that the system as it has operated has denied the students of "property poor" districts the right to which the education clause entitles them.

We recognize, however, while the system provides the capacity to permit districts below the guarantee to support educational programs greater than minimally required, and while requirements as to breadth of programming as enforced through the monitoring system insure that each district in fact provides such programming, State support does not provide plaintiffs' districts with fiscal support so as to provide them with fiscal capacity or financial resources equal to that of the comparison districts. Nor does it provide such capacity or resources to any district below the guarantee. However, we do not believe that the distinction permitted is arbitrary given the State's interest in giving local residents throughout the State a voice as to the amount of educational services and expenditures and providing that some of the cost is borne locally to stimulate citizen concern for performance, especially in view of the protection afforded by the system against any district failing to meet its delegated responsibilities to provide a thorough and efficient education, both with respect to educational program and fiscal support. See Robinson I, supra, at 498-500.[6]

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[6] Moreover, while the Court in Robinson I noted that claims of invidious discrimination based on classifications such as race must be closely examined, and that it was not likely that any State interest could justify such discrimination, Robinson I at 491, we concur with the Commissioner that plaintiffs have failed to demonstrate either invidious discrimination or discriminatory impact based on race which would support a finding of constitutional infirmity. Commissioner's decision, at 836.

Nor do we find merit to plaintiffs' claim under the Law Against Discrimination. As argued by the defendants, and noted by the Commissioner, this claim was not included as part of the pleadings or prehearing order in this case. Commissioner's decision, at 838. This, according to defendants, mandates the exclusion of this claim based on concepts of fundamental fairness. Id.

We agree with defendants' arguments that it would be fundamentally unfair to allow such a claim to be raised so late in the proceedings. Furthermore, in that plaintiffs did not raise the claim until post-hearing briefs and in those briefs failed to specifically articulate how their claim under the Law Against Discrimination related to the proofs submitted at the hearing, it is difficult to ascertain the actual nature of plaintiffs' claims under this statute. What plaintiffs have presented is insufficient to warrant a conclusion that the Law Against Discrimination has been violated.

Apparently, plaintiffs' claim under the Law Against Discrimination is premised on the erroneous assumption that a violation of the equal protection clause is automatically a violation of the Law Against Discrimination. Commissioner's decision, at 839, The Law Against Discrimination, however, is a specific statutory scheme that, although overlapping in many ways with the equal protection clause, is not synonymous with that constitutional protection. As the Commissioner noted, the proofs and standards of review under the equal protection clause are different from those required to meet a prima facie case under the Law Against Discrimination. Commissioner's decision, at 839.

Moreover, unlike a constitutional challenge, an attack on the validity of one state statute made in reliance on another state statute can only succeed if the statutes directly conflict. City of Camden v. Byrne, supra. Even when a direct conflict exists, the more specific statute governs over the more general statute. See, e.g., W. Kingsley v. Wes Outdoor Advertising Company, 55 N.J. 336 (1970). Plaintiffs, in this case, have not shown a direct conflict between the Law Against Discrimination and Chapter 212. Even if such a conflict did exist, the more specific requirements of Chapter 212 would govern. Thus, plaintiffs would not be entitled to the relief sought in this matter, i.e., invalidation of Chapter 212, based on the Law Against Discrimination.

Additionally, we agree with the Commissioner that "[w]hile broad in jurisdiction over discrimination claims, the Law Against Discrimination is not intended to cover all situations where discrimination might arise." Commissioner's decision, at 839-840. Although clearly schools are places of public accommodation under the Law Against Discrimination, Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978), nothing in the Law Against Discrimination suggests that it was intended to reach either the Legislature's actions in funding schools in the state or the Department's general authority to supervise those schools. In fact, the language as to

public accommodations refers only to the actions of "any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation," N.J.S.A. 10:5-12(f), not to their state regulators. Thus, we find that even if plaintiffs were to prevail on an equal protection challenge in this case, plaintiffs cannot prevail on their Law Against Discrimination claim, both because of their failure to formally plead the claim early enough in the case to provide for a proper adjudication of those claims and, further, because the Law Against Discrimination was not intended to provide a remedy for the type of "discrimination" alleged in this case.

V. CONCLUSION

For the reasons expressed in this opinion, we concur with the Commissioner of Education that plaintiffs have failed to prove that the funding provisions of the Public School Education Act of 1975, as they have operated, have caused significant educational disparities between districts below the guaranteed tax base and those above it such that either urban children generally or children in plaintiffs' districts have been deprived by operation of the system of the educational opportunity required to prepare them to function politically, economically and socially in our society.

As set forth in our opinion, based on our own review of the record, we have concluded that plaintiffs' proofs relating to program offerings, staff ratios, staff qualifications and facilities fail to provide an adequate basis for a finding that there are educational disparities of such significance as to demonstrate that students attending public school in districts below the guarantee or in urban districts have been denied a thorough and efficient education. In this respect, we have concluded that the substantive educational standards provided by the current statutory system as implemented by regulation assure that every district will fulfill its delegated responsibilities to provide a thorough and efficient education. In so concluding, we recognized that the school districts in six of the seven urban areas upon which plaintiffs focused in these proceedings, i.e., Camden, East Orange, Jersey City, Paterson, Newark and Trenton, failed to meet those standards when evaluated under the monitoring system. However, given the particularized deficiencies identified in these districts, we found that the individualized approach provided by the current system is appropriate, and that the corrective measures being taken under that system with respect to these districts provides the best method of which we are aware for assuring correction of the deficiencies in these districts.

We have further concluded that plaintiffs have not shown that the fiscal capacity that has been afforded to districts below the guarantee by operation of Chapter 212 has been inadequate to enable every district to generate the necessary fiscal support to provide a thorough and efficient education or that the financial resources that have been provided by the State have been inadequate. We have found that plaintiffs have not demonstrated

that differences between districts in the quality of the educational programs they provide are due to the expenditure levels of those districts or that districts have not budgeted adequately to provide a thorough and efficient education. Further, plaintiffs have not shown that municipalities generally or those in which plaintiffs reside are unable to meet their obligation to provide sufficient fiscal support for education.

Although we have recognized that jurisdiction to decide the ultimate constitutional issues lies with the Court, we have been attentive to the decisions of the Court which have considered the meaning of the constitutional promise of the education clause and the guarantees of the equal protection provisions of our State Constitution in the context of public education, and we have addressed those questions. We have concluded that the Public School Education Act of 1975 as implemented has provided for a system of public education that assures that all districts will provide an education such that the children of this State will be equipped for their roles as citizens and competitors in the market place and that, as it has operated, the Act has provided the fiscal capacity and resources to enable every district to in fact provide such education. Although the system does not provide plaintiffs' districts or any district below the guarantee with fiscal support so as to provide them with fiscal capacity or resources equal to the wealthiest districts in the state, we believe that the differences permitted by the statutory framework are justified by the State's interest in giving local residents throughout the state a voice as to the amount of educational services to be provided above those minimally required and in stimulating local concern by providing that some of the cost is borne locally. We have also found that, based on the proofs in this record, plaintiffs cannot prevail on their claim under the Law Against Discrimination.

We have found that the proofs do not support a conclusion that, systemically, our system of public education is failing to assure the provision of an appropriate education to the children of this state. However, these proceedings have demonstrated to us the need for certain improvements so as to enhance each district's ability to realize the maximum potential provided for by the Public School Education Act.

We have concluded that the State Board regulations that require districts to develop educational objectives must be strengthened to more effectively guarantee that each district will develop educational objectives in sufficient number and of such quality to provide the basis for an educational plan directed at achieving, not just some, but all State and district educational goals, and have directed that the Commissioner propose to us amendments to the regulations to accomplish this. We have also concluded that the monitoring regulations must be strengthened by providing more outcome standards with respect to curriculum, and toward that end the State Board has recently adopted regulations that will establish core proficiencies and provide for assessment of their effectiveness.

Although we have not found that district boards have failed to budget adequately, we have concluded that our responsibility to ensure that districts fulfill the fiscal responsibilities that have been delegated to them requires that we establish through the regulatory process a formalized system for review of annual budgets. We have therefore directed that the Commissioner propose such regulations to us. We have also directed that those regulations provide for review of the budget in any case of reduction by the municipality, regardless of whether the district board appeals, and that they include express provision for situations in which the Commissioner directs an increase in a district's budget and the municipality claims that it can not meet its municipal expenses after meeting its obligation to fund the education budget.

While we do not have the authority to direct legislative action, we have found that there are areas in which the improvements called for require legislative action. Although we have found that the fiscal capacity that has been afforded to districts below the guarantee by virtue of the operation of Chapter 212 has been sufficient to enable every district to generate adequate fiscal resoures to provide a thorough and efficient education, we have not been able to ignore that where the costs of initiating new programs are significant, the accompanying tax effort to support the local contribution required for the first year may deter the initiation of such programs. We have concluded that, from an educational perspective, it is necessary to increase the fiscal capacity of districts through current year funding so as to maximize their ability to enhance their existing programs beyond legally required minimums. We have likewise concluded that current year funding for state aid provided for debt service and capital outlay would increase the capacity of districts to improve their facilities.

Although we have found that the amount of fiscal resources that have been appropriated by the Legislature has not been insufficient to enable every district to provide a thorough and efficient education, we could not ignore that, in contrast to equalization aid, minimum aid distributed to districts above the guarantee does not represent fiscal support essential to enable those districts to provide a thorough and efficient education. We have concluded that were the State to face fiscal constraints such that it could not fund equalization aid at a level necessary to ensure that every district below the statutory guarantee would have sufficient fiscal resources to provide a thorough and efficient education and at the same time provide minimum aid, it would be educationally irresponsible to permit allocation of the State's limited resources to minimum aid before allocating the funds necessary to enable districts below the guarantee to meet their constitutional obligations. We therefore agree with the Commissioner that the Legislature should develop a formal mechanism to insure that distribution of state aid in the case of a short-fall in revenues will be effectuated in a manner that will have the least impact on districts below the guarantee.

Although we have found the capacity and resources provided by Chapter 212 adequate to enable districts to provide for maintenance and to make minor capital improvements, we have concurred with the Commissioner that facilities needs now exist statewide of such magnitude that it is beyond the capacity of Chapter 212 to generate the capital necessary for renovation, renewal and replacement of existing facilities that will be needed. We join the Commissioner in seeking a legislative solution, and have directed that a statewide survey of the facilities needs of every district be taken so as to initiate that process.

In arriving at our decision, we have rejected plaintiffs' objection to the notice taken by the Commissioner of various programs and educational initiatives effectuated under his leadership as well as statistical data relating to current year funding. While that information is not essential to either the Commissioner's decision or our own, we find its inclusion entirely appropriate to provide a fuller picture of the current educational system as it operates or could operate. We likewise reject plaintiffs' objections to the notice we have taken of information pertaining to the certification and monitoring status of the districts in the urban areas focused on by plaintiffs and those other districts in the state that are not currently meeting State standards. While this information may not be essential to deciding this case, we do not believe that we would be fulfilling our responsibility either to the Court or the children of these districts if we did not assess the operation of the corrective process with respect to those districts in the urban areas upon which plaintiffs have focused.[7]

In conclusion, we have found that plaintiffs have not demonstrated a systemic failure of our State's education system. Our obligation, however, does not end with that finding. Thus, in considering this case, we have examined our educational system with a critical eye in order to ascertain how our current system can be improved so as to raise the quality of education statewide and to better meet the challenges of educating the diverse student population which we serve. It is our ultimate goal to assure that the full potential inherent in the Public School Education Act will be realized for each and every child in this state. We believe that implementation of the improvements specified in this decision will bring us closer to that goal.

Maud Dahme, Betty A. Dean, Anne S. Dillman, Alice Holzapfel, Regan Kenyon, John T. Klagholz, Nancy Schaenen, James Seabrook, Sr., and Robert Woodruff join in the opinion of the State Board.

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[7] Additionally, at the request of defendants, we have taken official notice of D-253ID.

Betty A. Dean, concurring.

I fully concur with the State Board's decision in this case. In addition, I add the following comments.

The responsibility of this Board, recognizing that each member has his or her own viewpoint, has been to consider this case and arrive at the right result.

That our educational system's foundation -- a part of which includes financial resources -- has some flaws, we readily acknowledge. However, a brighter part of the record consists of efforts to remold the structure, the financial base, courses, and to increase attendance at all levels, even though we realize observers may question the wisdom of how they are developed.

We concede that our "fresh look" is not a "brand new look," and that our view of the educational practices and goals must be put in balance and influence each other in some sensible fashion. Even if we were to successfully develop every school within the state into replicas of each other, we cannot escape the fact that each child will develop at his own pace. Someone has stated that "each child has a distinctive set of drives -- for physical activity, for food, for sexual expression, for power. Each one has his or her own mind qualities, abilities, ways of thinking and patterns of mental conditions. Each one has his or her own emotional set-up and his or her leanings, whether toward art, music literature, etc. All these leanings are subject to change and development. No one ever 'recovers' from the fact that he was born an individual." We cannot impart to each child all the facts and skills he or she will need: the information and skills for doing this simply do not exist. "We can only think of education in terms of helping children learn the motivations and skills to continue learning for the rest of his or her life."

The educational system for which we are responsible remains more than adequate for achieving a thorough and efficient education.

Any decision to make more programming available in a local district than is now required should come from the people of that district voicing their concerns to their local board of education.

This board has the capacity, through its hearing process -- direct, unpretentious and focused -- to appropriately address and consider questions and opinions of fundamental importance to our educational system...questions and opinions from anyone and any body or agency having questions and/or opinions.

Should you ask if we have accomplished something through this decision we are handing down today, I would say, "Yes, we have."

April, 13, 1989
Date of Mailing _____

Reversed N.J. Supreme Court
(119 N.J. 287)

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4296-88
AGENCY DKT. NO. 63 - 4/88
DEPARTMENT OF EDUCATION

ANNE S. GARMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

Steven R. Cohen, Esq. (Selikoff and Cohen, attorneys) for petitioner
Louis J. Greco, Esq., for respondent

Record Closed: November 24, 1988 Decided: January 4, 1988

BEFORE **EDGAR R. HOLMES,** ALJ:

PROCEDURAL HISTORY AND STATEMENT OF CASE

Anne S. Garman was employed by the respondent Board of Education as an untenured teacher. Prior to her achieving tenure by operation of law, N.J.S.A. 18A:28-5, she was given sixty (60) days notice of intent to terminate pursuant to contract. Petitioner requested a hearing before the respondent Board by letter dated January 7, 1988. She was heard by the Board on January 11, 1988.

The Superintendent recommended petitioner's termination because he alleged that she used "extremely poor judgment...as a classroom teacher." The

example given was a questionnaire prepared and distributed by two of her students which he characterized as "patently offensive and unacceptable."

The Board voted to terminate petitioner effective March 30, 1988.

The petitioner filed a Petition of Appeal before the Commissioner of Education on April 8, 1988, alleging that the respondent's action was arbitrary, capricious and ultra vires.

The respondent filed a Response to Verified Petition with the Commissioner on June 9, 1988 and an Amended Response on August 30, 1988.

On June 14, 1988, the matter was transmitted to the Office of Administrative Law to be heard as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On August 18, 1988 a prehearing conference was held. The issues to be addressed at the plenary hearing were "whether the Board's action to terminate petitioner from her employment position was arbitrary, capricious and/or ultra vires?" and, if so, the remedy to be afforded petitioner.

The plenary hearing commenced on October 21 and October 24, 1988 and the record was held open for thirty (30) days to permit the parties to brief the issues.

FACTUAL DISCUSSION

Petitioner is certified in social studies and psychology. She was teaching social studies in the fall of 1987 when she took over three psychology classes. She had been at the school since April 10, 1985, first as a Homebound coordinator and then as a social studies teacher. She was relieved of three social studies classes when she took over the psychology classes but continued the lesson planning for those courses.

The psychology students were preparing to undertake a unit entitled Methods of Psychological Research. In a very brief meeting with petitioner concerning the psychology course, the former teacher presented her with some guidelines for a psychological methods project which included the preparation,

dissemination, collection, compilation and evaluation of a survey, and a final written report (P1).

Two students prepared a survey which requested information concerning sexual practices and preferences from students 13 to 20 years of age. (P2) The questions were explicit. The two students sought information regarding intercourse, oral sex, use of condoms, masturbation, pornography, nudity, homosexuality, teacher fantasies, music, looks and body parts as objects of arousal, i.e. "face, chest or bust, legs, genital area, behind (sic)."

The Superintendent characterized these questions as patently offensive and unacceptable for use in a secondary school. The petitioner has not sought to controvert his statement. No legal argument has been made, either in support of or contrary to the Superintendent's characterization. Both parties appeared to acquiesce in the Superintendent's opinion, probably because the questions exhibit the prurience commonly attributed to teenaged boys.

Petitioner argues only that she did not authorize the sexually oriented survey and explicitly told the two boys not to continue with that survey. She produced a student on her behalf who testified that she overheard petitioner tell the two boys "you can't use this."

Petitioner also produced as a witness Eugene Sharp, a representative of the New Jersey Educational Association who consulted with her concerning her charges. He testified that she steadfastly maintained to him that she did not approve the boys' sexually oriented survey.

On the other hand, the Board produced a witness, Superintendent John E. Dugan, who testified that petitioner admitted to him that she succumbed to pressure from the two students and permitted them to disseminate the survey. S.F., one of the two students involved, testified that he had petitioner's permission to utilize the sexually oriented survey subject to spelling corrections and some rewording in order to make the questions more "professional."

Joseph Breidenstine, petitioner's supervisor, testified that petitioner acknowledged to him that she permitted the boys to use the survey after they

wore her down." Principal Ronald Grunstra testified that petitioner said to him she approved the sexually oriented survey " after the students insisted."

There was no testimony offered at the hearing from the two union representatives the petitioner brought to the meeting with her principal and superintendent.

In addition to the oral testimony, documentary evidence was presented by both parties. Among the exhibits is the petitioner's own outline of her presentation, P-15. P-15 contains Grunstra's memorandum to John Dugan. The memorandum at numbered paragraph 5 contains her admission that the two students' survey was offensive and that she nevertheless allowed them to use it.

The survey prepared by the two students, P-2, contains numerous spelling errors among other things.

The petitioner claims that she did not authorize the sexually oriented survey and produced a student to corroborate her testimony. The credibility of witnesses therefore, becomes an issue.

CREDIBILITY

In this case only the petitioner asserts categorically that she never authorized the boys to release the sexually oriented survey. She called one female student on her behalf who testified that she heard the petitioner tell the boys "you cannot use this." The female student's testimony however, is not necessarily inconsistent with the alleged admission by the petitioner that the boys "wore her down" or that she "succumbed to pressure." In order to be worn down or succumb to pressure one must first take a position contrary to the person who wears you down or to whom you ultimately succumb.

The Board on the other hand called three witnesses who testified that petitioner admitted that she ultimately authorized the boys to release the survey. The Board also produced one of the students. He testified that he had authority to release the sexually oriented survey.

Of course credibility does not depend upon the number of witnesses, and the fact finder is not bound to believe the testimony of any witness. *In re: Perrone*, 5 N.J. 514 (1950).

Bias, motive, or interest in the outcome of the suit must be reckoned with in determining the probative value of testimony. *State v. Spruell*, 16 N.J. 73, (1954); *In re Ungar* 160 N.J. Super. 322 (App. Div. 1978).

The petitioner has the most to gain or lose as a consequence of this hearing; a tenured position in the high school from which she graduated is at stake, not to mention her reputation.

The testimony of her student, that she heard petitioner say "you cannot use this," as I pointed out above, does not reach the question of whether petitioner eventually authorized the boys to use the survey.

The credibility of the three witnesses to the petitioner's admission against interest has not been impeached. Indeed they corroborate each other. The petitioner first admitted to her supervisor Joseph Breidenstine, that the boys "wore her down." She then admitted to her Principal Ronald Grunstra that she approved the survey after the students "insisted." Finally, she told her Superintendent John Dugan that she "succumbed to pressure" from the two students and permitted them to disseminate the survey. These witnesses have not been shown to harbor any ill will or malice towards the petitioner which would occasion them to lie about this. Joseph Breidenstine gave her a good recommendation in his evaluation of her. (P-15) . John Dugan, in his memorandum to the Board recommending termination, also said that, but for this incident, he would have recommended her for re-employment in 1988.

These three employees of the Board, upon whose credibility the Board relied in its decision to terminate the petitioner, I also find to be credible and believable witnesses.

FINDINGS OF THE FACT

1. Two students in the petitioners psychology class at Absegami High School

during the school year 1987-1988 produced and distributed a sexually oriented survey as a project for a unit entitled Methods of Psychological Research.

2. The sexually oriented survey was patently offensive and unacceptable for use in a secondary school.

3. The petitioner authorized the two students to utilize the sexually oriented survey as a project in the unit including granting permission to disseminate the survey to members of the student body.

4. The petitioner's authorization to the two students to utilize the survey was against her better judgment and she only authorized the use of the survey when her will was overborne by the students in question.

LAW AND DISCUSSION

Nontenured teachers are entitled to know the reasons for their dismissal, termination or nonrenewal. The reasons may not be arbitrary, unreasonable, capricious or otherwise improper. *Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County*, 1968 S.L.D. 7; *Donaldson v. Board of Education of North Wildwood* 65 N.J. 236, 247 (1974). See also, N.J.S.A. 18A:27-3.2 and N.J.A.C. 6:3-1.20 which codifies this right.

The reason set forth in this case, that petitioner used "extremely poor judgment as a classroom teacher" was fully documented. She admitted to Board employees that she permitted two students to utilize an offensive sexually oriented survey because they "wore her down;" although she denied it to the Board. The expectation that teachers will exercise sound judgment and not be persuaded by students to suspend sound judgment or act contrary to sound judgment is not arbitrary, unreasonable, capricious, or improper. It is a fair exercise of managerial discretion. It is a minimum expectation of boards charged with the requirement to provide a thorough and efficient education, N.J.S.A. 18A:7A-2a(6).

An additional question raised by petitioner at the hearing and in her brief is what did the board know and when did it know it; citing *Golletti v. Arco/Polymers,*

Inc., 32 FEP cases 1976 (W.D. Pa. 1983). She claims that the board did not have sufficient facts upon which to base it's decision to terminate her.

There is no question however that the board had before it the petitioner's admissions against interest. She presented to it P-15 which contained her admissions against interest at paragraph 5 of Grunstra's memorandum to John Dugan.

I am satisfied that the board was sufficiently apprised of petitioner's poor judgment involving the sexually oriented survey when it acted to terminate the petitioner's contract.

CONCLUSION AND ORDER

I **CONCLUDE** that the petitioner has failed to establish by a preponderance of the credible evidence that the Board's action in terminating her contract was arbitrary , capricious or *ultra vires*.

I **ORDER** that the Petition of Appeal be dismissed.

This recommended decision may be adopted, modified or rejected by the **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION,** who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN,** does not so act in 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.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

January 4 1989
DATE

Edgar R. Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

1/9/89
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 10 1989
DATE

Ronald J. Sarka K.S.
OFFICE OF ADMINISTRATIVE LAW

dho

ANNE S. GARMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

Exceptions to the initial decision have been filed by petitioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioner relies on the arguments set forth in her post-hearing brief (pages 3-9) before the ALJ in an effort to persuade the Commissioner that the findings and conclusions in the initial decision should be set aside.

Essentially, petitioner argues that the Board's action to terminate her employment is based upon a single event rather than being predicated upon her overall performance as a nontenured teacher.

She further claims that her overburdensome teaching schedule impacted negatively upon her ability to closely supervise her pupils. While it is noted that petitioner relied on the testimony of certain witnesses in support of her exceptions taken to the initial decision, the transcripts of such testimony were not provided to the Commissioner for his review. Petitioner, however, continues to maintain that the distribution of the objectionable surveys by two pupils in her psychology class to other pupils at the high school disputes her clear disapproval of the field questions set forth therein with total disregard for the guidelines established by her. She claims her teaching workload was such between November 6 and November 19, 1987 that the pupils, D.H. and S.F., were already distributing the surveys before she discovered the fact.

Moreover, petitioner argues that her abrupt assignment to the position of psychology teacher in October 1987 resulted in a workload consisting of teaching two classes of academic senior history, three classes of psychology, as well as being held responsible for planning lessons and grading pupils in three social studies classes that she had given up to teach the psychology

classes. Consequently, petitioner complains that she was accountable for eight classes at the high school notwithstanding the fact that the normal teaching load was five classes in the high school district.

Under the circumstances set forth in her post-hearing brief and incorporated by reference herein, petitioner maintains that the Board's reasons for terminating her nontenured employment were arbitrary, capricious and contrary to law.

Upon review of petitioner's exceptions, the Commissioner finds and determines that petitioner has failed to carry her burden of proving that the Board's action in terminating her employment as a nontenured teacher was arbitrary, capricious or illegal. The Commissioner finds that petitioner's denial of the fact that she gave pupils D.H. and S.F. permission to distribute the objectional surveys is severely compromised by her own admission to her immediate supervisor, principal and superintendent that she did, in fact, grant these pupils permission to distribute the surveys in question.

The Commissioner has given attentive consideration to the findings and recommendations of the ALJ, especially those upon which he has determined the issue of the credibility of the witnesses, and the Commissioner is not persuaded that a reversal of the initial decision is warranted. (In re Morrison, 216 N.J. Super. 143, 158 (App. Div. 1987))

Accordingly, the Commissioner adopts as his own the findings and recommendations set forth in the initial decision except to correct the statement which appears in the initial decision in paragraph 3, on page 5 which implies that petitioner, as a consequence of these proceedings, has "at stake" the gain or loss of her "tenured position at the high school from which she graduated." The record clearly reveals that petitioner did not achieve tenure protection at the time the Board took action to terminate her employment.

In all other respects, the initial decision in this matter is affirmed and the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

FEBRUARY 23, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5355-88
AGENCY DKT. NO. 168-6/88

RONALD S. BODINE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,
Respondent.

William R. Powers, Jr., Esq., for petitioner (Moss, Powers & Kugler, attorneys)

David M. Serlin, Esq., for respondent

Record Closed: December 20, 1988 Decided: January 9, 1989

BEFORE **JEFF S. MASIN**, ALJ:

Ronald S. Bodine appealed to the Commissioner of Education seeking employment as an elementary school principal. Bodine, who was previously employed in the Township of Burlington as a tenured elementary school principal until June 1979 when he lost his position due to a reduction in force (RIF), contends that pursuant to N.J.S.A. 18A:28-12 he is entitled to appointment as an elementary school principal to fill a vacancy in the district. He contends that the Board improperly denied him this appointment and instead appointed Joyce Payne, a non-tenured employee.

The matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Thereafter, a prehearing conference was held before Administrative Law Judge Jeff S. Masin on October 12, 1988. The petitioner then filed a motion for summary decision contending that there were no material disputes of

fact and that as a matter of law, he was entitled to the position pursuant to the statute. Respondent filed a brief contesting this, claiming that material disputes of fact did exist as to the right of the petitioner to the appointment. The Administrative Law Judge considered the arguments of counsel and determined that summary decision in favor of petitioner was appropriate. The parties were advised of this by letter of December 20, 1988, and an Initial Decision has now been prepared in support of that determination.

THE STATUTE

N.J.S.A. 18A:28-12 reads:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States . . . .

CONTENTIONS OF THE PARTIES

It is undisputed that Mr. Bodine is certified as an elementary school principal. He was hired by the respondent in September 1972 and assigned to the Pinewald School, a K-6 elementary school. He continued in this position continuously from September 1972 until 1979. He attained tenure on the first day of school, September 1975, and held that tenure through June 1979 when he was riffed.

Additionally, there appears to be no dispute between the parties as to Bodine's present status as the most senior elementary school principal previously employed by the district who lost his position due to a reduction in force. Up until 1988, other principals in the district had greater seniority as elementary school principals than the petitioner.[1]

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[1] Respondent's brief notes certain "incidents" during Mr. Bodine's tenure as principal. Mr. Bodine retained his tenure throughout his active service with the district. There is no contention that he was ever subject to any tenure charges or that he was ever accused by the Board of any wrongdoing. References to certain "incidents" contained in paragraphs 5 through 15 in respondent's brief are of no moment to this proceeding and are specifically disregarded as being inappropriate.

The respondent contends that the statute requires that an individual claiming priority under its terms for appointment to a position for which he/she is certified must be "qualified" in order to be reemployed and the phrase "shall be qualified" means more than the mere possession of the appropriate certification for the vacant position. In the view of the respondent, qualification is not so narrow as to be limited to merely the possession of the certification. In the present case, respondent argues that before it is required to reemploy Mr. Bodine, it has the right to determine his qualifications beyond the certification and therefore contends that before any decision can be made to reemploy Bodine, his "qualifications" must be considered. While the Board does not contest his possession of the appropriate certification, nor does it appear to contest his tenure status, his status on the priority list, and his seniority, it argues that he has failed to provide information requested in interrogatories concerning his activities since he was an assistant principal at Delran High School from September 1979 through June 1980 following his being riffed by Burlington, and questions whether he has been involved in education since 1980. The Board argues that at this juncture it is concerned about whether Mr. Bodine has been out of education for eight years and suggests that if this is so, and unless it is shown that he has kept abreast of current developments in elementary school education as they may affect the present curriculum and practices within the township either by continued educational experience or some other means, it cannot be certain that he is "qualified" for the position of elementary school principal.

Petitioner argues that the Board's position ignores the limited "qualification" required by the statute, that is, the only qualification required is the appropriate certification and seniority status. Attempts by the Board to investigate petitioner's activities since 1980 to see whether or not he has been involved in education and contentions that if he has not, he is no longer "qualified," are irrelevant since the statute does not impose any overlay of qualifications beyond certification and the here acknowledged seniority.

For the reasons expressed below, I **FIND** that as a matter of law the statute does not require any qualifications beyond certification in the position in which employment is sought and the necessary seniority. I **CONCLUDE** that the phrase "shall be qualified" merely refers to possession of the certification, which is the sine qua non for appointment to a principal's position, and the seniority status. I **CONCLUDE** that Mr. Bodine's activities within or without the educational field since 1980 are irrelevant to a

determination of his qualification for appointment (barring any evidence of some activity which would subject him to loss of certification and/or license, such as criminal conviction) and that under the circumstances there is no material dispute of fact as to his "qualification." As such, the matter is ripe for decision in a summary fashion in accordance with the principles established in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954), and permitted in administrative proceedings pursuant to N.J.A.C. 1:1-12.5. Therefore, I **CONCLUDE** that Mr. Bodine is entitled to appointment to the position of elementary school principal which the Board filled at its May 18, 1988 meeting, effective July 1, 1988.

DISCUSSION

The statute, N.J.S.A. 18A:28-12, contains no specification of the "qualifications" required of a person who is to receive the benefit of the priority status therein conferred. It requires that a teaching staff member be "dismissed as a result of such reduction." The person is then placed by operation of the law on a "preferred eligible list" and "shall be and remain upon . . . (the) list." The listing "in the order of seniority for reemployment" and the reemployment is to occur "whenever a vacancy occurs in a position for which such person shall be qualified." Where a person fulfills these conditions, he "shall be reemployed by the body causing dismissal, if and when such vacancy occurs . . . ." There is nothing in the statute which refers to any term of years during which the preference remains in effect, any limit upon the length of the preference, or any indication visible in the face of the statute other than by interpretation of the term "qualified" as to the specifics of any qualifications which must be demonstrated to obtain the reemployment.

Counsel correctly suggest that this appears to be a case of first impression in New Jersey. Respondent argues that the term "qualified" must be interpreted in the context of a tenured teaching staff member who is dismissed as a result of a reduction in force, who may have remained out of the education field for a period of eight years and then seeks to be re-employed. Respondent suggests that the meaning of the term and of the preference contained in N.J.S.A. 18A:28-12 must be "derived from the whole act and not from any single component part."

N.J.S.A. 18A:28-12 was amended by P.L. 1935, Ch. 126, Sect. 1 to include the word "qualified." The sponsor statement, as quoted by respondent, states:

> . . . amendment . . . designed to ensure priority to supervising principals, principals and teachers who are under tenure of office and who, for reasons of economy, must be dismissed; when and if vacancies occur in the school system from which such dismissals took place.

Nothing in the quoted statement gives any clue as to any specifics of the "qualified" status required by the amendment. The statement says in a straightforward fashion that riffed principals are ensured priority where a vacancy occurs. Nothing else is stated, nothing else appears to be suggested.

Respondent contends that the use of the phrase "shall be qualified" implies an intention on the part of the legislature to "impose upon a teaching staff member who has been dismissed due to a reduction in force a continuing duty to remain qualified by continuing to be active in education either through teaching or continuing education." Whatever the merits of such a requirement might be, and they may be many, there is certainly nothing directly stated in the statute which says any such thing, which imposes any such obligation. Had the legislature desired, it could certainly have said that the Board could examine the "qualifications" of individuals, their training, their background, their activities since the reduction in force, etc. No such thing is stated. Respondent also argues that the legislature could have used the word "certificate" or presumably "certificated" had it intended to limit the qualifications required to the possession of the proper certificate. Respondent points out that N.J.S.A. 18A:28-1, the tenure provisions of the education statutes, use the word "certificate" frequently and the word "qualified" only appears in subsection 28-12. Respondent senses a distinction which implies that "qualified" requires something more than the mere possession of the certificate. A review of the statute belies this suggestion. N.J.S.A. 18A:28-4 provides:

> No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position . . . .

In order to acquire tenure, it is therefore necessary to hold the appropriate certificate. One is not "qualified" for tenure without holding the proper certificate. Once one holds

such certificate, one may acquire tenure by the appropriate employment and length of service. N.J.S.A. 18A:28-5 defines the length of service required for achieving tenure and notes a list of employee positions eligible for tenure and refers to all of these as being in "positions which require them to hold appropriate certificates issued by the board of examiners . . . ." Tenure then remains in effect for employees "during good behavior and efficiency . . . ."

N.J.S.A. 18A:28-12, requiring that a person be "qualified" in the context of the education laws and the tenure statutes and seniority provisions, does nothing more than require that one hold the certificate which qualifies the individual for the position. An examination of the specific language of the section indicates that a teaching staff member may be dismissed in a RIF and will remain upon the preferred eligibility list for reemployment in order of seniority and that reemployment will occur "whenever a vacancy occurs in a position for which such person shall be qualified . . . ." Qualification in this sense surely means certification for the particular position. Thus, a teaching staff member who has no certification as a principal would not be entitled to reemployment because that person is not "qualified" for that position as the individual does not have the proper certification. While it is correct to say that the legislature could have said "whenever a vacancy occurs in a position for which such person shall be certificated" or "shall hold the proper certificate," the fact that the legislature used the term "qualified" and not one of the other suggested phrases, does not imply that they meant something different when they referred to "qualified" in the context of the tenure law. Qualification only means more than "certificated" in the sense that it also means that the employee has the necessary seniority and tenure.

Respondent suggests that several cases from other jurisdictions offer "limited" guidance on the meaning of the term "qualified" in connection with employment and reemployment issues. Thus, in Hagarty v. Dysart-Geneseo Community School, 282 N.W. 2d 92 (Supreme Ct., Iowa 1979), the court held that with respect to a school board policy which provided for recall of teachers terminated because of reductions in enrollment, which policy indicated in relevant part, "will have recall rights to positions for which they are qualified for a period of one year from the date of their termination . . ." and which policy had been amended to include "these recall rights will be extended only once to the qualified personnel, "that the only requirements imposed were certification and general endorsement for teaching in the elementary grades so that the teacher would have the "authority . . . necessary to be assigned to teach in the position which is offered." The

recall rights were viewed as "liberal" and purposely so under the language of the staff reduction policy. The court noted that in Bishop v. Keystone Area Ed. Agency No. 1, 275 N.W. 2d 744 (Iowa Supreme Ct. 1979), a "different standard for determining employment qualifications had been established by the school board" in that case which interpreted "qualified" more broadly to include considerations of the ability of an individual to work with others in a team effort, which was viewed as essential in connection with the particular type of changeover which had occurred from former joint county school systems to area education agencies.

In Farmer v. Holten Public Schools, 138 Mich. App. 99, 359 N.W. 2d 532 (Ct. App. Mich. 1981), the court dealt with a statute which provided:

> Any teacher on permanent tenure whose services are terminated because of the necessary reduction in personnel shall be appointed to the first [1st] vacancy in the school district for which he is certified and qualified.

In this case, the statute clearly provided for some qualification beyond certification.

Both parties cite Capodilupo v. West Orange Township Board of Education, 218 N.J. Super. 510 (App. Div. 1987), in support of their positions. In Capodilupo the Court considered the rights of Mr. Capodilupo as opposed to two other employees of the Township Board of Education. Capodilupo was a tenured secondary school physical education teacher. Reilly and Savage were not tenured. Capodilupo was terminated by the Board pursuant to a reduction in force. He claimed that he should have been offered one of two elementary physical education teaching positions held by the two non-tenured employees, Savage and Reilly, who were retained despite the reduction. The State Board reversed the determination of the Commissioner and the Board and found that Capodilupo was entitled to be retained.

On appeal the Court considered the relationship between the seniority provisions of N.J.A.C. 6:3-1.10 and the tenure provisions of N.J.S.A. 18A:28-5. The Court concluded that with respect to seniority Capodilupo possessed no seniority rights concerning elementary school positions because elementary physical education and secondary physical education teaching positions were considered separate seniority categories, pursuant to N.J.A.C. 6:3-1.10(1)(15)(iii). However, the Court went on to conclude that Capodilupo had tenure in all positions for which his instructional certificate qualified him, including

elementary physical education, even though he did not have seniority in that category. The State Board had relied on its "quasi-legislative responsibility to balance 'the protection afforded tenured teaching staff members by N.J.S.A. 18A:28-5 and the authority granted to district boards of education by N.J.S.A. 18A:28-9.'" The State Board ruled that districts are obligated to take into consideration tenure rights of employees effected by a RIF. The Appellate Division agreed with this determination and concluded that:

> The State Board was within its delegated authority when it ruled that a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification.

The Court went on to note that the State Board had found

> that the Board's obligation to consider tenure in a RIF could be balanced by 'sound educationally based reasons for its decision to retain a non-tenured teacher.' However, the Court determined that it was 'unnecessary and inappropriate to address the merits of this portion of the State Board's opinion'

because one of the non-tenured teachers had not cross-appealed and the "Board advanced no 'educationally based reasons' to retain Reilly, beyond his experience as an elementary teacher." (Reilly had cross-appealed.)

Capodilupo clearly supports the liberal application of the tenure statute to protect tenured employees in their positions as opposed to non-tenured individuals where RIFs occur. Nothing in the decision of the Appellate Division supports a denial of reinstatement to a individual holding the proper seniority and tenure based upon any alleged other qualifications, such as the Board imposed in this case. Although the question of whether "sound educationally based reasons" could defeat the tenured employees' rights may still be open, the Court has not determined that the State Board's position is correct. In the absence of such approval, a reading of N.J.S.A. 18A:28-12 does not appear to support the imposition of additional qualifications other than possession of the proper seniority and certificate. If the State Board determines as a quasi-legislative matter to impose additional qualifications, it may perhaps have the authority to do so. However, one can question whether the quasi-legislative balancing engaged in by the State Board in Capodilupo with respect to the interplay between seniority and tenure is the

same sort of "legislating" that would be necessary for the Board to impose a definition of "qualified" in the statute under consideration.

In summary, there appears to be no case law in New Jersey which has interpreted the statute and the meaning of the term "qualify." Case law from other states cited by respondent seems to indicate variance in the use of the phrase depending on whether establishment of qualifications is left to a local board or whether the statute provides some clear guidance through the use of multiple terms such as in the Michigan statute. Further, as pointed out by respondent, several states, such as California and Illinois, have limited the preferred right of employment by establishing time limits, such as 39 months in California, West's Ann. Cal. Educ. Code No. 44956(a)(1), or one year as in Illinois, Ill. Ann. Stat. Ch., 122 para. 24-12. New Jersey statute does not set such time limits.

For the reasons set forth, I **CONCLUDE** that the phrase "qualified" simply means that the individual who has been riffed and who seeks reemployment must be certified, that is, must hold the appropriate certification for the vacant position. No other qualifications beyond that are required, other than of course having been previously employed, having been riffed, and having the necessary seniority. Interpreting the phrase "qualified" to incorporate any other standards is beyond the scope of the legislation as presently written and is not implied by either the legislative history or the statutory context. It is apparent that the purpose of the legislation was to provide for liberal reemployment rights for those who lost their positions through no fault of their own, but through reductions in force necessitated by circumstances over which they had no control. While it might be appropriate for the Legislature to review this statute and provide for some limitations on the right in order to assure that persons seeking reemployment still have the necessary knowledge and familiarity with educational practices and policies even if they had been removed from the educational system for many years, the Legislature has up to this point not seen fit to impose such requirements. In this case, where there is no material dispute of fact as to Mr. Bodine's prior employment, tenure status, termination due to a reduction in force, and seniority, since he holds the appropriate certificate he is qualified under the Act. Therefore, he must be reemployed in the position which became available as of July 1, 1988. The failure of the Board to reemploy him in that position was improper and the appointment of Ms. Payne to the position was equally improper. Although suggestions are made in a rather secondary manner that Ms. Payne's employment

was appropriate even despite Mr. Bodine's qualification under the Act because she filled certain "affirmative action" needs, being both black and female, respondent has not presented any legal authority suggesting that affirmative action needs may overcome the liberal preference provision of the Tenure Act.

In view of the above, it is **ORDERED** that Mr. Bodine shall be immediately appointed to the position of principal in place of Ms. Payne and that he shall be made whole for all monies lost as a result of the failure of the Board to appoint him effective July 1, 1988.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

DATE — **JEFF S. MASIN, ALJ**

Receipt Acknowledged:

1/10/89
DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 12, 1989
DATE — OFFICE OF ADMINISTRATIVE LAW

ds

RONALD S. BODINE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions submitted by the Board were untimely received pursuant to the applicable provision of N.J.A.C. 1:1-14.8. Accordingly, the reply exceptions submitted by petitioner are not considered either in the disposition of this matter.

Upon his careful and independent review of the record of this matter, the Commissioner agrees with the findings and conclusion of the Office of Administrative Law "where there is no material dispute of fact as to Mr. Bodine's prior employment, tenure status, termination due to a reduction in force, and seniority, since he holds the appropriate certificate he is qualified under the Act." (Initial Decision, ante) Consequently, the Commissioner concurs that the Board must reemploy him in the position which became available as of July 1, 1988, and he must be made whole for all monies lost as a result of the failure of the Board to appoint him effective as of that date.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

February 23, 1989

RONALD S. BODINE,	:	
PETITIONER-RESPONDENT	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 23, 1989

For the Petitioner-Respondent, Moss, Powers, Kugler & Lezenby (William R. Powers, Esq., of Counsel)

For the Respondent-Appellant, David M. Serlin, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. By virtue of Petitioner's certification as a principal, he is "qualified" within the meaning of N.J.S.A. 18A:28-12 for the position of principal in the district. See Mirandi v. Board of Education of the Township of West Orange, decided by the State Board, April 5, 1989.

July 6, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5549-88
AGENCY DKT. NO. 201-7/88

ALEX YUKA,
Petitioner,
v.
TOMS RIVER SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent

Alex Yuka, petitioner, pro se

Milton Gelser, Esq., for respondent (Gelser, Kelaher, Shea, Novy & Carr)

Record Closed: December 2, 1988 Decided: January 11, 1989

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Alex Yuka (petitioner) is the father of a boy enrolled in the tenth grade of the Toms River High School who is also a participant on the high school varsity wrestling team. Petitioner claims his son, S., was wrongfully disqualified by school authorities from participation on the wrestling team during the 1988-89 wrestling season for failure to have accumulated 30 academic credits during the preceeding semester. Petitioner seeks an Order by which the Board would be directed to allow S. to participate on the team. Alternatively, petitioner seeks a waiver by which S. would be excused from the requirement of having successfully accumulated 30 credits the preceeding semester. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case on July 27, 1988, a prehearing conference was conducted October 3, 1988. The matter was scheduled for hearing December 1, 1988 at the Point Pleasant Borough Municipal Building, Point Pleasant. The conclusion is reached

in this initial decision that petitioner has failed to establish by a preponderance of credible evidence, or any evidence, that the Board or its agents, officers or employees improperly disqualified S. from participation on the high school inter-scholastic varsity wrestling team for 1988-89 and petitioner failed to establish a basis upon which a waiver from the academic credit rule should be granted S.

BACKGROUND FACTS

The background facts of the matter as established by a preponderance of credible evidence are these. The Board's policy regarding pupil eligibility for athletic and other co-curricular activities, effective for 1987-88 and for first application in September 1988, requires high school pupils to pass a minimum of 30 credits the preceeding school year in order to be declared eligible for participation. In effect, the policy as of September 1988 required pupils who wished to participate in inter-scholasitc athletics to have passed 30 credits during 1987-88. (C-1, C-2) Pupils were notified in writing of the 30 semester credit requirement during October 1987 (R-3) and again during February 1988 (R-4). The evidence further shows that guidance counselors brought the 30 credit course requirement to the attention of student athletes for purposes of the 1988-89 academic year (R-1, R-2). The high school principal testified under oath that during 1987-88 he made general announcements to all high school pupils regarding the new policy. Thus, S. had knowledge of the 30-credit policy in 1987.

The guidance counselor of S., Mark DeVoe, testified that S. wanted to take an elective biology course in an effort to strengthen his desire to get a college wrestling scholarship upon graduation from high school. S. enrolled in the biology course during 10th grade in 1987-88. S. failed biology in the first quarter marking period. S. continued to do failing work in biology during the second marking period and then he, S., decided to drop the course. The action of S. to drop the biology course reduced his total academic load credit for the 1987-88 year from 30 to 25 credits thereby eliminating his eligibility for participation on the wrestling team during 1988-89 under the Board's then existing policy. While Mr. DeVoe testified he did discuss with S. the consequences of dropping the biology course S.'s father, petitioner herein, complains that school authorities did not discuss the consequences with him, petitioner, of his son dropping biology. It is noted DeVoe is of the view S. should be allowed to wrestle. (See R-5). The accumulation of 25 credits by S. during 1987-88 does not in any way jeopardize his high school graduation, despite his not having made up the 5 credits of the dropped biology course.

Following a declaration by school authorities that S. was not eligible to participate on the high school wrestling team for 1988-89 for failure to accumulate 30 credits during 1987-88, an informal hearing was afforded petitioner, S.'s father, by the Board on June 21, 1988. (See minutes of meeting). Petitioner was advised that S. could make up the 5-credit difference by attending summer school during 1988, thereby becoming eligible to participate under the Board's policy. Petitioner and S. rejected the opportunity for summer school. Despite some Board members voicing concern that S. should be allowed to participate on the varsity wrestling team during 1988-89, the fact remains that a majority of the Board determined that for S. to participate he would have to make up the 5 credits during the 1988 summer school session. S. opted not to attend the 1988 summer school session. S. is not wrestling on the inter-scholastic athletic wrestling team.

This concludes a recitation of all relevant background facts of the matter.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:11-1 authorizes boards of education to adopt rules and regulations for the operation of its schools as it sees fit. The obvious purpose of the Board's policy by which pupils are obligated to successfully complete 30 academic credits the preceeding year in which they wish to participate in athletics and other co-curricular activities is to insure that all persons recognize it operates its facilities primarily for academic pursuits, not for inter-scholastic athletics or other co-curricular activities. True, those kinds of activities are in the scheme of things important but their importance is limited to their place in the larger purpose of public schools. Nevertheless, this Board has determined that the accumulation of 30 academic credits is the standard pupils must achieve in order to participate in extra-curricular activities. The policy has a legitimate objective. Petitioner has not shown that the policy or the objective is inherently without a rational basis.

In regard to petitioner's argument that school authorities did not notify him of the consequences of S.'s determination to drop the biology course, petitioner has cited no authority by which school authorities would be obligated to specifically tell the father of a high school pupil of the athletic consequences of the pupil's dropping a course nor has petitioner presented any reason why such a policy should be imposed upon this Board by an external source. Surely S., as a high school pupil who happens to be a wrestler, should be

sufficiently mature to keep petitioner apprised of his progress in school. Obviously, there was a breakdown in communication between petitioner and S. That communication breakdown, however, cannot be presently used as a basis to force the Board to grant S. a waiver from the 30 academic credit requirement for participation on the wrestling team.

Having considered the foregoing, I **FIND** no impropriety on the part of the Board, its agents, officers, or employees with respect to the disqualification of S. from participation on the high school inter-scholastic varsity wrestling team for 1988-89. I further **FIND** that no basis has been established by petitioner upon which the Commissioner should order the Board to grant S. a waiver from the 30 academic credit rule. I, therefore, **CONCLUDE** that the petition of appeal must be dismissed for failure of proofs presented by petitioner. The petition of appeal is accordingly **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 11, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

1/12/89
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 13 1989
DATE

Ronald L. Taylor
OFFICE OF ADMINISTRATIVE LAW

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DOCUMENTS IN EVIDENCE

C-1	Memorandum, September 24, 1987
C-2	Board's policy
R-1	Memorandum, September 15, 1987
R-2	Memorandum, September 24, 1987
R-3	Memorandum, October 1987
R-4	Memorandum, February 1988
R-5	Letter, June 6, 1988
	Minutes of meeting, June 21, 1988

ALEX YUKA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record in this matter including the initial decision rendered by the Office of Administrative Law.

It is noted that no exceptions were filed by the parties to the initial decision pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of the record, the Commissioner finds and determines that the ALJ properly concluded from the credible evidence before him that petitioner did not carry his burden of proof that the Board's action in disqualifying S. from participation on the varsity wrestling team for the 1988-89 school year was in any way improper or illegal.

Moreover, given the fact that S. was advised that he could make up the 5 credit course deficit from the prior school year (1987-88) by attending summer school prior to the commencement of the 1988-89 school year, which he declined to do, evokes no empathy from the Commissioner since it was S., and not the school authorities, who caused his disqualification from the varsity wrestling team during the 1988-89 school year.

Accordingly, the Commissioner adopts as his own the findings and conclusion set forth in the initial decision. The instant Petition of Appeal in hereby dismissed.

COMMISSIONER OF EDUCATION

FEBRUARY 27, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3844-88
AGENCY DKT. NO. 94-4/88

WEEHAWKEN BOARD OF EDUCATION,
Petitioner,
v.
NEW JERSEY STATE COMMISSIONER OF EDUCATION, AND A.W., A MINOR,
Respondents.

Henry W. Heunemann, Esq., for petitioner
(Krieger and Ferrara, attorneys)

Lori L. Chewkanes, Deputy Attorney General, for respondent
(W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: November 29, 1988 Decided: December 20, 1988

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted by the Commissioner of Education to the Office of Administrative Law on May 24, 1988, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. At issue is whether petitioner is responsible for the payment of tuition for a minor child (A. W.) placed by DYFS in an out-of-state facility. See, N.J.S.A. 18A:7B-12. The case was preheard on August 10, 1988, by Judge Elinor R. Reiner and was heard before the undersigned administrative law judge on November 1, 1988.

TESTIMONY FOR PETITIONER

Testimony was presented at the hearing by one witness on behalf of the Weehawken Board and three witnesses on behalf of the Commissioner.* The petitioner's witness, Vincent J. Ruppert, is the school district's attendance officer and has held that position for more than 30 years. Included among his duties is the responsibility for verifying pupil residence. In January 1988, Ruppert was directed by the superintendent of schools to verify whether one Filomena Miranda resided with her minor son (A. W.) at a particular address in Weehawken. When Ruppert went to the premises he was told that Miranda and A. W. had been living in an apartment rented to a woman named Fran Maloney. Ruppert spoke to Maloney who told him that although Miranda and A. W. had lived in her apartment in 1987 for about one month, she moved out "quite a while ago."

TESTIMONY FOR RESPONDENT

The first witness for respondent was Nydia Farias, who has been employed as a DYFS caseworker for about 15 years. Farias knows both Miranda and A. W. On August 31, 1987, Farias's supervisor informed her that a motion to remove A. W. from the custody of his mother had been entered by the Superior Court and it was necessary to implement that order immediately. Thus, on that same date, Farias proceeded with her supervisor to 95 Highwood Terrace in Weehawken, went to the first floor apartment rented to Fran Maloney and found Miranda, A. W., and another son there. A. W. was removed from the custody of Miranda and immediately taken to a foster home in Sussex County.

On cross-examination, Farias indicated that about one year earlier a similar removal took place when the family was living in Union City. Thus, when Farias confronted Miranda in the Maloney apartment on August 31, 1987, she and her

*Although A. W. also was named as a respondent, he is unrepresented and the Board agreed that no relief is sought as to him in any event.

supervisor anticipated there might be a problem and were accompanied by two police officers. Despite this assistance, it took about one hour to effect the removal of the children.

Farias also said that Maloney told her that Miranda and her children could continue to stay in the Maloney apartment and there was no reason to remove the children. Also, while Miranda told Farias she had found another apartment, she did not identify where it was nor could she produce any documentation to verify her statement.

The next witness for respondent, Marne E. Benson, has been a DYFS employee since June 1983 and was Miranda's and A. W.'s caseworker from February 1986 to June 1988. According to Benson, Miranda and her children lived in Union City from February 1986 until March 1987, when they were evicted. Thereafter, according to Benson, they had various residences. On August 19, 1987, Benson learned Miranda was living with Maloney at the 95 Highwood Terrace address. Benson then proceeded unannounced to the apartment and found Miranda, A. W. and another son living there. Benson said she told Miranda it would be necessary for the children to be registered in school and to have proper care taken of them. Miranda replied that she intended to stay in Maloney's apartment while looking for an apartment in Keansburg, New Jersey, where her brother lived.

As a result of her observations on August 19, 1987, Benson recommended removal of the children, which action took place on August 31, 1987, as testified by Farias. A. W. was placed in a foster home in Sussex County. Sometime during mid-September 1987 Benson attempted to contact Miranda but learned she had moved.

Benson's last contact with Miranda was on September 30, 1987, when the latter appeared in court with respect to the custody determination. At that time, according to Benson, Miranda told her that she now lived at 4707 Park Avenue in Weehawken. When Benson later attempted to find the address, she was unable to do so. In mid-November 1987 A. W. was placed in a residence facility in

Pennsylvania. Benson does not know where Miranda is living and has not seen her since the court appearance last year.

Benson also identified a packet of documents pertinent to the proceedings (Exhibit R-1, with attachments). In particular, she reviewed the contents of a report designed to determine the district of residence for a child placed by a state agency in a group home, a private school or an out-of-state facility (attachment R-5 to Exhibit R-1). According to Benson, as of the date of the report (December 1987), the address of Miranda was unknown, although her last known address was listed as 4707 Park Avenue, Weehawken. Benson said she put this apparently erroneous information in the report since that was the address Miranda gave her on September 30, 1987. However, with respect to the address of Miranda at the time of the initial placement on August 31, 1987, Benson listed it as the Maloney apartment at 95 Highwood Terrace, Weehawken.

On cross-examination, Benson repeated that she did not know where 4707 Park Avenue was located and as far as she could tell there was no such building address in Weehawken. In fact, a letter she sent to that address was returned with a notation that there was no such number.

Benson conceded she did not know how long prior to August 31, 1987 Miranda and A. W. were living in the Maloney apartment in Weehawken. The first time she actually saw them there was on August 19, 1987, when she observed them in a corner bedroom with paper bags full of their clothing. Miranda told her she had come to Weehawken to try to find a job but intended to move to Keansburg.

Finally, Benson identified an affidavit she had executed on August 27, 1987, in which she related much of the background pertaining to the "travels" of Miranda and her sons (Exhibit R-2). According to that affidavit, Miranda was residing in Union City on March 25, 1987, but on April 2, 1987, she contacted Benson to tell her she now was residing at a motel in North Bergen. On April 6, 1987, Benson discovered that Miranda and A. W. had been residing at yet another motel in North Bergen, but had checked out that day. On April 15, 1987, Benson visited an address in Jersey City and found the Miranda family residing there. On May 12, 1987, Benson

received a message from Miranda indicating that she now was living at the York Motel in North Bergen. On May 15, 1987, Benson arranged for the family to be placed in a shelter in Jersey City. On June 4, 1987, Benson received a call from A. W.'s older brother, who told her that the family was again residing at a motel in North Bergen. On June 15, 1987, Benson received a call from Miranda requesting that DYFS find a place for her to stay with her children. Benson explained to Miranda that all community resources had been exhausted and it appeared that DYFS would have to place the children in foster care. Miranda hung up on her. The following day, Benson received a call from Miranda stating that she was now residing in Jersey City, but two weeks later, when she visited the address given to her, Benson found no one at home. Then, on July 17, 1987, Benson received a telephone call from Miranda informing her that she was now living with her brother in Keansburg. Some days later DYFS received a referral to the effect that Miranda had been abusive to her sons, one of them had run away and the matter was under investigation in Monmouth County. Then, according to the affidavit, Benson discovered on August 19, 1987, that the Miranda family was living with Maloney in Weehawken. Benson visited the address that day and, as noted, found Miranda, A. W. and another son there. The affidavit went on to indicate that Miranda told Benson she planned to continue working at night and would be leaving "J." (another son) in charge of A.W. Miranda also indicated to Benson that "she would be moving again soon."

Another attachment to Exhibit R-1 is a letter dated December 11, 1987, to the superintendent of schools from Melvin L. Wyns, Director of the Bureau of School Finance. In that letter Wyns pointed out that since A. W. had been placed in the Pennsylvania facility on November 13, 1987, and since his mother, Filomena Miranda, presently was missing and her address unknown, then pursuant to N.J.S.A. 18A:7B-12, Weehawken was the school district responsible for payment of A. W.'s tuition since his mother was residing in Weehawken at the time of A. W.'s initial placement by a state agency. In a reply letter, dated January 11, 1988, the superintendent advised Assistant Commissioner Calabrese that Weehawken was contesting the Department's position regarding the applicability of the statute.

The last witness for the State was William W. Poch, presently school business administrator in Union City, who had been employed by the Department of Education for 16 years. In December 1987, Poch served as assistant director of the Bureau of School Finance.

Included among Poch's duties while employed by the Department was the responsibility to review determinations respecting school district obligations to pay tuition for out-of-state placements pursuant to N.J.S.A. 18A:7B-12 and N.J.A.C. 6:20-5.3. According to Poch, he reviewed the information as to Miranda and A. W. and initially approved the designation of Weehawken as the district of residence because that was where he believed A. W.'s custodial parent (Miranda) resided on November 13, 1987, at the time of the boy's placement in the Pennsylvania facility. Thus, the original determination was made in light of the language of N.J.S.A. 18A:7B-12(b), which provides that the district of residence for children who are placed in an out-of-state facility, "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." [emphasis added] However, upon review, realizing that the whereabouts of Miranda were unknown on November 13, 1987, Poch resorted to another section of the subparagraph which provides that if, as here, the district of residence of the custodial parent as of the time of the placement (November 13, 1987) could not be determined, then "the district of residence shall be the district in which the child resided prior to such admission or placement." [emphasis added]. Thus, since A. W. was removed directly from the custody of his mother in the Weehawken apartment on August 31, 1987, placed in a foster home, and then placed in Pennsylvania, the Department concluded that Weehawken was the responsible district of residence under the statute.

FINDINGS OF FACT

Based upon my review and consideration of the testimony and the documentary evidence in this case, I make the following findings of fact:

1. On August 31, 1987, A. W., a minor child seven years of age, then residing with his mother in an apartment at 95 Highwood Terrace, Weehawken,

New Jersey, was removed by DYFS from the custody of his mother (Filomena Miranda) by virtue of a court order and placed on an emergent basis in a foster home in Sussex County.

2. Between August 19 and August 31, 1987, at least, Miranda and A. W. lived in the apartment in Weehawken.

3. On November 13, 1987, A. W. was moved by DYFS to a facility in Bethlehem, Pennsylvania. The whereabouts and address of Miranda on that date were, and remain, unknown.

4. Since Miranda had custody of A. W. and resided in the apartment in Weehawken on August 31, 1987, the Department of Education determined pursuant to N.J.S.A. 18A:7B-12 and N.J.A.C. 6:20-5.3(a)(3) and 6:20-5.3(b) that the "district of residence" for determination of the tuition obligation pertinent to A. W. was Weehawken since that was "the district in which [A. W.] resided prior to [his] admission or placement [by DYFS.]"

DISCUSSION

The decision in this case turns upon the interpretation to be given to the following provisions of N.J.S.A. 18A:7B-12 and N.J.A.C. 6:20-5.3(a):

N.J.S.A. 18A:7B-12. District of residence; determination

> 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, 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.

If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

c. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child. The tuition shall equal the State average net current expense budget per pupil plus the appropriate categorical program support. This amount shall be appropriated in the same manner as other State aid under this act. The Department of Education shall pay the amount to the Department of Human Services or the Department of Corrections.

N.J.A.C. 6:20-5.3 Method of determining the district of residence

(a) The district of residence for school funding purposes shall be determined according to the following criteria:

. . .

3. The "district of residence" referred to in paragraph two of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency.

(b) The commissioner shall determine the "present district of residence" or "district of residence" referred to in N.J.S.A. 18A:7B-12(b) based upon the address submitted by the Department of Corrections or the Department of Human Services on forms prepared by the Department of Education.

(c) The commissioner shall notify district boards of education of the determination of the district of residence.

From the evidence it appears that between August 19 and August 31, 1987, at least, a period of 13 days, A. W. and his mother, Filomena Miranda, resided in an apartment located at 95 Highwood Terrace, Weehawken, New Jersey. Indeed, according to both Ruppert's and Farias's testimony, based upon information given to them by Maloney, it is possible that Miranda and A. W. actually lived there for an even longer period of time, perhaps one month. Since the applicable statute and

require the Commissioner to determine the district of residence based upon information provided by DYFS, and since it is clear that A. W. and his mother were living with Maloney on August 31, 1987, the question is whether pursuant to those authorities Weehawken is the "district of residence" immediately prior to the admission of A. W. to the out-of-state facility.

Petitioner maintains that the only evidence of A. W.'s connection with Weehawken is the fact that he and his mother were in the Maloney apartment on August 19, 1987, and again on August 31, 1987. At no time, however, were the children registered for school in Weehawken nor, according to the Board, is there any concrete proof that A. W. even remained in Weehawken between those two dates. Indeed, based upon the history of this family's transient existence, it is the Board's position that arguably the family did not stay at Maloney's apartment for more than one day at a time. Thus, according to the Board, the meaning of the term "residence" as used in the statute and regulation involved in this case must closely be scrutinized to determine whether the Department's position can be sustained. In this respect the Board argues that since pursuant to N.J.S.A. 18A:1-1 "residence" must be given the same meaning as "domicile," it cannot reasonably be argued that Miranda and A. W. had a "true, fixed and permanent home" at the 95 Highwood Terrace apartment or, indeed, at any one of the numerous places they stayed during all of 1987. Thus, since it is not possible, given the particular circumstances of this case, to determine Weehawken or any other place to be the "district of residence," the Board asserts that it is the responsibility of the state to assume the fiscal responsibility for A. W.'s tuition pursuant to N.J.S.A. 18A:7B-12(c).

While there is a surface appeal to petitioner's argument, based upon the transient nature of Miranda's living arrangements and the fact that her stay with Maloney clearly was on a temporary basis, I believe that the determination by the Department under the statute and the regulations nevertheless was appropriate.

First, I agree with respondent that the terms "residence" and "domicile" are, for purposes of this case, distinct terms having different meanings and are not to be construed as synonymous. See, e.g., Rosenberg v. Universal Underwriters, 217 N.J. Super. 249 (Law Div. 1986); Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959);

Cromwell v. Neeld, 15 N.J. Super. 296, 300 (App. Div. 1951); M.A.M. v. Board of Education of the Black Horse Pike Regional School District, 1974 S.L.D. 845.

While Miranda's decision to locate herself with her sons in the Weehawken apartment in July or August 1987 apparently was purely serendipitous; nevertheless, that was the school district where she "resided," however temporary it may have been, on the pertinent date. Accordingly, Weehawken must bear the tuition responsibilities imposed upon it by the law.

In the Rosenberg case, the court made reference to an earlier decision by the Appellate Division, Continos v. Parsekian, 68 N.J. Super. 54 (App. Div. 1961), which, as here, involved a consideration of the effect of the temporary nature of one's "residence" for purposes of attaching legal consequences. In Continos a student who was a Greek domiciliary living in a rented room in New Jersey while working in New York was struck by hit-and-run driver. The student thereafter quit work, left New Jersey, and returned to college in another state. The could held he was not a New Jersey "resident" within the meaning of the Unsatisfied Claim and Judgment Fund Law; rather, such a person was to be considered a mere "sojourner" in New Jersey. Continos v. Parsekian at 61. In reaching that result, the court pointed to the repeated recognition of the difference between the words "domicile" and "residence" and noted, in particular, that the word "resident" has ". . . varied meanings and significations dependent on the connection in which it occurs and the result designed to be accomplished by its use, and that those factors also determine whether it should be given a broad or a restricted construction." Continos v. Parsekian at 58-59. Thus, finding that Continos did not fit into the class for whose benefit the unsatisfied claim and judgment fund was intended, the Appellate Division stressed the temporal nature of Continos' presence in New Jersey and the negation of any evidence to demonstrate an intention to reside here.

In its decision in Continos the court also reviewed the earlier decision in Collins v. Yancey, where the same statute had been interpreted to provide relief to an individual who had been living and working in New Jersey for about six months prior to his injury. Later, in Sullivan v. Saylor, 79 N.J. Super. 1 (App. Div. 1963) the court

observed that the difference between the results in Continos and Yancey was that Yancey involved someone who arguably could claim a status of "resident" and was not a "mere sojourner." Id. at 5. The court in Sullivan also made reference to a Maryland decision which equated residence with domiciliary status and observed that New Jersey takes a different view--"one may be a resident . . . although his domicile is elsewhere." Ibid.

Thus, as the cases point out, a decision construing "residence" must turn upon the language and intent of the particular statute involved as there is no fixed definition of that term. See, Rosenberg, at 255. In this case the respondent argues, and I agree, that the legislative history of N.J.S.A. 18A:7B-12 reveals a clear intent to impose tuition liability for a status less than that of a pure domiciliary. Indeed, only recently, the Commissioner reiterated that N.J.S.A. 18A:7B-12 and the implementing regulations do not require a determination of domicile. See, Board of Education of the City of Orange v. New Jersey State Department of Education, et al., OAL Dkt. No. EDU 0016-87, (August 25, 1987) decided by the Commissioner November 13, 1987.

Subsequent to the conclusion of the hearing and the submission of posthearing briefs, the Board submitted a brief summary of the decision of the Commissioner in Board of Education of Mainland Regional High School District v. Peterson and Merlino, OAL DKT. No. 7304-87 (May 23, 1988), decided July 6, 1988, wherein the Commissioner adopted an administrative law judge's decision that establishing temporary sleeping quarters in a school district did not give rise to a finding of domicile under N.J.S.A. 18A:38-1(d). That case is not particularly pertinent to the present one since the issue in Mainland Regional was whether the local board of education was going to be saddled with having to provide a free education to a student whose custodial parent plainly was not establishing a bona fide temporary residence. In short, the statutory policies involved in the Mainland Regional case, not to mention the specific facts, are quite distinct from those involved in the case at bar.

CONCLUSION AND ORDER

Accordingly, based upon my review of the evidence, I **CONCLUDE** that pursuant to N.J.S.A. 18A:7-B-12(b) and N.J.A.C. 6:20-5.3(a)(3) the district of residence for A. W. immediately prior to his placement was Weehawken and that the determination by the Department that Weehawken is obligated for A. W.'s tuition was proper. I therefore **ORDER** that the petition of appeal should be **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **Saul Cooperman** for consideration.

December 21, 1988
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

12/22/88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 23 1988
DATE

Ronald I. Parker, Acting Director & Chief ALJ

amr/e

BOARD OF EDUCATION OF THE TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE COMMISSIONER OF EDUCATION AND A.W., a minor, RESPONDENTS.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to the requirements of N.J.A.C. 1:1-18.4.

Upon review of the record the Commissioner concurs with the ALJ's findings and conclusions and therefore adopts them as the final decision in this matter for the reasons expressed in the initial decision.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

FEBRUARY 27, 1989

DATE OF MAILING - FEBRUARY 28, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON CROSS-MOTIONS FOR
SUMMARY DECISION
OAL DKT. NO. EDU 3646-88
AGENCY DKT. NO. 107-4/88

STEPHEN JENNINGS,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF HIGHLAND PARK,
MIDDLESEX COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

Frank N. D'Ambra, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: December 12, 1988 Decided: December 19, 1988

BEFORE JOHN R. TASSINI, ALJ:

STATEMENT OF THE CASE

Petitioner alleges that he is a tenured teacher and that the respondent Highland Park Board of Education ("Board") was obligated to offer a teaching position to him instead of to another nontenured teacher who was hired.

Despite its prior statements to the contrary, the Board denies that petitioner has tenure. The Board therefore submits that petitioner had no seniority or other preference for the position and submits that petitioner cannot show that the position was improperly denied to him.

PROCEDURAL HISTORY

On April 27, 1988, the petition of appeal in this matter was filed with the Commissioner of Education. N.J.S.A. 18A:6-9. On May 16, 1988, the Board's answer was filed with the Commissioner.

The matter was transmitted to the Office of Administrative Law where on May 17, 1988, it was filed as a contested case. N.J.S.A. 52:14F-1 et seq. On August 11, 1988, a prehearing conference was held and on August 18, 1988, I entered a prehearing order.

On October 12, 1988, petitioner filed a notice of motion and brief for summary decision and on October 24, 1988, the Board filed a notice of cross-motion and brief for summary decision. On October 20, 1988, petitioner filed a supplement to his brief. On October 31, 1988, the Board filed a supplement to its brief. On November 21, 1988, the motion was the subject of a telephone conference wherein the facts were stipulated. On December 5, 1988, petitioner filed a letter brief together with certification, and on December 12, 1988 respondent filed a reply to petitioner's letter brief.

FACTUAL DISCUSSION

I. I FIND the following FACTS based upon the parties' stipulations:

1. Petitioner is certified as a teacher of "physical education." (See, Exhibit P-1) N.J.A.C. 6:11-6.2(a)18.

2. During the 1983-84, 1984-85, 1985-86 and 1986-87 school years, the Board employed petitioner as an athletic trainer and teacher of health, although petitioner was

not certified to teach "health." (See, Exhibits P-2, P-3 and P-4, and N.J.A.C. 6:11-6.2(a)10.)

3. At its meeting of April 21, 1986, the Board approved a motion purporting to grant tenure to petitioner. (See, P-5.)

4. During the 1986-87 school year, the Board abolished petitioner's position as part of a reduction in force ("RIF") due to declining enrollment and reasons of economy, and his employment by the Board ended on June 30, 1987. (See, R-1.)

5. During the 1987-88 school year, one of the Board's physical education teachers suffered a stroke and left his position, never to return.

6. Petitioner applied for the physical education teacher's position; however, the Board hired another nontenured teacher.

II. The petitioner has certified to the following FACTS, which I accept for the purposes of this motion.

1. In June 1983, the petitioner obtained his college degree and the Board offered him a position for the 1983-1984 school year teaching health. (See, P-6, paragraph 2.)

2. After receiving the offer, the petitioner notified the Board's Principal Donohue and Athletic Director Dakelman that he was certified only as a "physical education" teacher (not as a "health" teacher). Contrast, N.J.A.C. 6:11-6.2(a)18 with N.J.A.C. 6:11-6.2(a)10. Mr. Donohue and Mr. Dakelman "indicated that this was no big deal and that (petitioner) could teach the subject." (See, P-6, paragraph 2.)

3. Sometime during the 1983-1984 school year, the petitioner completed college courses so that he would be "eligible" for certification to teach health. (See, P-6, paragraph 3.)

4. Relying upon the above-noted actions of Mr. Dakelman and Mr. Donohue, the petitioner refrained from application for a certification to teach health.

LEGAL DISCUSSION

The motion for summary disposition is an efficient means of disposing of litigation available when there are no genuine issues of material fact leaving a decision to be made on legal issues. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954); R. 4:46-1; N.J.A.C. 1:1-12.5. This matter is ripe for such disposition.

A tenured teacher whose position had been abolished as part of a RIF would be entitled to preference as against a nontenured teacher with the same certification who was also applying for the same position. Capodilupo v. W. Orange Tp. Ed. Bd., 218 N.J. Super. 510, 515 (App. Div. 1987). See also, Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 242 (App. Div. 1987).

Therefore, the first issue to be disposed of here is whether petitioner is tenured.

I. THE STATUTORY REQUIREMENT OF EMPLOYMENT AS A TEACHER HOLDING THE "APPROPRIATE CERTIFICATE"

The tenure provisions in school laws were designed to aid in the establishment of a competent and efficient school system by affording to teachers a measure of security in the ranks they hold after years of service. Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). However, in order to acquire the security of permanent employment by tenure, a teacher must comply with the precise conditions set forth in the statute. Zimmerman v. Board of Education of Newark, 38 N.J. 65, 72 (1962).

The Legislature requires that no teacher shall acquire tenure if he has not held an "appropriate certificate" for the position in which he was employed. N.J.S.A. 18A:28-4.

Given the fact that petitioner is the holder of only a "physical education" certificate, it must be decided whether he held the "appropriate certificate" for the position of teacher of health.

Education regulations provide for certifications with endorsements in subjects including "health education," "health and physical education" and "physical education." See, N.J.A.C. 6:11-6.2(a)10, N.J.A.C. 6:11-6.2(a)11 and N.J.A.C. 6:11-6.2(a)18. The regulations obviously are intended to assure that teachers are competent in the subjects they teach and an appropriate endorsement is required for the corresponding teaching assignment. This is in keeping with the students' right to a thorough and efficient education. See, N.J. Const., Art VIII §4, par.1; N.J.S.A. 18A:6-40 et seq.; N.J.A.C. 6:11-6.1(a).

Petitioner's "physical education" certification authorizes him to teach only that subject, as distinguished from a "health" or "health and physical education" certificate, which authorize their holders to teach health. Contrast, N.J.A.C. 6:11-6.2(a)18 with N.J.A.C. 6:11-6.2(a)10 and 11.

Given the above facts and law, I must **CONCLUDE** that, although petitioner did in fact teach health, he was not the holder of an "appropriate certificate" for that subject and his service cannot be credited towards tenure. This is true even though the Board represented that petitioner had acquired tenure. In other words, the Board could not confer tenure where the teacher has not met the statutory requirements for same. Such an act was ultra vires and void.

II. THE APPLICATION OF THE EQUITABLE REMEDY OF ESTOPPEL

The Board has not denied petitioner's allegations that he relied upon the Board's actions and refrained from applying for certification as a teacher of health. The gist of petitioner's position is that the Board should be "estopped" from now denying what it previously represented, and therefore petitioner would acquire tenure.

The equitable remedy of estoppel is designed to apply when one party wrongfully induces another to believe certain facts exist and the other party reasonably relies and acts on such belief to his detriment. In such a setting relief may be ordered so that a loss is not borne by an innocent and reasonable party. Foley Machinery Co. v. Amland Contractors, Inc., 209 N.J. Super. 70, 75 (App. Div. 1986).

Estoppel is not favored in the law. However, it may be available, even against a public entity, provided the party asserting same meets his burden of proof of all the elements. Virginia Constr. Corp. v. Fairman, 39 N.J. 61, 72 (1962); see also, Lawes v. Lynch, 7 N.J. Super. 584, 593 (Ch. Div. 1950), aff'd 6 N.J. 1, 11 (1950). Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979); Miller v. Miller, 97 N.J. 154, 163 (1984); Feldman v. Urban Commercial, Inc., 70 N.J. Super. 463, 474 (Ch. Div. 1961).

Here the petitioner recognized at the outset that his certification was not appropriate. As noted above, the appropriate teaching endorsement is required for the corresponding teaching assignment and a physical education endorsement is not appropriate for teaching health. See, N.J.A.C. 6:11-6.1(a) and contrast N.J.A.C. 6:11-6.2(a)18 and N.J.A.C. 6:11-6.2(a)10. The tenure statute also clearly requires the "appropriate certificate" for service to count towards tenure. N.J.S.A. 18A:28-4. I CONCLUDE that the petitioner cannot show reasonable reliance upon the Board's actions; because of the clear requirements of the law, the petitioner must be held to have acted unreasonably.

Moreover, where a public entity is to be estopped, the officials acting for it must have authority to make the representations relied upon. See, O'Malley v. Department of Energy, 109 N.J. 309, 316 (1987); Cipriano v. Department of Civil Serv., 151 N.J. Super. 86, 91 (App. Div. 1977). The statements of the Board's principal and athletic director and the Board's motion purporting to confer tenure upon the petitioner were ultra vires, void and lacking in authority.

The illegal acts of the Board and its personnel do not except the petitioner from statutory requirements for tenure. A teacher's tenure is not property right, but is dependent upon a statute which is promulgated to ensure the overriding public interest in the education of children. See, N.J. Const., Art. VIII §4, par. 1; N.J.S.A. 18A:28-4; N.J.A.C. 6:11-6.1(a). Laba v. Newark Board of Education, 23 N.J. 364, 391 (1957). The petitioner's personal interest cannot compel a result clearly contrary to statute.

I must **CONCLUDE** that (a) the equitable remedy of estoppel cannot be used to grant tenure to the petitioner and (b) the petitioner therefore does not have a tenured teacher's seniority and preference for the position, as against the nontenured teacher who was hired.

A board of education generally has no duty to reemploy a nontenured teacher at the end of his contract term. Zimmerman v. Board of Education of Newark at 75. See also, Bednar v. Westwood Bd. of Educ. at 242. No facts have been presented from which I may conclude that the Board's hiring of a teacher other than petitioner resulted from some improper purpose. Therefore, the Board, which has broad discretionary authority to employ one person instead of another, is entitled to the usual presumption of correctness. Schinck v. Bd. of Ed. of Westwood Consol. School Dist., 60 N.J. Super. 448 (App. Div. 1960), Quinlan v. Bd. of Ed. of North Bergen Tp. , 73 N.J. Super. 40, 46 (App. Div. 1962). See also, N.J.S.A. 18A:27-1 et seq. Without tenure, petitioner has acquired no seniority rights and he cannot upset the Board's hiring of another teacher.

CONCLUSION

I **CONCLUDE** that the petitioner's motion must be denied, the Board's motion must be granted and the petition must be **DISMISSED**.

ORDER

I **ORDER** that the petition be **DISMISSED** with prejudice.

I also strongly recommend that the Commissioner investigate and take appropriate action relative to (a) the Board's employees' wrongful representations to petitioner that he could teach a subject for which he was not certified; (b) the Board's employment of a teacher in an area for which he was not certified; and (c) the Board's ultra vires resolution purporting to confer tenure upon the petitioner. All of these acts were clearly in violation of laws intended to assure the thorough and efficient education of children, including N.J.S.A. 18A:6-40 et seq. and N.J.A.C. 6:11-3.1.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

12/12/88
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

12/21/88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 22 1988
DATE

Ronald J. Rankin
FOR OFFICE OF ADMINISTRATIVE LAW

ro/e

STEPHEN JENNINGS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4; however, the Board's reply exceptions were untimely filed.

Petitioner's exceptions reiterate that he has tenure as a physical education teacher by virtue of his having served as an athletic trainer. Relying on Dennis Clark v. State of New Jersey, Board of Trustees, Teachers' Pension and Annuity Fund, New Jersey Superior Court, Appellate Division October 9, 1979, Docket No. A-1705-78, petitioner claims it is uncontroverted that he "was required to hold an appropriate teaching certificate to be athletic trainer, that the Highland Park Board of Education required a teaching certificate for the position and that he worked four consecutive years in that position." (Exceptions, at p. 2) He avers the law is clear that tenure can be granted to a teaching staff member in an unrecognized title and that "whereas here, any instructional certificate is required, then the teacher receives tenure and seniority using the certificate that they hold, in this case, physical education." (Id.) Petitioner cites Shirley Vanderhoof v. Board of Education of the Scotch Plains-Fanwood Regional School District, decided by the Commissioner April 15, 1987, aff'd State Board June 1, 1988. Petitioner further claims the ALJ ignored the fact that the Board has the right to grant him tenure even if the Commissioner determines that the athletic trainer position in Highland Park did not and does not require a teaching certificate as a condition of employment. He cites Plumbers and Steamfitters v. Woodbridge Board of Education, 159 N.J. Super. 83 (App. Div. 1978) and Wright v. Board of Educ. of City of East Orange, 99 N.J. 112 (1985) for the proposition that the Board has the power to "agree to tenure." (Id.)

The Commissioner notes that petitioner's final argument presented in exceptions concerning a Mr. Leppert is not considered in the Commissioner's consideration of this matter, since such information is broached for the first time in exceptions, without the ability of opposing counsel to cross-examine as to the accuracy or pertinence of such information.

Upon his careful and independent review, the Commissioner rejects the initial decision and finds petitioner is tenured as a teacher for the reasons which follow.

It is undisputed in the record that petitioner was hired as a full-time teaching staff member with all emoluments of employment attached thereto. It is also clear from the record that petitioner's employment since 1983 has involved some combination of teaching health classes during the day under his physical education endorsement, albeit wrongly so, while serving as athletic trainer for the remaining periods of the school day, plus after school and on weekends. Thus, it cannot be stated that petitioner's service as an athletic trainer was extracurricular, for which he was merely paid a stipend above and beyond that salary he otherwise might have received.

Moreover, the Commissioner's review of this matter leads him to conclude that the Board clearly was derelict in its responsibility, as required by law, to ensure that petitioner, a full-time teaching staff member, was properly certificated for the role of teacher of health and athletic trainer. N.J.S.A. 18A:28-4; N.J.A.C. 6:11-3.6(a)

Initially, the Commissioner notes that the position title of athletic trainer is an unrecognized one. Had the Board intended to employ petitioner in such role, it was obliged, pursuant to N.J.A.C. 6:11-3.6(b), to submit a "written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment." Such request must be accompanied by a job description. Then, the County Superintendent considers the approval of such request and what certification and title for the position is appropriate for such position if it is to exist. The record before the Commissioner is devoid of any such indication of compliance with this regulation.

The Commissioner is equally concerned that the Board was in flagrant violation of N.J.S.A. 18A:28-4 in hiring petitioner as a health teacher knowing that he lacked appropriate certification as a health instructor. See Exhibit P-6. While the Commissioner agrees with the ALJ that "[p]etitioner's 'physical education' certification authorizes him to teach only that subject, as distinguished from a 'health' or 'health and physical education' certificate, which authorize their holders to teach health. Contrast, N.J.A.C. 6:11-6.2(a)18 with N.J.A.C. 6:11-6.2(a)10 and 11" (emphasis in text) (Initial Decision, ante), the Commissioner does not concur with the ALJ's conclusions regarding petitioner's tenure and estoppel arguments.

The Board permitted petitioner to serve as a health teacher/athletic trainer in its district from 1983 until June 30, 1987, purportedly conferring tenure upon him in April 1986. (See P-5.) The certificate the Board required petitioner to hold for said position was an instructional one, with an endorsement in physical education, the sole certificate he held. The fact that the

Board was remiss in failing to properly seek approval of the unrecognized title of athletic trainer will not be used to preclude petitioner from the statutory benefits of tenure which flow from his having been employed in a position requiring a certificate, having in fact held the requisite certificate and having served in the position for the requisite period of time for acquisition of tenure. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 81 (1982) See also Thomas De Gise v. Board of Education of the City of Jersey City, decided by the Commissioner May 5, 1987, aff'd State Board September 2, 1987, aff'd N.J. Superior Court, Appellate Division December 15, 1988. Therein the Commissioner cites Lori Boehm v. Board of Education of the Township of Pennsauken, decided by the Commissioner June 19, 1984, appeal dis. State Board September 5, 1984 for the proposition that

> a teaching staff member will not be deprived of the legislatively granted status of tenure in a situation where a board of education has failed in its responsibility to follow state statutes and regulations, be it from ignorance, neglect or other form of inaction on the part of the board. See also Michael Furst v. Bd. of Ed. of Rockaway Twp., decided by the Commissioner May 18, 1984, aff'd State Board October 24, 1984.*** (emphasis in text) (DeGise, at p. 15)

A question remains as to what area his seniority accrues in that petitioner is indeed a tenured teaching staff member. Because the Board required petitioner to hold a teaching certificate for his full-time employment and because he served under his physical education endorsement in his capacity as athletic trainer, petitioner's seniority thus accrues in the area of physical education because seniority flows from the endorsement.

As to any future argument that might arise concerning seniority as it pertains to health, no evidence is presented to suggest that petitioner procrastinated in any way from apprising the Board that he believed he was not properly certified to teach health. Neither did he in any way misrepresent his qualification. In fact he clearly indicated to the Board his misgivings about whether he was appropriately certificated. See, by way of contrast, Linda Ledwitz v. Board of Education of the Manalapan-Englishtown Regional School District, decided by the Commissioner March 14, 1985, aff'd State Board January 6, 1988, aff'd N.J. Superior Court, Appellate Division February 16, 1989. While it is true that petitioner could have applied for his certificate after having completed the health course he lacked, independently from the Board's having assumed he was adequately certified, the Commissioner would not deny him the benefit of tenure since he was eligible for a health endorsement from some point in 1984 because the Board failed to meet its responsibility under law and regulation to ensure that all personnel were properly certified.

Thus, the Commissioner finds and determines that petitioner is also eligible for seniority in the area of health from the date in 1984 when he officially and satisfactorily completed the coursework in health necessary for his obtaining an endorsement in health. See Barbara Saad v. Board of Education of the Borough of Dumont, 1982 S.L.D. 440.

Accordingly, for the reasons expressed herein, the Commissioner rejects the initial decision, finds that petitioner is tenured and directs he be reinstated to the vacancy in the physical education department in question, with all emoluments due and owing him. Notwithstanding these conclusions, the Commissioner notes that petitioner is not absolved from obtaining the necessary certification for teaching health, and he is hereby directed to secure forthwith an endorsement in health or physical education/ health through the Office of Teacher Certification.

COMMISSIONER OF EDUCATION

FEBRUARY 27, 1989

STEPHEN JENNINGS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, February 28, 1989

For the Petitioner-Respondent, Klausner, Hunter & Oxfeld (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

From 1983-84 through 1986-87, the Board of Education of the Borough of Highland Park (hereinafter "Board") employed Stephen Jennings (hereinafter "Petitioner") as an athletic trainer/health teacher. Petitioner received his certification as a teacher of physical education in October 1983, but was not certified to teach health. Petitioner taught one class of health per day during the 1983-84, 1984-85 and 1985-86 school years and two classes in 1986-87.

In April 1986, the Board approved a motion purporting to give Petitioner tenure. At the end of the 1986-87 school year, Petitioner's position was abolished as part of a reduction in force. In 1987-88, Petitioner applied for a vacant position in the district as a teacher of physical education, but it was given instead to a non-tenured teacher. In April 1988, Petitioner filed the instant action alleging violation of his tenure and seniority rights.

In proceedings before an Administrative Law Judge ("ALJ"), the parties filed cross-motions for summary decision. As part of his response to the Board's cross-motion, the Petitioner included an affidavit in which he asserted that as a condition of his employment, the Board had required him to possess a valid teaching certificate. He further stated therein that he had advised his supervisors of the fact that he did not hold a health endorsement for teaching health, but that they were unconcerned. As a result, he maintained, he did not apply for such certification, although he had completed the necessary coursework.

On December 19, 1988, the ALJ, accepting "for the purposes of this motion," the facts certified by Petitioner, recommended granting the Board's cross-motion and dismissing the petition. The ALJ concluded that although Petitioner had taught health, he did not hold the appropriate certificate for that subject pursuant to N.J.S.A. 18A:28-4 and his service could not, therefore, be credited towards tenure. The ALJ also addressed Petitioner's assertion that he had refrained from applying for a health endorsement in reliance upon the Board's actions. Noting that the Petitioner recognized from the time of his hiring that his certification was not appropriate, the ALJ concluded that Petitioner could not show reasonable reliance upon the Board's actions so as to warrant the application of equitable estoppel, stressing that in light of the clear requirements of the law, the Petitioner must be held to have acted unreasonably.

On February 28, 1989, the Commissioner rejected the ALJ's recommended decision to grant the Board's cross-motion for summary decision, concluding that Petitioner was, in fact, tenured as a teacher. Asserting that "[t]he certificate the Board required petitioner to hold for said position was an instructional one, with an endorsement in physical education," Commissioner's decision, at 13, the Commissioner concluded that the Board's failure to properly seek approval of the unrecognized title of athletic trainer could not be used to preclude Petitioner from the statutory benefits of tenure. Such tenure, the Commissioner maintained, flowed from Petitioner's "having been employed in a position requiring a certificate, having in fact held the requisite certificate and having served in the position for the requisite period of time for acquisition of tenure." Id.

The Commissioner determined that Petitioner's seniority accrued in the area of physical education since the Board had "required Petitioner to hold a teaching certificate for his full-time employment and because he served under his physical education endorsement in his capacity as athletic trainer..." Id. at 14. The Commissioner further concluded that, under the circumstances, Petitioner was eligible for seniority in the area of health from 1984 when he completed the coursework necessary for a health endorsement. The Commissioner noted that there was no evidence that Petitioner procrastinated in informing the Board that he was not properly certified to teach health or in any way misrepresented his qualifications.

Based upon his findings and conclusions, the Commissioner directed that Petitioner be reinstated to the vacancy in the physical education department, with all emoluments due and owing.

The Board filed the instant appeal from the Commissioner's decision, arguing that there is nothing in the record which demonstrates that it required Petitioner to possess a teaching certificate as a condition of his employment, and that the Commissioner erred in applying estoppel against the Board, in concluding that it was sufficient for seniority purposes that

Petitioner had satisfactorily completed the necessary coursework for a health endorsement, and in assuming Petitioner's facts to be true in apparently granting his motion for summary decision.

After a thorough review of the record, we reverse the Commissioner and dismiss the petition.

As correctly pointed out by the ALJ, Petitioner's physical education certification did not authorize him to teach health. N.J.A.C. 6:11-6.2(a)(18). Only holders of "health education" and "health and physical education" endorsements are authorized to teach health in the public schools. N.J.A.C. 6:11-6.2(a)(10), 6:11-6.2(a)(11). Petitioner, as noted, possessed only a physical education endorsement, and thus did not hold the "appropriate certificate" for such position as required by N.J.S.A. 18A:28-4 for the acquisition of tenure.

Petitioner, however, alleges that he was a tenured teaching staff member insofar as he "was required to hold an appropriate teaching certificate to be athletic trainer, that the Highland Park Board of Education required a teaching certificate for the position and that he worked four consecutive years in that position." Answer brief, at 2. Petitioner does not argue that the duties and responsibilities of the athletic trainer position were such that a physical education certification was required by law for qualification for the position, but, rather, maintains that "since as an athletic trainer, he was a member of the professional staff who was required to hold a valid and effective certificate, he falls within the definition of 'teaching staff member,' N.J.S.A. 18A:1-1, and therefore, he has tenure as a teaching staff member." Brief in response to cross-motion for summary decision, at 1.

We find such argument to be without merit. N.J.S.A. 18A:28-5 provides for the acquisition of tenure by "teaching staff members." N.J.S.A. 18A:1-1 defines "teaching staff member" as:

> ...a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners...

Although the Board allegedly required Petitioner to hold a physical education certification,[1] under the applicable regulations, there is no recognized position title for the position of "athletic trainer" and, consequently, no standard, provisional or emergency certificate or endorsement thereunder specific to employment in that position. See N.J.A.C. 6:11-6.1 et seq. In such cases, the authority to determine what certification, if any, is required for service in the position is vested in the county superintendent.

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[1] See infra n.3.

N.J.A.C. 6:11-3.6.[2] Petitioner, however, relies upon his assertion that the Board treated him like a member of its teaching staff and required him to hold a teaching certificate.

However, and notwithstanding the Board's failure to submit this position title to the county superintendent, the fact that the Board required Petitioner to hold a teaching certificate with a physical education endorsement did not elevate the position of athletic trainer to that of teaching staff member within the meaning of N.J.S.A. 18A:1-1 so as to confer tenure on Petitioner pursuant to N.J.S.A. 18A:28-5 based on his employment in that position. See Rumson-Fair Haven Education Association et al. v. Rumson-Fair Haven Regional School District Bd. of Ed., decided by the State Board of Education, August 5, 1987, aff'd, Docket #A-291-87T8, slip op., at 8 (App. Div. 1988). "[T]o hold otherwise would allow each local board of education to define what is a teaching staff member simply through its own certification requirements." Id.

Again, the regulations do not include any position title for the position of "athletic trainer." Nor did Petitioner allege that the duties of the position, which included treatment of injured students and care and storage of athletic equipment and uniforms, were such that a teaching certificate with a physical education endorsement was required by law. Moreover, our review of the record, including the job description, provides no indication that the duties attending the position of athletic trainer were of such character as to require such a certification.[3] See id., decision of the State Board, at 10.

The fact that the Board allegedly viewed and treated Petitioner like a member of its teaching staff cannot act to convert that which was not a teaching staff position under law into one that was. The requirements for tenure are statutory, and under the instant circumstances, such treatment did not alter the character of the position in which Petitioner was employed. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982).

Thus, while we agree that the Board was derelict in not submitting the unrecognized position title of athletic trainer to the county superintendent for approval and for an attendant determination of the appropriate certification, if any, required for this position, the Board's alleged requirement of a physical education certification did not elevate the position of athletic

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[2] We note that the Board failed to follow the procedure mandated by N.J.A.C. 6:11-3.6, which requires a board desiring to use an unrecognized position title to submit a job description to the county superintendent for approval of the proposed title and a determination of the appropriate certification, if any, required for service in that position.

[3] We note that the job description for the position of athletic trainer does not include any certification requirements.

trainer to that of teaching staff member, and in the absence of any allegation or evidence in the record that a physical education certification was, in fact, required by law for qualification for the position, we conclude that even accepting Petitioner's certified facts to be true, he has not met the statutory requirements for the acquisition of tenure.[4]

Petitioner also asserts in his affidavit that although he did not possess a certification in health, he had been eligible for such an endorsement since 1984, but had not submitted an application in "detrimental reliance" upon the comments of his athletic director and principal that such an endorsement was not necessary. Although Petitioner does not expressly argue in the cross-motions that the Board should be estopped from denying his tenure and seniority rights, we agree with the ALJ that the use of equitable estoppel is not warranted under the instant circumstances.

As the ALJ points out, Petitioner recognized at the outset that his physical education certification was not appropriate for teaching health. We find, in addition, that the applicable regulations governing teaching authorizations are clear and unambigious. There can be no doubt or uncertainty but that a "physical education" endorsement "authorizes the holder to teach physical education," N.J.A.C. 6:11-6.2(a)(18), whereas a "health education" endorsement "authorizes the holder to teach health education," N.J.A.C. 6:11-6.2(a)(10), and a "health and physical education" endorsement "authorizes the holder to teach health and physical education." N.J.A.C. 6:11-6.2(a)(11). Clearly health education is regarded as separate and distinct from physical education.

Under the circumstances, we conclude that the statements of the athletic director and principal and the Board's improper action in assigning him to teach health without the appropriate certification cannot be used to excuse the Petitioner's failure to acquire a health endorsement, and Petitioner's reliance upon such actions in the face of clear regulations to the contrary cannot be regarded as reasonable. Petitioner had primary responsibility to apply for and possess appropriate certification during his employment. Ledwitz v. Bd. of Ed. of the Manalapan-Englishtown Regional School District, decided by the State Board, January 6, 1988, slip op., at 4, aff'd, Docket #A-2861-87T7 (App. Div. 1989). We therefore agree with the ALJ that the Petitioner cannot show a reasonable reliance upon the Board's actions so as to warrant the application of equitable estoppel.

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[4] We note, in response to Petitioner's exceptions requesting a remand for purposes of determining what certification, if any, is required for service in the position of athletic trainer, that a remand would not be appropriate in this case since Petitioner has not alleged that a teaching certificate with a physical education endorsement was required by law and our review of the record, including the job description, provides no indication that the duties attending the position of athletic trainer were of such character as to require such a certification.

Thus, even accepting as true the facts proferred by Petitioner, and considering the moving papers and pleadings in a light most favorable to Petitioner, we find that he is not entitled to tenure as a teaching staff member and agree with the ALJ that the Board is entitled to a grant of its cross-motion for summary decision as a matter of law. We therefore dismiss the petition. In light of our determination that Petitioner is not tenured, we need not address the seniority issues raised herein.

Attorney exceptions are noted.
Alice Holzapfel abstained.
December 6, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 7494-88
AGENCY DKT. NO. 293-9-88

CITIZENS ADVOCATING REFERENDUM FOR EDUCATION ("CARE"), and WILLIAM MATHEWS,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC, MORRIS COUNTY,
Respondent.

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185 Washington Street
Newark, New Jersey 07102
Monday, January 9, 1989

Arnold H. Chait, Esq., for petitioners
(Vogel, Chait, Schwartz and Collins, attorneys)

James Rothschild, Jr., Esq., for Board of Education of the Township of Passaic, respondent
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

John R. Pidgeon, Esq., for Passaic Township Committee, Intervenor
(Pidgeon & Pidgeon, attorneys)

Record Closed: January 9, 1989 Decided: January 17, 1989

This is a transcript of the administrative law judge's oral initial decision rendered, pursuant to N.J.A.C. 1:1-18.2.

TRANSCRIPT OF OPINION
BEFORE THE HONORABLE PHILIP CUMMIS
ADMINISTRATIVE LAW JUDGE
DATED JANUARY 9, 1989

The Court: Good morning everybody. We're going to issue the decision today in the Citizens' petition and it's going to take a while so everybody make yourselves comfortable. Before we get there, we had three pieces of evidence that were offered by Mr. Rothschild that I reserved decision at the summations. I am going to at this point accept all three into evidence. I've reviewed them. They are Vincent Calabrese's Certification and we're going to take that into evidence as R-1. The second one is Anthony Villane's Certification. We'll take that in as R2. I shall view that as part of the Legislative history in this case, and R-3 would be the engineering report of Alvin Fischer & Robert D. Redlien, Consulting Engineers. The report is signed by Mr. Fischer and dated December 9th, 1988. It gives us a further perspective on the condition that Mr. Fischer found the school to be in after his examination and it shall be viewed in line with Mr. Patel's examination and Mr. Barry's examination. It also should be noted for the records since I am not going to comment on this in the evidence that there are still questions as to the front wall, whether it's load bearing or not, and what the problems, if any, if they are serious are behind the front wall of the Central School.

Next, in the manner of business, Mr. Rothschild you wanted to be heard.

Mr. Rothschild: On the issue Your Honor of the substituted language.

The Court: Yes.

Mr. Rothschild: Your Honor, I have had extensive discussions with our bond counsel, Mr. Moyer, concerning the language in Article II, Section 201(i) through (l) in the proposed lease purchase agreement. Mr. Moyer and I are both of the strong belief that the language in the draft agreement was in all respects in compliance with the Statute of the Constitution. Nevertheless, Mr. Moyer and I redrafted that language slightly and I would like to read the redrafted language into the record. This language is in place of Section 201(i) through (l) and is denominated (i). The (j), (k) and (l) are now subparts (1), (2) and (3) of (i). I will now read the new language which will be Article II, Section 201(i):

> "(i) In furtherance of the Constitutional mandate to provide Thorough and Efficient Education, as set out in Article VIII, Section 4, Paragraph 1 of the Constitution, and as required by N.J.A.C. 6:22A-1.1 et seq., the Lessee intends to include in its annual budgets during the duration of this Lease all Basic and Supplemental Rent Payments required hereunder. The Lessee reasonably believes that monies in an amount sufficient to make all Basic and Supplemental Rent Payments can and will lawfully be appropriated pursuant to N.J.A.C. 6:22A-1.1 et seq. and will be made available for this purpose. The Lessee will use all reasonable and lawful means to secure the appropriation of money sufficient to pay the Basic and Supplemental Rent Payments coming due during each fiscal year in which such payments are due, including the following:

(1) In any fiscal year within the Term of the Lease that sufficient funds are appropriated to make Basic and Supplemental Rent Payments, the Lessee, unless ordered to do by the Commissioner of Education under the Commissioner's Constitutional mandate to insure Thorough and Efficient Education shall not transfer from the budget line item any amount designated for the payments of Basic or Supplemental Rent, and shall make such payments in a timely manner.

(2) In any fiscal year within the Term of this Lease that a budget of the Lessee is not approved by the voters, and if the governing body of the Township deletes from the proposed budget of the Lessee a sum of money which makes it impossible for the Lessee to make Basic and Supplemental Rent Payments, the Lessee agrees that the Commissioner of Education has authority and jurisdiction under the Commissioner's Constitutional mandate to compel Thorough and Efficient Education to reinstate sufficient sums of money to enable the Lessee to make the Basic and Supplemental Rent Payments.

(3) The Lessee recognizes that the Commissioner of Education pursuant to his Constitutional mandate to compel Thorough and Efficient Education has the authority and jurisdiction to cause the Lessee to make Basic and Supplemental Rent Payments even if the inclusion of such payments, together with other expenses desired by the Lessee, would cause the Lessee to exceed its annual permitted budget increase. Owing to its recognition of this requirement, the Lessee will not claim that its permitted annual budget increase limitation forbids it from making its Basic and Supplemental Rent Payments.

This covenant is subject to the Commissioner of Education's Constitutional mandate to compel Thorough and Efficient Education."

Thanks, Your Honor.

The Court: Mr. Chait.

Mr. Chait: Yes, we are very pleased that the Board of Education and the bond counsel have substituted this language for paragraphs (i), (j), (k) and (l) in the lease. We deem this to be significant substantive changes which eliminate the legal defects as to those particular sections only which were raised in this issue and we deem that they now render those sections in compliance with the enabling Statute.

The Court: Thank you, Mr. Chait. I have had an opportunity to completely review the recording as just presented by Mr. Rothschild and I do make a finding that the language as now written is permissible and valid under both the Statutes and Constitution of the State of New Jersey and I would so order it be used in a lease purchase agreement of this nature.

Anything further Mr. Rothschild?

Mr. Rothschild: Your Honor, two unrelated points but it may help expedite the process today. There has been some challenge to the inclusion of $500,000 in the lease purchase agreement for furniture and similar equipment and some challenge to approximately $1,800,000 which the Board allocated to capitalized interest in the first two years. While the Board believes strongly that both of these sums are legal under the Statute and Constitution, it is the Board's

view that they are not truly necessary at this time and the Board will not seek approval for either of those two sums.

The Court: And, therefore, they will be abstracted from the lease purchase agreement as you have presented it to both myself and Mr. Chait and Mr. Pidgeon.

Mr. Rothschild: Yes, Your Honor, that's true.

The Court: Does that take care of all the changes?

Mr. Rothschild: Yes, thank you Your Honor.

The Court: Allright. This is a petition and application for interim relief. The Commissioner of Education transferred the matter to the Office of the Administrative Law for a hearing as a contested case on October 12th, 1988. The original Petition in this matter was filed on September 12th, 1988. An Answer was filed by the Board of Education on October 4th, 1988 and a Pre-Hearing was held by me on October 22nd, 1988. At that Pre-Hearing, although a formal Pre-Hearing was not entered into and prepared, it was agreed that in a case of this nature with its attendant problems needed a date as soon as possible to get these issues tried. I set down on my calendar a trial schedule to commence on November 14th, 1988 and in fact this matter did commence on November 14th, 1988. Trial dates were held on the 14th, 15th, 16th, 17th, 22nd, 23rd, 28th and 30th of November; the 1st, 2nd, 6th, 8th and 9th of December, the 3rd and 4th of January and thereafter there was a continual filing of briefs and the record was finally closed yesterday on January 8th, 1989 when I received Mr. Rothschild's final brief in this matter.

In terms of evidence, there were numbers of joint exhibits which have been marked into evidence as J-1 through J-258. There are certain exclusions which will be reflected on a separate evidence sheet but essentially there were probably a minimum of 245 exhibits that are presently in evidence as joint exhibits. Additionally, the Township submitted 20 exhibits, P-1 through P-20, through their attorney Mr. Pidgeon and the school board has additionally in evidence the three exhibits that I admitted this morning which are marked R-1 through R-3.

Now the facts in this case are fairly clear. I shall review them and put them down for the record.

The petitioner, Citizens Advocating Referendum for Education, now known as CARE, is an unincorporated nonprofit organization presently consisting of approximately 186 individual taxpayers residing in the Township of Passaic, County of Morris. Individual petitioners, Christl Smith and William Mathews, are both members of CARE and taxpayers residing in the Township of Passaic. Petitioner Smith is also the parent of students enrolled in the Passaic Township school district. Concurrent with the petition filed in this matter, petitioners filed a Memorandum opposing the pending application of the Board of Education of Passaic Township, known as the respondent, to the Commissioner of Education, known hereafter as the Commissioner, and Local Finance Board, known as LFB, for approval of a lease/purchase agreement in excess of five years. Petitioners seek invalidation and

reversal of actions of respondent adopting a plan to replace four existing school district buildings by constructing a new single K-8 school under a $15,000,000 lease purchase agreement. Petitioners assert that:

(a) Over a significant period of time respondent induced the public to believe that any facilities improvement plan ultimately endorsed by respondent would be submitted to the district voters for referendum approval;

(b) Only after adoption of the single plan did the respondent disclose an intent to discard its prior commitment to voter referendum and that thereafter the respondent engaged in a course of conduct which both denied the public and Township governing body a fair opportunity to examine, evaluate and controvert the lease purchase plan;

(c) Respondent has expended public funds and solicited quotations for implementation of the lease purchase plan without compliance with statutory and regulatory prerequisites to such actions;

(d) Any approvals granted by the Board of Facilities Planning Services, known as the Bureau, and without compliance with the document submission requirements of the application regulations were not made known to the public and that pursuant

to N.J.A.C. 6:22-1.7(a) petitioners have the right in these proceedings to appeal the determination of the Bureau;

(e) Respondent has acted arbitrarily, unreasonably and capriciously in adopting a facilities improvement plan which is contrary to recommendations solicited by respondent from study committees and independent consultants.

(f) Respondent has acted arbitrarily, unreasonably and capriciously in adopting a facilities improvement plan which is educationally unsound and not in the best interest of the school district and which will impose an excessive and undue burden on the taxpayers.

(g) The June 27, 1988 action of respondent approving the proposed terms of the lease purchase agreement exceeds the lawful authority of the respondent.

(h) The amount of financing by lease purchase was not authorized by a Resolution publicly adopted and is invalid.

The respondent conducts a K-8 school district serving the Township of Passaic which is approximately 12.5 square miles in area and has a population of 8,000 people. Currently, there are approximately 620 students accommodated in three elementary school buildings on three geographically separated parcels of land. In addition, the school district

owns a fourth parcel of land on which a former elementary school has been converted for use as the district's administrative building.

The school district enrollment, inclusive of special education students placed outside the district, has declined from 1,313 students to approximately 641 students, which includes special education students that are no longer attending class in the district but are the responsibility of the school district.

Pursuant to a 1977 contract with the Department of Education, a facilities survey of all New Jersey public schools was conducted by Uniplan, an independent architectural, engineering and educational planning firm of Princeton. The Uniplan Facilities Survey for the Passaic Township School District is dated August 31st, 1978. This survey was developed over a one year period with the stated intent that the greatest amount of information could be provided to assure that the accuracy of all data was dependable. The physical evaluation of each school was based upon site inspections. Cost estimates were stated to be based upon Uniplan's long experience in schools of this construction. The survey rated the educational and physical condition of all school buildings as fair and found the 1977 enrollment to be only 87% of existing building capacity. The estimated total cost for rehabilitations and additions to bring all facilities as close as possible to contemporary standards was $1,900,000 calculated in 1978 costs, with a statement that costs

escalations may be assumed to be an average of 10% a year. The Uniplan survey emphasized that:

> "These statistics are carefully considered, realistic and are based on consistent evaluations and consistent evaluation standards."

In 1985, E.I. Associates, Architects-Engineers-Planners, was retained by respondent to prepare a facilities survey. The E.I. report (dated June, 1986 in material respondent distributed to the public) contains specific line-item improvement recommendations and costs for each building. The E.I. estimates of construction costs to remedy these deficiencies and to make recommended improvements (including energy conservation measures) is as follows:

Central School	$804,000.00
Millington School	$446,550.00
Gillette School	$472,500.00
Elm Street Administration Building	$265,000.00

In June, 1986, University Associates, herein known as UA, Educational Planners and Consultants hired by respondent, delivered a comprehensive analysis and evaluation of the Passaic Township educational program and facilities. The respondent charged UA with conducting a study of the demographics of the community updating student enrollment projections, updating school building capacities, updating the educational program and the recommendations for changes and recommending a facilities plan with estimated economic implications. The UA report projects that over the next 10 years the in-district pupil enrollment (exclusive of special

education students sent out of the district) will increase to a range of 698 to 806 students. The existing school building capacity as detailed in the UA report significantly exceeds the 10 year enrollment projection. Based upon facility examination, the UA report lists the positive and negative aspects of each existing building. The report finds that all three school buildings are usable as a school and are structurally sound. Four upgrading options are then outlined with projection costs.

Respondent referred the EI and UA recommendations to a Long-Range Planning Committee, herein Committee. The Committee consisted of a cross-section of people, including members of the Board of Education, administrators, teachers, community members and elected officials of the Passaic Township governing body. On June 28, 1986, the Committee delivered its report to respondent. The stated objective of the Committee was to make recommendations which would provide a quality school system at reasonable costs to the taxpayers and to provide an environment to continue the existing pattern of educational excellence. The Committee found that $3,500,000 was needed to maintain the status quo of existing facilities. The Committee considered and outlined seven alternate facility plans. The Committee recommended Alternate C which provides for a K-5 Central School and a 6 through 8 Millington School. The reasons cited for the Committee's choices were as follows:

Fifth graders are more suitably grouped with K-4 than with 6-8.

It minimizes the building of new classrooms but provides new cafetoriums, libraries, gymnasiums, science, instrumental music, home economic and art rooms.
Results in a superior environment to both groupings of children.

Maintains more land for recreational purposes and preserves the physical separation of the two preferred class groupings.

Alternate C is significantly less expensive than a single new K-8 building.

After reviewing various enrollment projections, the Committee determined that planned facilities should accommodate a minimum of 704 students and a maximum of 836, plus special education students. Like the UA report, the Committee found all existing school buildings to be usable as a school and to be structurally sound. The Committee utilized the EI cost estimates for required improvements and contacted local architects and commercial general contractors to obtain estimates of costs of upgrading and new construction. The cost of implementing Alternate C (with administrative offices being relocated to Central or Millington) was found to be $8,119,450. Against this cost, the Committee projected that between $1,275,000 and $2,550,000 of revenues would be realized from the sale of the Gillette and Elm Street buildings, so that the net capital outlay would range from $5,500,000 to $6,800,000. The estimated cost of a new K-8 single facility was stated to be $13,100,000, without consideration of additional costs for site preparation and before application of revenues from the sale of other buildings.

In June, 1987, the respondent announced its intent to employ an architect to obtain State approval of architectural plans and to submit the capital improvement plan to the voters at a public referendum. Also in June, 1987, the respondent directed the Superintendent to file information and documents with the Bureau required by the Bureau for assessment of the Board's request for permission the close the Gillette School.

In July, 1987, respondent retained the architectural firm of Harsen & Johns, herein known as the Architect, to immediately develop a progress schedule for additions and alterations to the Central and Millington Schools. The schedule submitted by the Architect on August 28, 1987, planned for a referendum to be held February 16th, 1988.

On August 10, 1987, the Architect sought and received from the respondent confirmation that he was to proceed with a two school renovation and improvement plan using Millington and Central and incorporating the business aspect and the Board office into one of the two schools. Gillette and the Elm Street property would be closed.

On September 28, 1987, the respondent's Superintendent publicly endorsed the proposal that the educational specifications reflect realignment of district classes to be K-5 and 6-8.

On December 7th, 1987, educational specifications drafted by Board member Slater, the Superintendent and representatives from the District were distributed to the Board.

On December 14th, 1987, the Board directed the Architect to proceed with a one-step plan for a new school.

On February 1st, 1988, the Architect presented several building plan layouts for a new K-8 building designed to hold 950 to 1,000 students. The Board entertained and ultimately endorsed this proposal.

On February 8, 1988, respondent approved a revised draft of educational specifications based on a new single school plan.

In April and May of 1988, presentations were made to the Board by an underwriter and by a representative of the Department of Education concerning lease purchase financing. Bernard Steinfelt of the Department of Education advised the respondent on May 23rd, 1988 that if it proceeded with a referendum and a negative vote resulted and then sought approval of a lease purchase agreement, the State would not go against the wishes of the district voters.

Respondent held a special meeting on May 31st, 1988 to consider whether to proceed with a bond referendum or a lease/purchase plan. Comments from the public reflected consternation that the Board might abandon its long-standing commitment to present the facility improvement plan to the voters for approval.

On June 13th, 1988, the respondent directed its Business Administrator to employ a consulting engineer to examine and report on the condition of the Central School. Consulting Engineering Edwin Barry was retained and inspected

the Central School on June 22, 1988. In his report to respondent dated June 23rd, 1988, Mr. Barry details conditions requiring repair and his recommendations. With request to the question of whether Central School is beyond repair, Mr. Barry advised respondent as follows:

> "Considering the tremendous cost of replacing this building today, I would make every effort to do the necessary remedial work to place it back it good condition and establish a preventive maintenance program to keep it that way. The cost of ramps, an elevator, etc. for the handicapped code and outside air vents for the heating and ventilating units is expensive in an old building, however, they cost almost as much in a new building. I believe this building could be brought back in good servicable condition for less than one-tenth the cost of the new building."

Approximately three months after receipt of the report, the Board wrote to Mr. Barry requesting clarification and estimated costs for the remedial work he recommended. Mr. Barry and another professional engineer associated with him re-inspected the Central School on September 23rd. In his supplemental report to the Board dated September 26, 1988, Mr. Barry provided estimated costs for each item of the remedial work recommended. He specifically concluded that cracks in the floor were not hazardous and that there were no signs of rot in the roof. Mr. Barry concluded that the estimated cost of all work outlined was $865,000, which includes $250,000 for air conditioning, and also includes providing accessibility for the handicapped.

By letter dated September 29th, 1988 to Bernard Steinfelt, the District Business Administrator furnished the

structural engineering reports of Mr. Barry with an explanation of why the existence of substance of the Barry report was not disclosed to Mr. Steinfelt at the hearing he conducted on September 12, 1988 on the respondent's application to the Commissioner for approval of the lease purchase plan.

At its June 13th, 1988 meeting, the respondent determined to undertake a mailing to all households in the District to provide information regarding the K-8 building. This mailing took the form of an invitation to the public meeting Monday, June 27th, 1988, herein known as the Invitation. The Invitation illustrated construction costs and tax rate comparisons made by the Board between the renovation plan of the two schools and the new consolidated K-8 school. The Invitation stated:

> "We wish to vote on this matter June 27th at our Board meeting. We urge you to attend."

According to the Board's count, 230 residents accepted the Invitation and attended the June 27th meeting. The Board adopted Resolutions authorizing the filing of applications for approval of a lease purchase financing plan and Resolutions authorizing the solicitation of quotations for services of financial advisors to provide an economic evaluation of lease terms for the consolidated school, along with recommendations for the most appropriate and least expensive financing alternative.

On July 6th, 1988, the Passaic Township governing body unanimously passed a Resolution urging the Township Board

of Education to reconsider its vote of June 27th, 1988 authorizing construction of a new school by way of a lease purchase.

During and July and August, 1988, the citizens continued to press the Board to reconsider its decision to proceed with a lease purchase plan. Comments recorded in Board minutes reflect that the taxpayers thought all along that the facilities improvement plan would be the subject of a voter referendum and therefore citizens had not acted earlier to demand information or to mobilize a challenge to the Board's earlier determinations.

Respondent proceeded at its first meeting of August 22nd, 1988 to employ an underwriter, an agent bank and special legal counsel and authorized its officers, acting Superintendent, Board Secretary, Board Solicitor, Financial Advisor, Special Counsel, Auditors, Architects, and others to proceed to perform such acts, execute such documents and do all such things as are necessary to accomplish the issuance of Certificates of Participation, herein known as COPS, and the entry into a lease or leases and such other transactions as are necessary, including applications to the Local Finance Board of the Department of Community Affairs and the Commissioner of Education of the State of New Jersey, to accomplish the financing of capital improvements by the construction of a new school building on real property owned by the school district by and on behalf of the Board of the Education of the Township of Passaic, located in the Township

of Passaic, County of Morris, State of New Jersey, pursuant to N.J.S.A. 18A:20-4.2 et seq.

Following the June 27th, 1988 meeting, citizens were unable to obtain information from the Board offices concerning either the status of the application for approval of a lease purchase agreement or the documentation, preparation or submission to the Commissioner and LFB.

For several weeks beginning in mid-August, CARE representatives made an unsuccessful effort to obtain copies of the lease purchase application. Initially, although the Board had approved the application on August 22nd, citizens were advised that the applications were incomplete. This response continued until September 6th, six days before the Commissioner scheduled a hearing on the application.

On September 6th the Board Secretary stated that although the applications had been sent to the Commissioner and LFB by Federal Express on September 2nd, pursuant to a directive from the Commissioner's office, the applications and accompanying documents were not to be released to the public. Respondent withheld the requested documentations pursuant to this directive and once the Commissioner's office approved the release of the documents in question on September 9th, 1988, the documents were made available to persons requesting the same.

Although the applications were dated August 22nd, 1988, they were not received by the Commissioner and LFB until sometime after September 5th, 1988. At this point the

attorney for CARE made written requests to participate in the September 12th hearing before the Commissioner's representative and for postponement of the hearing because respondent failed to file a complete application 15 days before the hearing date as required by N.J.A.C. 6:22A-1.1 because relevant application documents had been withheld from the public allowing insufficient time for review and response because the high holiday of Rosh Hashanah fell on September 12th and 13th precluding appearance by counsel for CARE. Concurrently, the Passaic Township Committee submitted a Resolution to the Commissioner requesting a 14 day postponement of the September 12th hearing citing the facts that the lease purchase plan proposed by respondent is a controversial issue in the community, that neither the Township Committee nor residents of the Township have had the opportunity review the application submitted by the Board of Education and those opposed to the application have had not had sufficient opportunity to prepare this case. Over the objection of CARE and the Township Committee, Mr. Steinfelt, sitting as the Commissioner's designee, conducted the hearing on September 12th.

Petitioners were not permitted to attend or participate in the September 12th, 1988 conference hearing, although Mr. Steinfelt initially granted counsel for CARE two working days after religious holidays to make a written submission. When counsel for CARE argued that under the circumstances two working days was unreasonable, Mr. Steinfelt

granted an additional two working days for the written submission of CARE's statements and objections.

In its application to the LFB, the respondent seeks authorization to undertake a $15,000,000 lease purchase financing, inclusive of construction costs, for a single K-8 school to accommodate approximately 1,000 students.

The facts in this case as I have set them forth are undisputed and I find the above to be factual and the facts of this case.

What I intend to do now is to briefly go over the evidence given by the various parties who have testified in this matter. The evidence was to weighty and too long to go over it in a very thorough heavy manner, but what I have tried to do is hit the pilot lights of each of your testimonies whomever is in this room has testified.

Christl Smith testified on November 23rd, 1988, that she was part of a 1985 commission to look into the educational needs of Passaic for a five year plan. Working with the 1987 Uniplan, the EI Associates Plan and a five year Master Plan, population studies were conducted and as a result of their studies in that report, and further as a result of a study done about the acreage needed to build a middle school, it was eventually found that one needed a 20 acre site plus one acre for each 100 students. The architect testified later in this case that, due to the fact that a school was already on the site, the 20 plus one acre for each 100 students was unnecessary and that rule did not have to be followed. In her

Committee's plan, they accepted all the assumptions of both Uni and Master Plans in this case, including the 1985 Uniplan preliminary report and other studies. It should be noted that CARE accepted all reports that were submitted by the Uniplan or the other organizations that were hired by the Board to do the studies in this case and worked from those assumptions. She further testified that her Committee report was unanimous. Although some of the Committee liked a one school site, all of the Committee did vote to have a two school site, fixing up the two schools.

Pamela Thievon, a CARE Committee member and taxpayer of the Town, testified that what CARE specifically wanted was a referendum by the citizens of the Town to approve whatever was being done by the Board of Education and that in her opinion at the June 27th, 1988 meeting of the Board they went to a lease purchase plan in 10 minutes without any real discussion of the matter. Thereafter, she and hundreds of other taxpayers signed a petition to have a referendum. She also testified that there was trouble getting documents from the Town and pretty much cited the same history as I have just given in my facts of trying to obtain the documents. There was further evidence that CARE had tried to change with the Legislature of the State of New Jersey the Statute which granted lease purchasing and failed in that effort and what she wanted here, her demands were, she wants all the schools in the district kept, she does not want to tear down the old buildings, although she did not know what they should do with them.

William K. Strand, also a CARE member and a resident of the Township, is a civil engineer by trade and has a background in administration of new construction, testified that he, on behalf of the CARE Committee, was also a Vice President of Stone & Weher, who did appreciation studies in public utility cost matters with 57 assignments that he did in physical planning. He further testified that he was a member of the Board of Education from 1963 to 1978 and testified that it was the height of folly to waste by selling and abandoning the old school buildings which could be used. He felt that they had architectural merit and should be kept. He also testified that in his opinion the buildings could be renovated completely for $7,000,000. There was further testimony on his part that a figure of $60 a square foot for renovation which was the architect's figure was excessive and that the costs should not run more than in the neighborhood of $30.00 per square foot, although they could be $30, $31, $32, $33. He further testified that he has not been involved in school buildings since 1963 and 1964 and was not intimate with the new school code construction restruction requirements and did not check them. It was his very strong feeling that he did not want to destroy at any time any of the old structures, that there was a certain charm, and that they were the best things that the Town had to offer.

William J. Mathews, also a petitioner in this case, is a chemical engineer by trade and in 1973 he was on the Long Term Planning Committee for this Town. He was worried about

the loss of recreation facilities, he was concerned about the loss of flexibility of only having one building and taxes and he specifically thought this matter should go to referendum. He also believed that both buildings could be renovated for approximately $7,000,000.

The next person to testify was Ralph Maresca, Jr. who is the Acting Town Administrator. He advised us about outstanding costs that were imposed upon the Township for housing and sewer debt and for upgrading systems in the Town and affordable housing and there was a six year plan to complete them and the Town was concerned specifically about incurring further tax debt to the Town. He also advised of a sewer ban and the need for any new building to be given a waiver in order to build while the sewer ban was in place. He further testified that the school buildings were presently part of the emergency management shelter program and that recently there had been a review and designation of these buildings as emergency shelters and that the Town had no other plans at that point for other emergency shelters with the exception of the four buildings.

Nextly, David H. Evans testified as an expert opinion as an accountant in school auditing and finance. It was Mr. Evans' testimony that, although he did not have any real knowledge of lease purchasing agreements, he felt from reading this agreement the way it was structured at that point that many of the clauses may have led one to believe that this was a debt and not a lease purchase agreement.

Thomas S. Barbarow, Board Secretary and Business Administrator, testified in the area of filing of documents with the State of New Jersey and tried to bring us a picture from his standpoint of what happened with the filing of documents. I think the picture is rather clear from my previous finding of facts of what the chronology was here. Mr. Barbarow was hampered by the fact that he was brand new in his job by the time he came to be filing the documents and had very little, if any, knowledge of about what happened prior to him taking the office that he presently holds. He also testified that in regards to the sewer connection ban, he had sent the application to Mr. LoMante to file and he has not heard from that time and did not know whether or not the Board of Education had filed for a sewer waiver. He then testified on another day as to savings that the school would have in his opinion as Business Administrator for the school. If in fact the school went to a K through 8 one building and closed the other buildings, it was his opinion that the school could save an amount of $275,000 a year, each and every year, by a cut in staff and expenses by going to a one school building.

James A. Moyer, who was the bond attorney hired by the Board of Education, expert in bonding, lease purchase agreements, testified and described lease purchase agreements and bonding agreements. He advised us there have been 18 projects in the State of New Jersey that use lease purchase; he was involved in five of them. He talked about the various non-appropriations clauses. He advised that they were always

in agreement. They were in there for reasons to show that this was not debt. He talked about how money came from the district. He instructed us as to what COPS were and how the whole financing structure ran. I shall cover that sometime later. He further advised us that the law had just been changed and that the regulations were changed and that his organization and he was one of the proponents of the change, along with the Department of Education and the New Jersey School Boards Association. Mr. Moyer then told us that there were four bonding companies in existence that were willing to provide bonding in case of default on a lease purchase agreement and he talked about the non-substitution clause within this lease purchase agreement where a school district for a period of one year after a default in the nonpayment of the obligation could not use any other facility either by purchase lease or otherwise to conduct its educational needs within that district or probably any other district. He further advised that a lease purchase agreement was in essence a real estate lease, that they had been used in the State of New Jersey for various purposes for a period of 50 years, that under N.J.A.C. 6:22A-1.1, the amount of the lease costs per year as rent must be put in the budget, that in fact a lease purchase could bind future boards, that boards of education presently have two choices. If they want to borrow capital funds, either they can go for a bonding issue or a lease purchase issue, and he was aware of the sewer bans and specifically stated that this project would not close, whether

bonding or lease purchase, until the sewer waiver authority has been procured.

In line with that, Frederick A. Zavaglia, a budget analyst, testified that he was employed by Government Finance Association as a Vice President. He provided client service to school boards involved in bond issues for a period of some 20 to 25 bond issues in two years. Also involved in lease purchase agreements. He described the value of lease purchase agreements over bond issues as being speed to get the capital and a different way to sell securities, that there was more flexibility, that the payments could be structured in a more flexible manner, there were various methods of sale and these were rental payments, not debts. He described the disadvantages of lease purchase agreements as they are controversial, they are more legally complicated and more specifically that the public was not familiar with them. He described the advantages of bonding as having long term popularity, that they were more secure from the standpoint of the person who was purchasing the bond. They were widely accepted and less complicated to issue. The disadvantages of bonding were that they created debt, they were less flexible for marketing and the timing is slower. Based upon all the factors, he had recommended to this district that they go lease purchasing. He also discussed the one year restriction not to use other facilities and felt in his opinion that restriction was okay. He also testified that it was common in lease purchasing agreements to have penalty clauses.

Mr. Edwin Barry, a structural engineer hired by the Board of Education who was earlier mentioned, was not familiar with the education building codes in New Jersey, specifically as to school buildings. He was retained by the Town in June of 1988 to evaluate Central Avenue School. He in fact went out and did evaluate Central Avenue School and it was his opinion that the school is basically structurally sound although there were many areas such plumbing and electrical that he did not look at. He felt that the front wall which was bowing was a load-bearing wall and he firmly believed that all buildings should be saved, including the buildings in this district.

Phyllis Nordgren, the President of the Board of Education, testified that she had been a member of the Board for six years and three years as President, that she had studied enrollment figures and educational needs, that with a K through 8 building there could be provided a family life course as mandated by the State and a gifted and talented program as mandated by the State, that presently, there were no art classrooms, no music classrooms, home economics in third and fourth grades, that a one school building could provide children in a mix-and-match situation of all ages and abilities greater opportunity by movement of classes and afford greater opportunity by reason of the facilities in one building without having to consider busing and therefore students in a lower grade would have access to art classes, home economics, etc. which they would not have in a two school building.

Ms. Nordgren also talked about the costs and she gave us a perspective of how the one school building developed in the lease purchase agreement. It was her belief and testimony that over a course of time as the discussions went on and on and on and the reports came in and the Board reviewed all the information there was a shift within those members who had full knowledge of the problems in developing a two school sites, that somewhere along the line the factors crossed over and became evident that one should look into a one school site and as more time passed it became obvious to the Board that one should go with a one school site over a two school site, which is the present position of the Board. She also testified on enrollment and was of the opinion that, in viewing prior studies and long-range studies, and more particularly live birth studies, that the school as set forth by the architect as a one school building K through 8 would be the most reasonable and economic way for this district to go and fulfill their needs over the next 20 years.

Mary Louise Malyska, the Acting Superintendent of the school district, also testified. She is qualified as an expert in public education. She reviewed her studies on the live birth certificates, enrollment history, and demographic data, the projections in New Jersey of like towns and total enrollment projections. She advised that live births in the Town were up. They were presently running in the high 90's which would have a strong effect in this district within four or five years, that the live births have been up over a period of approximately three or so years.

She further testified that by 1992, 80 to 90 students a year would be entering the system. Approximately a building would need to be built for 765 students minimal by the year 2001. She further advised that with a new building K through 8 some if all of the special education students could be taken back in the building. She further testified that there studies done regarding the projected increase in enrollment from local new housing and she discovered that with the exception of one development none of the new housing as projected had come on line or even had started to be built and therefore the revised projections had to be made to consider the fact, when this new housing in fact was built, the enrollment would be up in addition to the live births. Mrs. Malyska also discussed the local school competition in terms of Catholic schools, in terms of potential idea of moving to other districts and further talked about the educational benefits of one school vs. two schools and that it would be easier to individualize a program, be easier to handle the personnel material, easier scheduling and easier transportation with one building as opposed to two or more, that the students can move around a one school building to meet their qualifications, that English as a second language could be handled in a better way than it is presently being handled. Today there is limited counseling for groups for psychology and social work that would change with a one school building in having all the personnel in one school. There were advantages in home economics and younger children would

get a chance to learn in that area. Also in the areas of computer and music which they are not being exposed to now, that older students would only mix with the younger students on a limited basis and she further testified that there would be an economic saving towards the budget every year in staff cuts and personnel and other areas such as educational supplies by having one building.

Lastly, Vincent V. Calabrese, an Administrator with the Department of Education, testified. It was Mr. Calabrese's opinion that lease purchase agreements in the State of New Jersey are legal, that pre-approval of the lease purchasing agreements by the State of New Jersey makes them binding agreements, that the school district must make payments or they would not be in compliance with the Thorough and Efficient if they did not make the lease payment/or rent payment every year, that it was the intent of the new legislation previously mentioned and of the regulations to hold the Board to make the rent payments every year. It was further his view of the new legislation and his interpretation that it was done so that it would be clear to the public based upon the history of what had happened in lease purchases in the State of New Jersey and nationwide that this would not be considered debt, that it would be considered a current expense in a current expense budget. He also testified on the non-substitution clause and it was his opinion that it was probably not a viable clause to have within a contract and stated that unless Thorough and Efficient was in danger he

would not object to it. He would object to it if Thorough and Efficient was in danger. He further testified that the general vote of a citizen on a budget item is for taxes, not to vote on line items, and believed that lease purchase agreements were in order in this case.

Mr. LoMante, the architect hired by the board of education, testified in essence that he had done multiple plans in this case, both a two school and a one school site and in a one school site he had also done multiple plans and eventually presented us with a plan that he recommended to the board of education. It was going to follow that he had run a cost audit on what it would cost at this time and place to redo the two schools as opposed to building the new school and it was his opinion that the essential cost would be approximately the same to refurnish the two school site as to build a new one school site. He was also asked on cross-examination about the objection of the Township Engineer and Planner as to traffic patterns and typographical problems and water problems, etc. and it was his opinion that they could be met. He was also asked about the filing of the papers based upon the timing of New Jersey regulations. One regulation was presently in existence and he testified that that was favorable with his filing and used that regulation. There was another regulation that was coming in and had not been in final approval yet by the State of New Jersey and he further testified that he knew that that regulation was going to be in eventually and did use that regulation and not the old regulation.

There were in this case approximately 27 issues presented by Mr. Chait. There were another 8 issues presented by Mr. Pidgeon and there were another 8 issues or so raised in defense in this matter by Mr. Rothschild, so in total, we started out with dealing with approximately 40 to 50 issues. Some of them have left us as some of the leases that we covered this morning show.

I am going to take the issues one at a time and deal with them at this point.

The first issue I shall deal with is whether or not the petitioners have standing to maintain this action. In its answer, the respondent asserts that some or all of the petitioners do not have standing in this matter. This contention I find to be without merit. As set forth in the introductory statement, CARE is an incorporated nonprofit organization with a rapidly growing membership now consisting of approximately 186 individual taxpayers residing in the Township of Passaic, some of whom have school-age children. As such, they clearly have standing to maintain this action. The standard for determining standing in New Jersey was expressed by the Supreme Court in the case of Crescent Park Tenants Association v. Realty Equity Corporation of New York, 58 N.J. 98, 107-08. Petitioners in the instant case as individual taxpayers and in some cases parents of school-age children clearly have a genuine stake in the outcome of this proceeding and its determination will have a direct effect upon them, both in the financial sense and in the sense as

citizens of the Township of Passaic. They have a genuine in the ultimate course of the educational plans and programs which respondent seeks to implement. A holding that petitioners do not have standing would be tantamount to a holding that challenged actions of the Board in this or any other case are immune from legal challenge or review. This contested administrative proceeding is the only avenue available to petitioners to controvert respondent's actions and create a complete record for appeal. It has been specifically held that taxpayers residing within the Township school district have standing to maintain an action challenging the proposed action of a board of education to close an elementary school and to lease the building to the State Department of Education. Silverman v. Bd. of Ed., Tp. of Millburn, 134 N.J. Super. 253, 257-58 (Law. Div. 1975); aff'd 136 N.J. Super. 435 (App. Div. 1975). It has also been held that a taxpayer has standing to attack an award of a bid to a contractor on an individual school construction project and to also contest the illegality of the bid specifications. See Albert F. Ruehl Company v. Board of Trustees of Schools for Indus. Ed., 85 N.J. Super. 410 (Law Div. 1964). In numerous other cases challenging the actions of a board of education, the standing of taxpayers to protest the action was so self-evident as to not even be raised as an issue. See, e.g. Fisher v. Board of Ed. Union Tp., Union County, 99 N.J. Super. 18 (App. Div. 1968); Schinck v. Board of Ed. of Westwood Consol. School Dist., 60 N.J. Super. 448

(App. Div, 1960); Fielding v. Board of Ed. of the City of Paterson, 76 N.J. Super. 50 (Chan. Div. 1962), aff'd 39 N.J. 85 (1963).

I therefore find that the petitioner CARE in this matter and the individual citizens listed in the petition have standing and I so order.

POINT 2 - Whether or not the petition was timely filed.

Over a significant period time, respondent advised the public that the facilities improvement plan ultimately endorsed by the respondent would be submitted to the district voters for referendum approval. When the Board on February 8, 1988 authorized the submission to the Bureau of Educational Specifications for a single K-8 school, respondent had not abandoned its commitment to hold a referendum seeking voter authorization for the single school proposal. The cost estimates and the method of financing were not discussed with representatives of the public at that time. N.J.A.C. 6:24-1.2(b) states that a petitioner requesting a contested case hearing as to any action by a district board of education is to be filed no later than the 19th day from the date of receipt of notice of the action being contested. The Petition in this matter was filed on September 12, 1988 within 90 days of the Board action abandoning its previously stated intent to schedule a referendum and authorizing the funding for the project by way of lease purchase financing. The provisions of N.J.A.C. 6:24-1.2(b) may on good cause be relaxed or dispensed with by the Commissioner. N.J.A.C. 6:24-1.17 provides:

> "The rules herein contained 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. 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."

The February 8th, 1988 decision to submit educational plans to the Bureau for review represented a single component of a much larger scale, planned to close down four existing school facilities, to sell school district properties, consolidate all schools to a single building board administration offices and to finance approximately $15,000,000 by entering into a complex lease purchase agreement. In February and continuing to June 27, 1988, the public had the expectation that a number of administrative approvals were required and any of which might nullify the plan or require changes in that ultimately the plan would be voted upon at a referendum. The Board minutes reflect that Board members wished to consider at a later date possible changes in the constructions plans but had not yet settled upon the method of finance. Until June 27, 1988, respondent was committed to nothing except obtaining administrative review comments on the consolidated K-8 proposal. It would be unreasonable to impose upon the taxpayers the burden of filing separate petitions challenging each of the myriad of components of a proposed construction plan which is scheduled for open presentation by two voters by way of a referendum or

otherwise. A multiplicity of separate actions would result challenging the educational plans, the schematic plan, the selection of an architect, a financial advisor, the method of financing, etc. as the Board takes each step in process which does not culminate until Board action seeking authorization from the voters or Commissioner to finance the project. At the time of the initial submission to the Bureau, respondent seemed committed to presenting a referendum to the citizens of the school district. It was not until June 27, 1988 that respondent determined to apply to the Commissioner for approval of a lease/purchasing finance plan. The invitation to the public sent to every household prior to the June 27th, 1988 meeting indicated that the decision whether to go forward with the project would made on June 27th, 1988 and that the views of the citizens were solicitated at that point. The Board minutes of June 27th, 1988 and later reflect the consistent comments from the public that they thought a referendum was to be scheduled for approval of the single school proposal. Under the circumstances, there was no reason for any of the petitioners to file an appeal from the February 8th, 1988 decision of the Board to obtain Bureau approval of educational specifications as this is the normal prerequisite procedure leading to the scheduling of a Board referendum. Certainly any petition filed then challenging the submission of the educational specifications would have been deemed premature. As I have commented many times in this trial, it was my question whether or not even this action was premature

since the Commissioner had not reached a final decision on whether to approve the agreements here. It also makes practical sense for citizens to await the outcome of a referendum before expending their own monies and/or public funds to launch pre-referendum litigation.

It was not until April and May that the Board began to preliminarily explore lease purchase financing as an alternate to a bond referendum. Under these circumstances, segmented application of the ninety day rule would clearly work an injustice upon petitioners. In Parisi v. Board of Education of the City of Asbury Park, Monmouth County, (decision of the State Board dated October 24, 1984), it was held that a cause of action arises and the ninety day period begins only when specific and definite notice is received by a petitioner that a decision has been irrevocably made from which an appeal should be taken. Otherwise, litigation would be precipitated each time there was a suspicion of alleged unlawful action resulting in a multiplicity of suits. Although the Parisi case is not factually related to the instant one, the underlying policy which it expresses is certainly applicable here. It can hardly be said that the petitioners received specific and definite notice of a final decision from which they would have to appeal, when respondent affirmatively indicated that the petitioners would have the opportunity to be heard through the ballot box.

In the case of D'Alessandro v. Board of Education of the Township of Middletown, Monmouth County, (Commissioner of

Education decision dated October 20, 1986), the Commissioner held that where there was potentially a continuing violation of the spirit of certain affirmative action regulations which were adopted more than ninety days before the filing of an appeal, such circumstances warranted relaxation of the ninety day rule. The instant case presents a continuing series of decisions which ultimately engendered the total dispute at issue. Respondent's action was not irrevocable and contestable until respondent withdrew the educational plan from voters' approval and authorized financing by way of a lease purchase agreement. Under these circumstances, the claims set forth in the petition are found to have been timely filed within ninety days from the Board's decision to undertake construction of a new K-8 school without submission of a capital project for voter approval. I so find and I order that the petitioners have not violated the ninety day rule and further order that if the Commissioner in the final decision finds that they have not come in within the ninety day rule I order that an exception to the ninety day for the preceding reasons be granted and I so order.

Issue 3. Does the form of lease purchase agreement avoid creating an unconditional debt by limiting the payment obligations of the school district to funds annually appropriated through the budgetary process?

The petitioners have attacked part of the validity of lease purchase law codified at N.J.S.A. § 18A:20-4.2(f). This challenge, however, should be rejected. Moyer testified that the lease-purchase concept has existed for many years and that it has always entailed the fundamental principle that a

government entity, through its existing body, may properly enter into long term contracts when authorized by statute. Cases show that so long as the contractual payment obligation is to be paid out of current revenues, subject to annual appropriation, such long term agreements are not considered debt. It is further shown that the New Jersey lease-purchase program for boards of education, as authorized by the Legislature and implemented by the Commissioner, comports with established lease-purchase doctrines, facilitates the use of lease-purchase as a financing tool for boards of education, and adds certainty to the program by setting forth statutory criteria which, when followed, assure the validity of transactions.

The New Jersey courts, as well as courts of other states, have long held that lease-purchase statutes and transactions are constitutionally valid. Bulman v. McCrane, 64 N.J. 105, 312 A.2d 857 (1973); Holster v. Board of Trustees, 59 N.J. 60, 279 A.2d 798 (1971); Enourato v. New Jersey Building Authority, 182 N.J. Super. 58, 440 A.2d 42 (App. Div. 1981); aff'd, 90 N.J. 396, 448 A.2d 449 (1982); see Teperich v. North Judson-San Pierre High School Building Corp., 257 Ind. 516, 275 N.E.2d 814 (1971), cert. denied, 407 U.S. 921 (1972); Jefferson School Township v. Jefferson Township School Building Co., 212 Ind. 542, 10 N.E. 2d 608 (1937); Bacon v. City of Detroit, 282 Mich. 150, 175 N.W. 800 (1937); St. Charles City-county Library District v. St. Charles Library Building Corp., 627 S.W. 2d 64 (Mo. 1981);

U.C. Leasing, Inc. v. State Board of Public Affairs, 737 P.2d 1191 (Okla. 1987); Greenhalgh v. Woolworth, 361 Pa. 543, 64 A.2d 656 (1949).

In one of the cases, Holster v. Board of Trustees, 59 N.J. at 71, 279 A.2d at 804, the Supreme Court held valid provisions of the New Jersey County College Bond Act. The questioned provisions provided for the issuance of bonds by the County which were to be paid, in part, from funds contemplated to be obtained from the State of New Jersey. Id. at 64, 279 A.2d at 800. The statute further provided that, as interest and principal payments fell due, they were to be met by state appropriations. Id. at 65, 279 A.2d at 800. The statute, however, also contained the following "non-appropriation" clause:

> "Bonds or notes issued under the provisions of this Act shall not be deemed to constitute a debt or liability of the State or a pledge of the faith and credit of the State but are dependent for repayment upon appropriations provided by law from time to time."

Id. (quoting N.J.S.A. § 18A:64A-22.8). This statutory provision was challenged as contravening the debt limitation clause of the New Jersey Constitution. Id. at 65, 279 A.2d at 800-01. The Court upheld the statute, however, reasoning that, because of the non-appropriation language contained in the quoted portion of the statute, the State would not incur debt. The Court noted that "[a]lthough there is doubtless a strong likelihood that payment of the bonds will in fact be met by legislative appropriations, we find nothing in the statute compelling the State to make such payments as a matter

of law." Id. at 66, 279 A.2d at 801. In Holster, therefore, the court approved of the non-appropriation framework in the creation of valid and constitutionally sound lease-purchase transactions. The Holster court recognized that government entities will almost certainly meet contractual obligations, but so long as that contractual obligation is to be met from current funds, subject to appropriation, no debt, in the constitutional sense, results.

In Bulman v. McCrane 64 N.J. 105, 312 A.2d 857 (1973), the Court again upheld the lease-purchase format in New Jersey. In Bulman, the taxpayer brought suit to enjoin the State of New Jersey from entering into a lease-purchase agreement for a building to be built on State property. Id. at 105, 312 A.2d at 858. The plaintiff claimed that the "lease" involved was not a true lease, and that it therefore ran afoul of constitutional debt limitations and referendum requirements. See id. at 107, 312 A.2d at 859.

The Bulman Court, however, rejected the challenge and, in doing so, laid the foundation for all future lease-purchase transactions in New Jersey. The Court rejected the taxpayer's assertion that the lease transaction was an improper evasion of constitutional debt limitations:

> "The fact that the State may be advantaged by ultimately acquiring title to a potentially useful building as the residue of a transaction otherwise faithful to the theory of a lease (certainly so from the viewpoint of the lessor) represents no good reason for judicial assiduity in laying hold of that circumstance to destroy the transaction as an unconstitutional debt. The sole obligation of the State here is for future installments of

> rent. They will presumably be paid out of current revenues as annually appropriated for the purpose. Under settled principles, there is no present debt in the constitutional sense."

Id. at 117-18, 312 A.2d at 863-64 (emphasis added). The Bulman Court held, in essence, that if the transaction is defensible as a lease, and the rent payments are payable out of current revenues as annually appropriated, no debt is created. Id. at 114, 312 A.2d at 861, 863-64.

Judicial approval of lease-purchase transactions has recently been expressed in Enourato v. New Jersey Building Authority, 182 N.J. Super. 58, 440 A.2d 42 (App. Div. 1981), aff'd, 90 N.J. 396, 448 A.2d 449 (1982). Enourato involved a constitutional challenge to the Legislature creating the New Jersey Building Authority and to the ability of the Authority to sell bonds and to pay its bondholders from rental payments received under a lease with the State of New Jersey. The plaintiff claimed, inter alia, that the legislation authorizing such a transaction violated the debt limitation clause of the New Jersey Constitution. Id. at 67, 440 A.2d at 44. By statute, the Authority's bonds were not to be considered a debt or liability of the State. The plaintiffs contended, however, that the lease obligation of the State, which funded the payments to the Authority's bondholders, was in fact unconstitutional "debt".

The statute involved required the lease to contain a "non-appropriation" clause. See Id. at 68, 440 A.2d at 47 (citing N.J.S.A. § 52:18A-78.5(O)). The proposed lease

agreement between the Authority, as lessor. and the State of New Jersey, as lessee, was described as follows:

> The lease itself is a highly detailed 39-page instrument. Indeed, it contains the types of provisions that would be anticipated to appear in an instrument providing for such a major transaction.... The Authority is to obtain the land for the project, but the State is to build it as agent for the Authority. The Authority will provide funds for the project by selling bonds and notes. The rent basically is to be an amount sufficient to satisfy the Authority's obligations on the bonds and notes. Nevertheless, in conformity with N.J.S.A. 52:18A-78.5(O)) the lease provides that all krent payments shall be subject to an dependent upon appropriations made by the Legislature from time to time. State is obliged to pay all expenses for the building and to keep the property insured. There are provisions (not at all unusual in a lease) dealing with destruction of the property, condemnation, quiet enjoyment, waste. inspection, assignment, subletting, defaults remedies, waiver of remedies and other matters. We perceive no reason to detail these provisions.

Id. (emphasis added). The Court found no constitutional violation of the statute or the proposed lease. Id. at 70, 440 A.2d at 47. Relying, in part, on the recitation of the non-appropriation language required by the statute, the Court approved the lease as not involving impermissible debt:

> Further. plaintiff does not even contend that the liability of the State on the lease in itself is a violation of the debt clause and, in any event. it clearly is not. Both the statute and the lease clearly indicate that all rent payments from the State are subject to appropriations being made by the Legislature. Further, the State may incur liability for future rentals without violating the debt clause. Bulman v. McCrane 64 N.J. 105, 117-118, 312 A.2d 857 (1973).

Id. at 70-71, 440 A.2d at 48. The Enourato decision in the Appellate Division demonstrates the continued acceptance of the lease-purchase concept, and further demonstrates the facilitation of lease-purchase entailed through statutory requirements for non-appropriation clauses. In Enourato, the authorizing legislation required leases by the State to contain a non-appropriation clause. The Court placed heavy reliance on the inclusion of the non-appropriation clause in the proposed lease in expressing its approval of the transaction. Significantly, moreover, the lease in question in the Enourato case appears to contain standard provisions also present in the Passaic Board of Education lease-purchase agreement for remedies, defaults, subletting, and other normal incidents of a leasehold relationship. In fact, other than the non-appropriation language, the lease in Enourato appears in most respects to be very similar to the type of instrument under contemplation here.

The case law in New Jersey, as well as in other states, demonstrates a recognition that government leasing, which is subject to annual appropriation, is outside the structures of constitutional debt limitations and referendum requirements based on the incurrence of debt. The case law has also demonstrated the validating nature of legislation which requires the non-appropriation language in government leases. The provisions of section 18A:20-4.2(f) of the New Jersey statutes, which authorize lease-purchase by boards of education, should be considered against this background; when

so considered, the New Jersey statute reveals itself to be clearly pro-lease-purchase and compliance with the statute assures the validity of the lease purchase document.

Section 18A:20-4.2(f) of the New Jersey Statutes. Which Permits Boards of Education to Finance Acquisition and Construction through Lease-Purchase Agreements, is Valid and Constitutionally Sound

The New Jersey Constitution requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years." N.J. Const. art. 4. § 1. Pursuant to the "thorough and efficient" mandate. the Legislature has specifically authorized boards of education to utilize lease-purchase agreements to finance the acquisition and construction of school sites and facilities. N.J.S.A. § 18A:20-4.2(f); see Memorandum from Commissioner of Education to State Board of Education, November 1, 1988. The petitioners have attacked the validity of this Statute, essentially claiming that the Statute impermissibly allows school districts to exceed debt limitations. Significantly, there is no constitutional limitation on the amount of "debt" a school district may incur. The constitutional limitations only apply to the State. See N.J. Const. art. 8, § 2, ¶ 3. The incurrence of debt. however, by a school district is governed by Chapter 24 of Title 18A (Education) of the New Jersey Statutes. The legislature has limited the amount of "net school debt" a school district may incur. N.J.S.A. §

18A:24-19. "Net school debt" is defined as "the amount of school bonds. for the payment of the principal and interest of which, such municipality or district is liable less the amount of any sinking fund held for the payment of same." Id. § 18A:24-1(f). "School bonds" are defined as promissory notes or bonds for the payment of the principal and interest. Id. § 18A:24-1(g).

Chapter 24 contains detailed procedures and requirements for the authorization of bonded debt, including submission of the proposal for voter approval. Id. §§ 18A:24-10(c); 18A:24-12(b); 18A:24-21(b); 18A:24-29. School debt in excess of the statutory debt limitation may be authorized, with consent of the Commissioner of Education and Local Finance Board, upon voter approval. Id. § 18A:24-23. There are further procedures for submission of bond proposals and ordinances to the Commissioner. the Local Finance Board. and the Attorney General of the State for approval. Id. §§ 18A:24-25. 18A:24-26, 18A:24-27. 18A:24-30. Only school bonds are entitled to the benefits of the New Jersey School Bond Reserve Act. See Id. § 18A:56-17 et seq. Indebtedness incurred by school districts shall bear the legend prescribed in section 18A:56-20. The obligations to be issued pursuant to the lease-purchase statute. however. may not bear this legend and are entirely outside the ambit of the statutory framework to authorize and secure school indebtedness.

The procedures and the statutory debt limitations outlined in Chapter 24 only apply to the issuance of school

bonds, that is. the issuance of "promissory notes or bonds...for the payment of the principal and interest which. a municipality or district is liable." Id. § 18A:24-1(g). Under the statutory scheme, "if promissory notes or bonds are not to be issued, there is no increase in statutory "debt" and the debt limitations. set forth at section 18A:24-19. simply do not apply.

Section 18A:20-4.2(f) permits a board of education to finance the acquisition and construction of a school facility without issuing promissory notes or bonds. See N.J.S.A. § 18A:20-4.2(f); Memorandum of the Commissioner of Education to the Members of the Board of Education. November 1, 1988. A board of education, by electing to finance through lease-purchase. may therefore lawfully avoid the debt restrictions set forth in the statute.

The petitioners suggest that the lease-purchase statute is inconsistent with and contrary to the debt-restriction statute. This argument mirrors the claim that lease-purchase statutes authorizing leases to the State violate the constitutional debt-limitation clause. This argument, however, is devoid of merit.

The legislature defined "lease-purchase agreement" in a manner consistent with the practice outlined in Bulman v. McCrane and elsewhere:

> As used herein, a "lease-purchase agreement" refers to any agreement which gives the board of education as lessee the option of purchasing the leased premises during or upon termination of the lease with credit toward the purchase price of all or part of rental

> payments which have been made by the Board of Education in accordance with the lease.

Id. § 18A:20-4.2(f). In 1986. in an amendment, a non-appropriation requirement was added to this legislation: "Any lease-purchase agreement authorized by this section shall contain a provision making payments thereunder subject to the annual appropriation of funds sufficient to meet the required payments or shall contain an annual cancellation clause." Id.

This amendment clarified the status of a lease-purchase agreement as not creating debt. The case law, including Holster v. Board of Trustee, 59 N.J. 60, 279 A.2d 798 (1971) and Bulman v. McCrane, 64 N.J. 105. 312 A.2d 857 (1973), teaches that the validity of lease-purchase rests on the identification of the contractual rent obligation to current revenues subject to annual appropriation. Inclusion of a statutorily mandated non-appropriation clause, moreover, enhances the presumptive validity of a lease-purchase agreement. See, e.g. Enourato v. New Jersey Building Authority, 182, N.J. Super. at 70-71, 440 A.2d at 47-48.

The petitioner's "debt" argument, of course, rests on a statutory restriction, not a constitutional mandate. Nevertheless, the reasoning of Bulman, Holster and Enourato compels the conclusion that, so long as the lease payments are to be made out of current funds. no legally significant debt is created.

The petitioners have criticized the lease-purchase agreement on the theory that the lease document amounts to an impermissible agreement to bind future boards of Education to

a contract. Where authorized by statue, however, leases or contracts which extend beyond the duration of a sitting board of education are valid. See Beverly Sewerage Authority v. Delanco Sewerage Authority, 65 N.J. Super. 86, 96, 167 A.2d 46, 51, aff'd 70 N.J. Super. 575, 176, A.2d 276 (App. Div. 1961), aff'd, 38 N.J. 354, 184 A.2d 864 (1962); City of New Brunswick v. Borough of Milltown, 135 N.J. Eq. 310, 313, 38 A.2d 288, 290 (1944) and D'Ercole v. Mayor and Council of Borough of Norwood, 198 N.J. Super. 531, 544, 487 A.2d 1266, 1271-72 (App. Div. 1984); 10 E. McQuillin, Municipal Corporations § 29.101 (3d ed., 1981 rev'd vol.). The New Jersey Legislature has specifically authorized boards of education to bind future boards to long-term leases required to support lease-purchase agreements. N.J.S.A. § 18A:20-4.2(c) (authorizing execution of leases for terms not exceeding fifty years).

The framework established in section 18A:20-4.2 of the New Jersey statutes clearly authorizes lease-purchase agreements in the traditional sense exemplified in Holster, Bulman, Enourato. The statute, in fact, has been so interpreted by the Commissioner of Education:

> Under the provisions of N.J.S.A. 18A:20-4.2(f). a district board of education is authorized to utilize lease-purchase agreements to finance the acquisition of sites, the construction of new school facilities, and renovations or additions to existing school facilities. Voter approval is not required for a district board of education to enter into a lease purchase agreement, but a resolution approved by a majority vote of all member of the board is required.

> A lease-purchase agreement refers to any agreement which gives a district board of education, as lessee, the option of purchasing the leased premises during or upon termination of the lease. Credit is given toward the purchase price of all or part of the rental payments which have been made by the district board of education in accordance with the lease. The option price declines over the term as rentals are paid. At the final option date the option price is usually a nominal amount.
>
> The lease-purchase agreement does not constitute debt, since the rental payments are subject to the annual appropriation of funds sufficient to meet the required payments. The rental payments are appropriated annually by the district board of education as part of the current expense budget.

Memorandum of the Commissioner of Education to the State Board of Education on November 1, 1988.

The State Board of Education has promulgated regulations, recently adopted. which by their terms give the Commissioner broad authority over lease-purchase transactions. N.J.A.C. 6:22A-1.1 et seq. Under the regulations, the Commissioner, in furtherance of his mandate to ensure thorough and efficient education, is to review proposed transactions. Id. 6:22A-1.2(f). Moreover, district boards of education are required, under the regulation, to include, in their annual budgets for submission to the voters, the rental payments under the lease, and a budget which does not contain the amounts will not be approved by the district superintendent. Id. 6:22A-1.2(g). These new regulations further demonstrate the importance of the lease-purchase program in advancing thorough and efficient education and further suggest the program's vitality.

Without question, the program authorized under section 18A:20-4.2(f) of the New Jersey statutes comports with and codifies the lease-purchase concept reflected in the underlying case law. It is also clear that, as the program does not involve the use of promissory notes or school bonds, no statutory debt restrictions or referendum requirements apply. Moreover, the recent inclusion of a statutory language requiring non-appropriation clauses in the lease-purchase agreements is consistent with case law and consistent with the concept that, in order to avoid the effect of statutory debt restrictions, rental payments are to be appropriated annually as part of the current expense budget and the lease payments themselves, as a contractual obligation, are subject to that annual appropriation. The statute, therefore, reflects precisely the type of program approved of in the New Jersey cases.

The proposed lease-purchase agreement contains the "subject to annual appropriation" language required under Section 18A:20-4.2(f) of the New Jersey statute. The proposed lease-purchase agreement, in compliance with the statutory requirements, provides as follows:

> (a) The lessee currently has a Fiscal Year ending on June 30 of each calendar year. An "Event of Nonappropriation" shall be determined to have occurred if the lessee shall determine not to appropriate monies to make basic rent payments or supplement rent payments. Upon the occurrence of an Event of Nonappropriation. then the Lease Term shall terminate effective upon expiration of the Fiscal Year. . . .

Lease-Purchase Agreement § 303(a). The inclusion of the statutorily mandated non-appropriation language fairly assures that the financing documents are, in fact. a valid lease-purchase agreement. See Enourato v. New Jersey Building Authority, supra. As the financing plan follows the established format, and the lease document contain the mandated non-appropriation language, the financing plan is a valid (debt-free) lease-purchase agreement.

It was further suggested that the proposed documents were not, in substance, a lease. This suggestion, however, must also be rejected and I make a finding that, in fact, this is a lease.

In Bulman v. McCrane, the Court held that if the government lease is theoretically defensible as a lease, the obligation to make the rental payment does not amount to a present debt. 64 N.J. at 114, 312 A.2d at 861-62. Hence, the petitioners seek to characterize the lease-purchase document as something other than a typical lease.

Whether a particular agreement is a lease depends upon the intention of the parties as revealed in the language establishing the relationship. Thiokol Chemical Corp. v. Morris County Board of Taxation, 41 N.J. 405, 417, 197 A.2d 176, 182 (1964). In asserting the language employed, numerous factors are to be considered:

> Ordinarily when a lease is made we find an agreement by the owner-lessor to turn over specifically-described premises to the exclusive possession of the lessee for a definite period of time and for a consideration commonly called rent. Although

> no absolute requirement exists for the use of particular words, the instrument is usually studded with terms . . . such as "lease," "let," "demise," "grant," and the like. Frequently, a lease is spoken of as a hiring of land, or a sale of a possession, occupancy and profits of land for a term.

Id. at 416, 197 A.2d at 182.

The proposed lease-purchase agreement is literally studded with the incidents of a typical lease. The terms lessor and lessee are used throughout to describe the parties. The agreement contains a provision reserving rent. Lease Purchase Agreement § 301. The document contains an agreement to lease the premises and specific terms concerning the duration of the lease. Id. §§ 501, 502. The agreement, as in most commercial leases, allocates the burden of providing insurance on the premises. Id. §§ 601, 602. The lease has provisions concerning assignment and subletting of the premises. Id. §§ 801-04. Consistent with characterization of the documents as a lease, the lease agreement provides for lessor's remedies under lessee's default, including lessor's right to re-enter and sublet the property for the lessee's benefit. Id. § 902. Significantly, the lessor, in this context, covenants to act in a commercially reasonable manner at all times in exercising lessor's remedies. Id. § 906. In short, the proposed lease-purchase agreement between Passaic Leasing Services. Inc. and the Board of Education of the Township of Passaic is, in all respects, a typical commercial lease of real property for a definite term and I so find. The lease language contains all

of the hallmarks that would be anticipated to appear in an instrument providing for such a major transaction. See Enourato v. New Jersey Building Authority, 182 N.J. Super. at 69, 440 A.2d at 47 (discussing 39-page lease-purchase agreement; provisions for destruction of property, condemnation, quiet enjoyment, assignment, subletting, defaults, remedies, etc. deemed "not at all unusual in a lease"); D'Ercole v. Mayor and Council of Borough of Norwood, 198 N.J. Super. at 540, 487 A.2d at 1269 (government leases to be viewed realistically as commercial instruments; proper for government lease to afford reasonable commercial comfort to lessor). Therefore, this is a valid lease purchase and I so find.

The petitioners have also criticized the proposed documents for containing "remedy" provisions. The provisions, however, are typical breach of contract remedies. Significantly, upon default, a primary lessor's remedy is to retake possession and re-let for the lessee's benefit. Lease-Purchase Agreement § 902. In fact. the lessor is virtually bound to act in a way to mitigate damages. At section 906 of the Lease-Purchase Agreement, the lessor agrees to do so by agreeing to act in a commercially reasonably manner.

Inclusion of provisions for remedies upon lessee's default does not invalidate the lease-purchase agreement. See Enourato v. New Jersey Building Authority, 182 N.J. Super. at 69, 440 A.2d at 47-48 (lease-purchase agreement containing usual assignment, subletting, default and remedy provisions

approved) in that case. In short, the lease document in question is a true lease and is not subject to criticism because it contains typical leasehold remedy provisions. If anything, these provisions provide hallmarks of a true lease and, under Bulman v. McCrane and the other authorities, establish and confirm the validity of the transaction, and I so find, with the exception of the clause which prevents the district from using other buildings. I find this clause to be offensive to the Constitution of New Jersey. I find the clause to be against Thorough and Efficient clause of the Constitution of the State of New Jersey and I find that a school district, under a lease purchase agreement or any other agreement, shall and must have the right, if they default or if the building becomes vacant or any other reason, they shall have the right to seek other premises and any remedy against the school district must be sought through other means as opposed to preventing a school district from carrying on the educational purpose that it is empowered with under the Constitution of the State of New Jersey and the laws thereunder and I so find and I therefore order that the interim relief requested on the issue of substitution of premises be granted to the petitioners. I further order that the interim relief as to the above provisions as to whether or not this is a valid legal lease be denied.

Did the Board of Education act patently, arbitrarily, capriciously or unreasonably in this matter?

By virtue of the bringing of this action, the petitioners herein have challenged the right of the Passaic

Township Board of Education to discharge its statutory obligation to conduct the schools of the Passaic Township School District and to provide suitable school facilities for use by the children and residents of the District. After due deliberation and consideration, the Board determined that the educational needs of Passaic Township students would best be served by replacing three existing elementary schools with a single newly constructed school facility which would house all of the district's elementary school children. The Board further determined that the construction of the new school facility would best be facilitated by the use of a lease purchase agreement as permitted under N.J.S.A. 18A:20-4.1(f). By way of this action, the petitioners seek to set aside the Board's determination to provide for the education of all district students in a single K-8 facility and to obtain such a facility through the participation in a lease purchase agreement. In order to accomplish these goals, petitioners seek inter alia an Order providing that petitioners be afforded full opportunity to examine and respond to and contest decisions taken with respect to the decommission, sale or lease of any school buildings or property. The petitioners likewise requested that the Commissioner direct the Board to reconsider alternate educational specifications based upon renovation and improvement of existing facilities.

A school district is deemed to be a separate and distinct local governing unit, which is governed by a board of

education. Botkin v. Mayor and Borough Council of Borough of Westwood, 52 N.J. Super 416 (App. Div. 1958) appeal dismissed 28 N.J. 218 (1958). The Legislature has vested the exclusive authority to conduct the schools of such district in the local board of education. N.J.S.A. 18A:10-1. As a duly constituted governing body of the school district, the board of education "is in sole charge and control of property owned by the district, including all school buildings and facilities and real property". Falcone v. Board of Education of Newark in Essex County, 17 N.J. Misc. 75 (1939). N.J.S.A. 18A:11-1(d) specifically empowers a local board of education to "[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct . . . of the public schools of the district." N.J.S.A. 18A:20-4.1(f) specifically authorizes a board of education to "acquire by lease purchase agreement a site and school building . . ." Nowhere does this statute require that a board first obtain the approval of the district's members prior to such acquisition.

That a local board of education has the exclusive authority to determine how many school buildings will be utilized in the district and to make determinations as to the closing, decommissioning and disposal of unneeded and/or unused school facilities is beyond question. As noted by the Supreme Court in Bd. of Ed., E. Brunswick Tp, v, Tp. Council, E. Brunswick, 48 N.J. 94, 108 (1966), the Legislature has vested in local boards of education the responsibility of pro-

viding "suitable school facilities and accommodations" for the residents of their respective districts. The discharge of this responsibility necessarily entails making determinations such as how many buildings to use, where school facilities should be located, the capacity and utilization rates of such facilities, when to discontinue the use of outmoded or under-utilized facilities and decisions concerning the maintenance and/or repair of such facilities.

Numerous court decisions have explicitly detailed the scope of this discretion which is vested in a local board of education in these regards. As noted in Silverman v. Bd. of Ed., Tp. of Millburn, 134 N.J. Super 253, 259 (Law Div. 1975) aff'd. 136 N.J. Super. 435 (App. Div. 1975):

> It is established law in this State that a local board of education may, in the exercise of its discretionary powers discontinue the use of a public school within the boundaries of its jurisdiction. Boult v. Passaic Bd. of Ed., 136 N.J.L. 521 (E. & A. 1948); Schuts v. Teaneck Bd. of Ed., 86 N.J. Super. 29 (App. Div. 1964), aff'd 45 N.J. 2 (1965) (emphasis added).

The Court went on to note that "[i]n addition to its right to close a school, the board of education may, pursuant to powers granted by virtue of N.J.S.A. 18A:20-2, sell and lease real estate and personal property . . ." Id. at 259. In addition to the statutory powers enumerated above in Silverman, N.J.S.A. 18A:20-4.1(f), specifically grants a board of education the power to provide for suitable school facilities and accommodations by way of the entry into lease purchase agreements.

The Board's decision in this instance to reorganize the structure of the district's schools and to provide the requisite "suitable educational facilities" by way of a lease purchase agreement, being an exercise of the discretion vested in the Board by the Legislature, is entitled to a strong presumption of validity and is subject to very limited administrative and judicial review. The applicable standard of review in cases involving discretionary acts of a board has been set forth in Kopera v. Board of Ed. of Town of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), where the court referred to

> . . .the well established rule that action of a local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.

Accord, Boult v. Board of Education of Passaic City, supra; Fraser v. State Board of Education, 133 N.J.L. 15 (Sup. Ct. 1945) aff'd 133 N.J.L. 597 (E. & A. 1946); Offhouse v. State Board of Education, 131 N.J.L. 391 (Sup. Ct. 1944) appeal dismissed 323 U.S. 667 (1944). As was stated by the Commissioner of Education in Majka v. Bloomfield Bd. of Ed.. 1980 S.L.D. ---- (Comm'r, 6/11/80), slip op. at 13:

> It is to be realized, therefore, that "it is not a proper exercise of 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 of matters which are by statute delegated to local boards . . ." Boult and Harris v. Bd. of Ed. of Passaic, 1939-1949 SLD 7, 13, aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E&A 1948) In other words, it is not a test for the Commissioner to determine if he would have reached a decision different from the one rendered by the Board. See John J. Caffrey, Jr., et al, v. Bd, of Ed. of the Township of Millburn, 1975 SLD 630.

This same standard has been consistently applied by the Commissioner, State Board of Education and the Courts in reviewing the decisions of local boards concerning the closing, discontinuation or consolidation of district schools or the adoption of district reorganization plans. As is the case herein, often times passionate and emotional challenges to such reorganization plans are mounted by well meaning parents and educational groups. The good intentions of the challengers notwithstanding, in order to prevail, it must be proved by such challengers that in reaching its decision, the board "violate[d] the law, act[ed] in bad faith (i.e., acted dishonestly) or abuse[d] their discretion in a shocking manner." Boult v. Passaic Bd. of Ed., 1939-49 S.L.D. 7,13 (Comm'r 1946). In Boult, the Court of Errors and Appeals went so far as to point out that a discretionary act of a board would not be set aside even if it were shown that in so acting, the board had based its decision on erroneous factual material, since "[d]iscretionary municipal actions may not be judicially condemned on that basis." 136 N.J.L. at 523.

That the standard of review enunciated in Boult and Kopera is to be applied in cases concerning challenges to school closing, consolidation or reorganization plans was clearly elucidated by the Court in Baker v. Westfield Bd. of Ed., 1980 S.L.D. --- (Comm'r, 7/28/80). Therein, the Commissioner upheld a decision of the Westfield Board of Education removing 2 of 8 of the district's elementary schools from service as against a challenge to such action by a group of parents/taxpayers. In so doing, it was stated that:

> Although this Court would not have reached a decision different from the one reached by the [Board], this is not the test for the Commissioner of Education to utilize. See John J. Caffrey, Jr., et al v. Bd of Ed. of the Township of Millburn, 1975 S.L.D. 630.
>
> Where a Board of Education considers all of the factors and proceeds to its determination to close a school in a deliberate, fair and conscientious manner, with good reasons for its actions, in such instances it is entitled to a presumption of correctness. Quinlan v. Bd. of Ed. of North Bergen, 73 N.J. Super. 40 (App. Dib. 1962); Boney v. Bd of Ed of the City of Pleasantville, 1971 S.L.D. 579; Majka v. Board of Bloomfield, supra. Only where a Board has acted arbitrarily, capriciously or unreasonably will its actions be upset. Quinlan, supra, at 47. Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966). [Westfield, supra, slip op. at 36].

A review of the extensive volume of cases where the decisions of a board to close schools or to reorganize or reconfigure a district has been upheld against a challenge by concerned parents and/or related groups would be imprac-

tical. It is abundantly clear, however, that provided the board had a rational basis for implementing such a reorganization plan, and did not act illegally, or in a patently arbitrary, capricious or unreasonable manner, or with improper motive, the board action must be upheld. If citizens are unhappy with the board's actions, the appropriate place to voice such dissatisfaction is at the ballot box --- not before the Commissioner or Courts. As noted by the Court in State v. Lally, 80 N.J. Super. 502, 513 (Law Div. 1963):

> There can be no question but that the Legislature has given to the members of the board of education as representatives of the public power (and duty) to deal with matters of education. In this capacity, board members act as agents of the State. [citations omitted]. Upon them is imposed the duty to provide educational facilities. The members of the board of education are elected to office because they are believed by the electorate to possess knowledge and ability to carry out the purposes of the education laws. If this be so . . . the activities of members of boards of education should be the exercise of their own discretion in determining the proper method to provide adequate educational facilities for the children of the district.
>
> * * * *
>
> Dissatisfaction on the part of school district members with the exercise of discretion and the formulation of policy as the part of any board member may always be expressed at the polls.

The evidence adduced in this matter has shown that the Board's decision to remove certain elementary schools from service and to provide for the education of all of the district's elementary school children in a single facility had a

rational basis, and was made after due deliberation and consideration. The same is true with regard to the Board's decision to enter into a lease purchase agreement for the purpose of making appropriate and adequate educational facilities available to the district's students. It is further true with regard to the Board's decision to enter into a plan to provide a single school K-8 as presented in the evidence in this case and I so find. I therefore deny interim relief as requested by the petitioners in this case as to the above two issues.

Will any payment be made prior to annual appropriation of funds sufficient to meet the required rent, so that such payments are not conditioned upon annual appropriations of funds nor paid from current expenses.

The thrust in this issue is whether or not a reserve fund must be maintained by the lessee in order to meet future rent payments. In the Treatise Municipal Corporations by John F. Dillon, 5th Edition (1911), it is since that time the concept of funding a debt service reserve fund whenever there is a question in a finance agreement that there may be a break or slowness in a required payment stream reaching the agent or trustee disbursing the funds for the benefit of the holders of debt obligation. This has now become well established. As a matter of fact, the State of New Jersey in its own certificate of participation financing for state equipment provides for debt service reserve funds in the indenture agreements. The legality of a debt service reserve fund has a legitimate purpose in being a necessary component of the raising of capital funds for construction of new buildings for school districts or municipalities to serve other public purposes is

well established in the United States has been commented on by Mr. Moyer in his testimony and I so find that it is valid. It serves the same function in many ways as security in rent or in any other large lease agreements.

There is also as part of this agreement an amount of $171,000 of bonding insurance which has been allocated as a part of the $15,000,000 borrowing funds and this amount, of course, would be paid back with interest over a period of the 20 years of the lease agreement. The question is whether or not one can legally borrow that money up front. The payment of the financial guarantee insurance premium is in the same category as paying the attorneys, the financial advisor, the the printer of the financial statement, selling documents, municipal rating agencies, Standard and Poors Corporation, reinvestor services and the bank note company printing the certificate from the bond proceeds. The insurance premiums are a legitimate cost of issuance.

I therefore find that it is a valid line item to be placed in the borrowing of the lease purchase agreement as are The other items that I just enumerated and I so order.

The next issue is should approval of the lease purchase agreement be withheld where material changes are required to eliminate discrepancies in the application and to resolve terms of the financing plan which are incomplete?

It has been my statement innumerable times during this hearing that, and I have stated before in this decision, that for some reasons, if not many reasons, I believe that this action was brought prematurely, that we were dealing with working documents and, although overall approval of the

working documents have been given final approval, of the terms have not been given as of this juncture. Example, the final figures will not be known as what it would cost to build the school as presented by the Board of Education until the bidding is let out. Furniture will be another example although it's not part of this case anymore. But there are many instances of costs and what has happened here is you have had approval of format and I find that approval of format is a perfectly valid way to handle any kind of transaction of this nature and I, therefore, would deny the appeal on this issue on that ground.

Should approval of the lease purchase agreement be withheld where the board of education failed to adopt resolutions specifying the amount of borrowing authorization sought, and where the amount of borrowing authorization sought is increased after respondent's adoption of a resolution approving the lease purchase application?

In its minutes the Board of Education did not specifically state that we adopt an amount of $15,0000,000 prior their adoption on January 5, 1989 at which time the Board clearly in its minutes adopted a figure of $15,000,000. Prior to that, the Board had by reference in its meeting and reflected in its meeting, adopted a figure I think of $15,385,000. I find that the adoption by reference of the $15,300,00 and now readopted as $15,000,000 was not fatal to the Board's requirement to specifically by resolution adopt a figure and that there was more than enough notice by the adoption of the documents showing me it was $15,300,000.

Mr. Pidgeon: But the figure is now $15,000,000?

The Court: The figure is now $15,000,000 by resolutions of January 5th, 1989.

Has respondent made sufficient submissions and obtained all administrative approvals prerequisite to approval of a lease purchase agreement?

Respondent has, with the exception of the necessary permit for sewer waiver, submitted sufficient documentation to satisfy the Commissioner of Education that at this stage of the proceedings the documents are in order and for whatever approvals he gives at this stage of the proceedings he has given. I have been advised by counsel in closing argument that now all documentation is finalized. Is that correct Mr. Rothschild?

Mr. Rothschild: All documents are finalized except for, of course, the sewer waiver

The Court: Except for the sewer waiver. I have not seen the finalized documentation as far as I know.

Mr. Pidgeon: The application to my knowledge has not yet been submitted.

Mr. Rothschild: Leaving sewer, all paperwork has been finalized.

The Court: Therefore I find that sufficient documentation has been submitted.

As required by N.J.A.C. 6:22A-1.2(a)(3), has the bureau of facility planning services approved the educational specifications, and project cost estimate prior to respondent taking any action to obtain the commissioner's approval of a lease purchase agreement?

The answer to that is yes; the bureau of facilities planning services has approved the specifications.

Did respondent publicly approve and submit to the bureau a project cost estimate, site plan and updated long-range facility plan as required by N.J.A.C. 6:22-1.2(b)?

The answer is the cost estimate, site plan and updated long-range facility plan have been submitted in accordance with 6:22-1.2(b) with the notation that, as I found earlier, the acreage is not in conformity. Based upon the testimony of Mr. LaMonte, the architect, that is not necessary under this section due to the fact that a previous school is cited herein.

Mr. Rothschild: That's true Your Honor, except he also said that on the specific question of acreage, which is really 20, the new regulations allow it in any event. I needn't address this. You're only on 16.

Before taking any action on the lease land, did respondent request and obtain school site approval from the bureau as required by N.J.A.C. 6:22-1.1(b)(1) and N.J.A.C. 6:22-1.2(b)?

I find that the architect submitted his plans to obtain school site approval from the Bureau as required by N.J.A.C. 6:22 etc., with the exception of the fact that for one submission, the rules presently in effect were used by the architect for the second submission as to site plan. The proposed rules that were not in effect at that time were used for the submission. The proposed rules that were submitted on are now in force and effect in the State of New Jersey.

Is respondent's submission to the bureau governed by the regulations in effect on the date approval is given?

The respondent's submission is governed by the rules on the date that the submission was made and I so find.

Did respondent submit to the bureau the documentation in support of a site approval request, as listed in subparagraphs (1) to (10) of N.J.A.C. 6:22-1.2(b), including a statement from the DEP that adequate water and an acceptable sewerage disposal system can be provided for the proposed ultimate maximum enrollment?

Mr. LoMante testified and I find that they did submit to the Bureau the documentation in support of a site approval request as listed in Subparagraphs 1 to 10 of N.J.A.C. 6:22-1.2(b), with the exception of an adequate water and acceptable sewerage disposal plan since a waiver is necessary from the DEP and it has not even been submitted to the Town at this time.

Does the proposed site have sufficient acreage for a middle school?

I find that under the provision as testified by Mr. LoMante that when the site is going to be recited upon a school site, that provision is not necessary and therefore the acreage is sufficient for a middle school.

Has respondent made written application under N.J.A.C. 6:22-1.3 and 1.5 to close existing schools and demolish the central school and has respondent obtained the requisite letter of recommendation from the county superintendent of schools and letter of approval from the bureau?

The answer to that is that is there has been no evidence in this case to show that the Board of Education has made these submissions.

On appeal filed by petitioners under N.J.A.C. 6:221.7(a) from the decision of the bureau, should the commissioner reverse any determination of educational adequacy and suitability of the site made by the bureau?

Based upon the evidence that I have heard in this case, all witnesses and all documents, the Commissioner should not reverse any determination of educational adequacy and suitability of the site made by the bureau.

Did the respondent act arbitrarily, unreasonably and capriciously by adopting a facilities improvement plan to construct a new K-8 school with a capacity between 900 and 1000 students to replace the four existing school facilities?

I have earlier commented on this and found that the school district has acted in a manner which is not arbitrary, unreasonable or capricious in adopting the one school site plan and the funding under which it wishes to proceed.

Will the new K-8 school be fully utilized within 10 years?

Based upon the evidence as presented above, I so find that it will be fully utilized within the 20 year plan although it may not have 1,000 in ten years if that's what the interrogatory is asking. The facilities, even with the present enrollment, by the time of construction will be fully utilized although the class size will only be 20 or 21 per student, they will not be as much as 25 per student and that will be the difference.

Is the single K-8 plan and the consequent divestitute of three existing district parcels of land and structures thereon, and the loss of recreational facilities in the best interests of the school district?

This is now moot. All during the trial, almost from the very beginning, the school district has conceded that recreational facilities at the other sites are necessary and has further conceded that they will maintain the recreational sites at Gillette and Millington, and I don't think Elm Street had any.

Mr. Rothschild: Your Honor, I wish to interject that I think we said that we would maintain them but that's not for the indefinite future.

The Court: Nothing is for the indefinite future. You are going to maintain them certainly for the next few years, are you not?

Mr. Rothschild: That's true, Your Honor.

The Court: In other words, I'll rule on it if that's true.

Mr. Rothschild: I just did not want to leave the impression they'll be maintained forever.

The Court: Nothing is forever.

May a board of education seek approval of a lease purchase agreement following a bond referendum defeat, and is the apprehension of an unsuccessful referendum a valid basis for electing lease purchase financing?

This goes to Mr. Steinfeld's question when asked whether or not a lease purchase could be entered into after the a bond referendum failed. I find, based upon Mr. Calabrese's testimony and the testimony of the other witnesses in this case, that if a bond referendum is offered in this specific district and if that bond referendum should fail, the Board of Education may enter into a lease purchase agreement for whatever facilities it decides to build at that time.

Mr. Pidgeon, your question specifically is -- and I'll take it as another interrogatory -- if the Millington and Gillette Schools are sold, then the Township will not have adequate emergency shelters available in case of emergency.

The only testimony that I have had in this case is by the Township Administrator stating that a plan had been made as I gave earlier in my opinion and I have no facts in which to reach a decision or rule on this one particular issue. I

don't know there are other buildings or whether if Central went to a one school building whether or not, based upon the facilities in Central, that would cover you for the adequate emergency shelter. It might very well because you do list in your brief such things as house people overnight. The new building would certainly do that. Toilet facilities -- the new building certainly will have toilet facilities. Facilities to feed a large number of people and most importantly that they're out of a flood zone, I have no information that Central is in a flood zone and unquestionably, due to the fact that they're going to be feeding up to 1,000 students for lunch, can and may feed citizens who are in distress because they need shelter. So that may cover your facilities. That's all I can comment on this; I cannot rule on it.

Mr. Rothschild?

Mr. Rothschild: Just two more points. One, on the question of whether respondent has made written application to close existing schools and demolish the Central School, your ruling is, of course, correct. I just want to point out, and I think it's undisputed in the testimony, that no one testified that it was necessary for respondent to do so at this time because respondent has not gotten to the point where that's necessary. And lastly, I could be wrong, but I think -- I'm not positive -- that you answered one other question, which is "Will respondent's facility plan, including the refusal to renovate and use any existing facility, impose an

excessive and undue burden on the taxpayers" That may be covered on the question of whether respondent acted arbitrarily, capriciously and unreasonably.

The Court: I believe I covered that and I will cover that because I want to make sure all the loose ends are tied up.

I find that the $15,000,000 plan that was presented to me by Mr. LoMante and the board of education would in fact be, based upon the evidence before me, the most reasonable route to take to solve the facilities problems within this school district. I would like to comment on that by saying that I also heard Mr. LoMante very carefully saying that if it had to be done in more than one stage, that one could look at the facility and rearrange the classrooms, such as doing the second floor on the left side of the building or the side most furthest from the kindergarten facilities, which in fact would cut down the size of this project and still in the future allow a building to accommodate the projected of approximately the maximum of 1,000 students. I find that may be a reasonable way to go under the circumstances but in no way does that change my opinion that, based upon the evidence, that the present facility as presented to me, K-8 with a total structure done, is also a very, very reasonable way to go, because one knows now what ones funding obligation is -- I don't know what they're going to be and nobody knows what they're going to be five years from now. If we have inflation of some 20%. It was a bad way to go. If you find that it

costs less because you can borrow at 3% or 4% or 5%, it was a brilliant move. I am not a soothsayer. I can only rule on the evidence before me.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

1/17/89
DATE

PHILIP B. CUMMIS, ALJ

Receipt Acknowledged:

1/17/89
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 18 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

par/e

CITIZENS ADVOCATING REFERENDUM FOR EDUCATION ("CARE") AND WILLIAM MATHEWS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PASSAIC, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is noted that exceptions to the initial decision were filed by petitioners and the intervening petitioners pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. In each instance, however, the exceptions filed by the parties rely on the arguments presented by way of a post-hearing brief and were addressed in detail in the initial decision. Accordingly, these exceptions are noted and incorporated by reference herein.

Upon review of the entire record the Commissioner is not persuaded that the respective positions taken by petitioners warrant a reversal of the findings and conclusions set forth in the initial decision except for the following determination of the ALJ which pertains to his approval of the Board's application with petitioner's consent to remove from the lease purchase agreement the amount of $500,000 for furniture and other similar equipment and the amount of $1,800,000 which the Board had allocated to capitalized interest during the first two years of the lease purchase agreement. In so approving this revision of the lease purchase agreement, the ALJ exceeded his authority to make such a determination insofar as it contravenes the specific provision of N.J.A.C. 6:22A-1.2(i) which reads as follows:

> (i) A district board of education having entered into a lease purchase agreement in excess of five years shall not terminate, change or alter the approved lease purchase agreement and accompanying legal documents pertaining thereto, without first obtaining the written consent of the Commissioner. (emphasis added)

Accordingly, for the reason set forth above, the Commissioner finds and determines that the Board must in fact follow the requirements of the above-cited regulation if it seeks to revise

the lease purchase agreement as originally approved by the Commissioner. In the alternative, in the event that the Board wishes to seek approval of the lease purchase agreement as originally approved by the Commissioner, it must submit such agreement for approval by the Local Finance Board in the Department of Community Affairs.

The Board is hereby directed to comply with the provisions of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 2, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6365-88
AGENCY DKT. NO. 275-8/88

COSKEY'S ELECTRONIC SYSTEMS,
Petitioner,
v.
SOUTHERN REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,
Respondent.

Mario Apuzzo, Esq., for petitioner

Franklin H. Berry, Jr., Esq., for respondent (Berry, Kagan, Privetera & Sahradnik)

Record Closed: December 13, 1988 Decided: January 13, 1989

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Coskey's Electronic Systems (petitioner) alleges that the Southern Regional High School District Board of Education (Board) unlawfully failed to award it a contract to replace a communication system in its middle school despite its bid allegedly being the lowest bid received by the Board following a public solicitation. Petitioner seeks an Order by which the Board would be required to award the bid to it or other appropriate relief. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case on August 26, 1988 a prehearing conference was conducted September 27, 1988 after which the matter was heard November 30, 1988 at the Barnegat Township Municipal Court, Barnegat. Following petitioner's presentation of its case in chief, the Board moved to dismiss the matter for failure to make out a prima facie case, or alternatively, for failure to state an issue for which relief could be granted. Petitioner was given the opportunity to file a written response to the motion which was received by

telephonic relay system on December 7, 1988 and in original typed form December 12, 1988. The conclusion is reached in this initial decision that the motion to dismiss must be granted for failure to state a cause of action and/or, alternatively, for failure to state an issue for which relief presently can be granted.

BACKGROUND FACTS

The background facts of the matter as established by a preponderance of credible evidence and over which there is no dispute between the parties are as follows. On June 29, 1988 the Board through public advertisement solicited bids to be received July 12, 1988 for the replacement of its middle school main communication control center. The bid specifications sought a Bogen Series 2233-125, or equivalent, communication control center. The specifications also required that the control center intercom channel have an output rating of 12 watts. The public advertisement also solicited an optional bid for the installation of a Bogen CLK-6 Master Program Clock or its equivalent. The specifications required that the entire communication system be installed and tested by August 31, 1988.

Petitioner submitted a base bid of $10,100 to replace the middle school communication control center, and a bid on the clock option of $1,436. Petitioner also submitted five separate pages of specifications on a Rauland Master Control Panel, MCI210. All parties in this dispute agree that it was understood petitioner was proposing to the Board the Rauland communication system as an equivalent to the Bogen communication system. The specification page to the Rauland MCI210 Master Control Panel states that the rated output of the intercom channel is 5 watts. In fact, in the narrative description accompanying the technical specifications it is stated that "MCI210 incorporates a complete multiple input program preamplifier with all necessary operating controls, plus a 5-watt intercom amplifier***". Petitioner points out that on the same specification page listed under "associated equipment" is a booster amplifier, VC6369.

New London Systems, d/b/a AIG Electronics Company, submitted a bid to the Board by which it proposed to replace the middle school main communications control center as required by the specifications for the price of $10,500. New London also submitted a bid on the optional Bogen CLK-6 Master Clock, installed, of $1,425. The parties stipulate (J-1) that the sealed bids were opened by the Board Secretary on July 12, 1988 in the presence of representatives from petitioner and from New London Systems.

All who were present were afforded an opportunity to review the submitted bids. The Board scheduled a meeting for July 27, 1988 at which it intended to award a contract on the submitted bids.

While the parties stipulate (J-1) that a few days before July 27, 1988 petitioner learned from the Board Secretary that it was not to be awarded the contract, a letter (P-3) dated July 14, 1988 from petitioner to the Board shows it had knowledge on July 14 of the likelihood its competitor would be awarded the bid. It was further understood by petitioner that the Board believed petitioner proposed to supply it with a Rauland communication center in lieu of the Bogen's center and that according to the Rauland's specification page (P-2, p.8) its intercom channel had a rated output of only 5 watts, not 12 watts as stated in the specifications. Therefore, the Board concluded the bid filed by petitioner failed to meet specifications.

Petitioner requested and was granted the opportunity to appear before the Board at its July 27 meeting. At that time, petitioner explained to the Board that the listing of the VC6369 booster amplifier under associated equipment on the same specification page to the Rauland center is to be used to boost the intercom channel output from 5 to 12 watts. Therefore, petitioner's representative at the meeting, Ronald J. Foti, declared that its bid did meet the Board's advertised specifications. Foti also presented the Board with additional information regarding the Rauland communication center at the meeting of July 27. (P-4).

Nevertheless, the Board unanimously voted to award the contract to New London System in the amount of $10,500 for the replacement of the middle school communication center (P-6). Petitioner admits being told that the reason the Board rejected its bid was the absence of a 12-watt intercom amplifier. Thereafter, the petition of appeal was filed August 22, 1988 before the Commissioner along with an application for a stay of the award of the bid to New London System. The stay, having been filed out of time, was not acted upon by either the Commissioner nor by a previously assigned administrative law judge. The installation of the communication center by the declared successful bidder, New London System, was just about completed.

This concludes a recitation of background facts as established by a preponderance of credible evidence.

ARGUMENTS OF THE PARTIES

Board contends that it properly awarded the contract to New London Systems because petitioner's bid failed to meet published specifications in that it proposed to provide a system with an intercom channel of 5 watts, not 12 watts as required. Moreover, the Board contends that even if petitioner should have been awarded the contract its request for damages must be denied as a matter of law and cites M.A. Stephen Const. Co. v. Borough of Rumson, 125 N.J. Super. 67 (App. Div. 1973).

Petitioner, in opposition to the Board's motion to dismiss, contends that its bid was the lowest bid the Board received to replace the middle school communication control center and that its bid meets the Board's published specifications for a 12-watt intercom channel. Accordingly, petitioner contends that the contract should have been awarded it. Petitioner also contends that the Board waived any defense regarding the unavailability of damages to it on the grounds that the prehearing order contains no reference to the no damage remedy defense.

LAW

Boards of education are obligated under the Public School Contracts Law, L. 1977, c. 114, codified at N.J.S.A. 18A:18A-1 et seq., to publicly advertise for bids when the total amount to be expended exceeds $7,500. All bids received in response to public solicitations must conform to advertised specifications. N.J.S.A. 18A:18A-2 states in full as follows:

> No bid shall be accepted which does not conform to the specifications furnished therefor. Nothing contained in this chapter shall be construed as depriving any board of education of the right to reject all bids.

Bids submitted in response to advertised specifications must be responsive to the specifications. Bids tainted with uncertainty made be declared invalid. When essential information is missing from a bid when it is open it may not be supplied then or thereafter. Belousofsky v. Board of Education of City of Linden, 54 N.J. Super. 219, 222-223 (App. Div. 1959).

In M.A. Stephen Const. Co., supra, the court held with respect to damages available to a bidder who should have been awarded a bid as follows:

> It is true that *** a bidder claiming to be entitled to the award of a contract for public work has long been held to have sufficient standing to challenge the rejection of his bid or the letting of the contract to another bidder, and to compel the award of the contract to him, McGovern v. Trenton, 60 N.J.L. 402 (Sup. Ct. 1897). But such standing was granted simply and solely in order that public interest might be served by compelling the lax for erring public official to properly perform his public trust. It was not thereby intended to create or establish in the bidder entitled to the award of the contract a right which, if violated, would render the public agency liable in damages to the bidder.
>
> 125 N.J. Super. at 74.

FINDING AND CONCLUSION

A relevant and material fact found to exist based on the established background facts of the matter is that there is an absence of a clear statement by petitioner in its bid papers filed with the Board prior to July 12, 1988 that it proposed to provide a Rauland communication system with a 12 watt output intercom channel. Such a defect is a material defect in petitioner's submitted bid. Regardless of the fact the Rauland communication center's basic rated output of 5 watts may be enhanced to 12 watts through the use of a booster amplifier, that point was not made clear by petitioner in its filed bid papers.

Accordingly, I **CONCLUDE** petitioner's bid filed prior to July 12, 1988 failed to conform to specifications. I further **CONCLUDE** that because the bid of petitioner failed to conform to specifications, the Board was prohibited from awarding it the contract. Finally, I **CONCLUDE** that the award of the contract by the Board to New London Systems is in all respects proper.

But even if petitioner should have been awarded the bid by the Board, there is no present relief which may be afforded petitioner by the Commissioner of Education. The absence of a contract award to petitioner does not create a basis upon which the Board is liable for damages to petitioner.

Accordingly, the Board's motion to dismiss must be granted for failure of Coskey's Electronic Systems to make out a prima facie case that it wad entitled to the contract and/or for failure of Coskey's Electronic Systems to state an issue upon which relief could be granted.

The petition of appeal is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 13, 1989
DATE

Daniel B McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

January 18, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 19 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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COSKEY'S ELECTRONIC SYSTEMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner excepts, inter alia, to the ALJ's finding that its bid failed to conform to specifications and that the Board was therefore prohibited from awarding it the contract. Petitioner avers that Belousofsky, supra, is distinguishable from the facts in the instant matter in that it did not try to supply missing information or change its specifications after the bids were opened. Nor did it try to manipulate the bid. Rather, it merely sought at the Board's July 27, 1988 public hearing to explain and clarify the bid to show that it met all the specifications and was thus the lowest responsible bidder.

Upon review of the record and the parties' exceptions, the Commissioner is in full accord with the ALJ's findings and conclusions and adopts them as the final decision in the matter. Petitioner's arguments are unpersuasive that the ALJ erred in his reliance on Belousofsky supra, because the instant matter is distinguishable. Contrary to petitioner's protestations, its bid failed to provide any statement whatsoever that a VC6369 booster was to be furnished along with the bid package so that the 5 watts output would be raised to 12 watts as required by the Board's specifications. To have failed to provide such a statement was clearly a material defect. As stated by the ALJ, bids must be responsive to Board specifications and those that are tainted with uncertainty may be declared invalid.

Despite petitioner's assertions to the contrary, the information it sought to contribute at the July 12, 1988 hearing was indeed essential information and, therefore, in accordance with the principles articulated in Belousofsky, supra, and as determined by the ALJ, could not be supplied after the opening of the bids.

Consequently, the Petition of Appeal in this matter is dismissed.

COMMISSIONER OF EDUCATION

MARCH 6, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5254-88
AGENCY DKT. NO. 172-6/88

SUSAN E. CIRULLO,
Petitioner,
v.
HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, BOARD OF EDUCATION, AND BARBARA NEWBAKER,
Respondents.

Arnold M. Mellk, Esq., for petitioner (Katzenbach, Gildea & Rudner)

Amy Wechsler, Esq., for respondent (Norris, McLaughlin & Marcus)

Record Closed: January 10, 1989 Decided: January 19, 1989

BEFORE DANIEL B. MC KEOWN, ALJ:

Susan E. Cirullo (petitioner), a non-tenured teacher whose employment for 1988-89 was not renewed by the employing Hopewell Valley Regional School District Board of Education (Board), alleges that the determination of the Board not to offer her continuing employment is arbitrary, capricious and unreasonable because it relied upon facts which were false and were willfully, maliciously, and with knowledge of the falsity of the facts represented to it by petitioner's school principal, Barbara Newbaker, to be true. Therefore, petitioner seeks an Order from the Commissioner of Education by which the Board's controverted decision not to offer her reemployment is declared arbitrary, capricious and unreasonable and by which the Board is directed to offer petitioner an employment contract for the 1988-89 academic year. In addition, petitioner seeks

judgment that principal Newbaker engaged in conduct which violated petitioner's asserted right, to be treated fairly and equitably. After the Commissioner transferred the matter to the Office of Administrative Law on July 18, 1988 as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted October 24, 1988 at which the issues were resolved and a hearing was scheduled to be conducted February 27, 1989. In the meantime, the Board filed a motion to dismiss the Petition of Appeal on the grounds the Petition fails to state a claim upon which relief could be granted. The conclusion is reached in this initial decision that the Petition of Appeal must be dismissed for failure of petitioner to state a cause of action.

BACKGROUND FACTS

For purposes of the motion to dismiss the basic facts alleged in the Petition alleged in the Petition are accepted as true and are as follows.

Petitioner was employed during the 1987-88 academic year by the Board as a teacher of physical education at the Board's Toll Gate elementary school. Petitioner was employed on a year-to-year employment contract. She had not acquired a tenure status of employment with the Board.

On or about April 11, 1988 the superintendent advised petitioner he would recommend that the Board not continue her employment upon the expiration of the 1987-88 employment contract. (Exhibit A) The superintendent refused petitioner's request of him for written reasons why he was recommending to the Board that it not continue her employment for 1988-89. The superintendent did advise, however, that following the special Board meeting to be held April 25, 1988 at which he would make his recommendation, and following the Board's decision should it accept his recommendation, she may request in writing a statement of reasons from the Board for its action.

The Board determined at its April 25 meeting not to offer to petitioner continued employment after June 30, 1988. The following day April 26, the Board secretary advised petitioner that her employment as a teacher with the Board was to cease June 30, 1988.

In response to her request, the Board secretary advised petitioner in writing on May 19, 1988 that the reasons the Board elected not to offer her continued employment are:

1. [Her] failure to keep an organized, well-managed classroom environment on a consistent basis.

2. [Her] failure to follow through on your professional growth plan and program recommendations made by district supervisors.

3. [Her] failure to state lesson objectives and summary statements on a consistent basis.

This concludes a recitation of the basic facts as alleged in the filed Petition of Appeal. It is noted that paragraphs 8, 9, 10, 11, and 12 recite conclusions, not basic facts.

It is sufficient here to note that petitioner alleges that the reasons given her for non-reemployment are false and that the Board knew or should have known that those reasons are false. Petitioner alleges that the Toll Gate elementary school principal, Barbara Newbaker, willfully, with malice, and with knowledge of the falsity of the reasons, submitted those reasons to the Board which it, in turn, relied upon to determine not to offer petitioner continued employment. Accordingly, petitioner alleges principal Newbaker intentionally sought to harm petitioner's professional reputation, good name, and employment relationship.

This then concludes a recitation of the basic facts of the matter as established by the pleadings and exhibits.

ARGUMENTS OF THE PARTIES

I

Board

The Board contends that a determination regarding the non-renewal of a non-tenured teacher's employment contract carries a presumption of validity and that administrative review of those decisions is very limited. The Board further notes that non-tenured teachers do not have a right to continued employment from year-to-year or to a full plenary hearing on the validity or adequacy of its reasons for non-reemployment.

Relying upon Ridgefield Park v. Bergen County Board of Taxation, 31 N.J. 420 (1960) the Board seeks dismissal of the Petition on the failure of the material allegations of fact contained within the complaint to state an actionable claim against it. The Board notes that a non-tenured teacher who complains of non-renewal must allege facts which, if true, would constitute a violation of constitutional or legislatively conferred rights. The Board maintains that the Petition must set forth adequate details and specific instances of such proscribed conduct and cites Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County, 1968 S.L.D. 7, which it is noted is quoted with favor in Donaldson v. Board of Ed. of No. Wildwood, 65 N.J. 236 (1974), and Guerriero v. Glen Rock Borough Board of Education, 1986 S.L.D. ____ (Feb. 7, 1986) and Sontupe v. Cooperman, 1987 S.L.D. _____ (Feb. 5, 1987).

In this case, the Board contends that petitioner does no more than allege it acted on untrue information and that its actions, therefore, were arbitrary, unreasonable and capricious. Even if petitioner establishes that it acted on untrue information, the Board contends that such a showing does not demonstrate improper conduct on its part nor does it amount to any violation of petitioner's constitutional or legislatively conferred rights. Accordingly, the Board seeks dismissal of the Petition of Appeal.

ARGUMENT OF PETITIONER IN OPPOSITION TO THE MOTION

II

Petitioner

Petitioner contends that because she claims her non-renewal was due to false facts and malice, such an allegation requires an evidentiary hearing and cites Greene v. McElroy, 360 U.S. 474, 496 3 L.Ed. 2d 1377, 79 S.Ct. 1400 (1959). Petitioner contends that by virtue of her allegation that the factual underpinning of the reasons given her by the Board for its non-renewal of her employment are false, she implicates her constitionally protected liberty interests and is entitled to a hearing as a matter of procedural due process and cites Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972). Finally, petitioner contends that not only has she stated a claim upon which relief can be granted, she also contends that because of the alleged injury to her reputation by the Board in its failure to continue her employment she may be entitled to recover damages and cites Endicott v. Huddleston, 644 F. 2d 1208 (7th Cir. 1980).

DISCUSSION AND CONCLUSIONS

A non-tenured teacher does not have the right to have an employment contract renewed, Winston v. Bd. of Ed. So. Plainfield, 125 N.J. Super. 131, 143 (App. Div. 1973). The discretion vested in a board over matters of non-tenured teacher employment is extremely broad. Such discretion may not be exercised in violation of a non-tenured teacher's constitutional or statutory rights.

Nevertheless, the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. As noted earlier, a non-tenured teacher whose employment is not renewed by a board of education is entitled to a plenary hearing only if facts are alleged which, if true, would constitute a violation of constitutional or legislatively conferred rights. Guerriero, supra. The New Jersey Supreme Court, in Donaldson v. Bd. of Ed. of No. Wildwood, supra, favorably cited the Commissioner's opinion in Ruch, supra, in its discussion regarding the nature of the hearing before the Commissioner for a non-tenured teacher after reasons for non-retention have been furnished. The Court noted that the Commissioner held the burden of sustaining an appeal was on the non-tenured teacher and that the non-tenured teacher's 'bare allegation' of arbitrariness was 'insufficient to establish grounds for action.' 65 N.J. at 247.

In this case, petitioner merely claims that the reasons afforded her by the Board for its non-reemployment are false. Inferrentially, petitioner contends she did not fail to keep an organized, well-managed classroom environment on a consistent basis; that she did not fail to follow through on a professional growth plan and program recommendations made by her district supervisors; and, that she did not fail to state lesson objectives in summary statement on a consistent basis. In other words, petitioner contends she positively performed those three tasks which the Board contends she did not perform.

The State Board of Education noted in Guerriero that the issue regarding non-reemployment of non-tenured teachers is very limited and not at all concerned with whether the affected person is a good teacher by objective criteria. Even if petitioner were to establish by objective criteria that she is a good teacher and that the Board erred in not reemploying her, such a showing implicates no statutory nor constitutional right.

Contrary to petitioner's assertion, whatever liberty interests she may have such interests are not implicated in this matter at all. Petitioner is as free to secure other teaching positions with other board of education as she was prior to this Board's determination not to reemploy her. This Board determined not to offer petitioner reemployment. Such a determination is well within its discretionary authority to determine who shall teach in its schools. The Board's determination not to offer petitioner employment for 1988-89 does no violence to any identified constitutional or statutory right enjoyed by petitioner.

Accordingly, the conclusion is reached here that the facts pleaded by petitioner fail to state a cause of action for which relief could be granted. Petitioner obviously disagrees with the determination made by the Board regarding her teaching skill. Nevertheless, the Board has the authority to determine who shall teach in its schools. Therefore, a disagreement of opinion between petitioner and the Board regarding her skills as a teacher does not rise to the level of a justiciable issue before the Commissioner of Education. Accordingly, the Board's motion to dismiss is **GRANTED.**

The Petition of Appeal is **DISMISSED.** The hearing scheduled to be conducted in the matter on February 27, 1989 is cancelled.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 19, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

1/26/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

1/27/88
DATE

OFFICE OF ADMINISTRATIVE LAW

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SUSAN E. CIRULLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HOPEWELL VALLEY REGIONAL SCHOOL DISTRICT, MERCER COUNTY, AND BARBARA NEWBAKER,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. A request to withdraw the matter was submitted to the Commissioner subsequent to the issuance of the initial decision. That request is herein denied in the absence of any provision in law or code governing withdrawals after the record has closed and an initial decision has been rendered by the Office of Administrative Law.

Upon review of the record and initial decision, the Commissioner adopts the ALJ's findings and conclusions as the final decision in this matter for the reasons expressed therein. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

MARCH 6, 1989

DAVID DOWDING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,	:	DECLARATORY JUDGMENT
RESPONDENT.	:	
	:	

Petitioner in this matter seeks declaratory judgment determining that in-school suspension in respondent's district is a teaching assignment, not a duty assignment, and requiring the Board to adopt a job description and to submit same to the County Superintendent for her review and approval.

Initially the Commissioner notes for the record that Petitioner Keith Hudak has withdrawn from his participation in this matter as of January 6, 1989, the date when counsel for petitioner submitted his brief in support of declaratory judgment.

In support of his contentions, Petitioner David Dowding relies on the following series of decisions of the Commissioner and the State Board for the proposition that "the position of in-school suspension teacher is not one of lesser expectancy, so that anyone filling the position was a teaching staff member." (Brief, at p. 2) Rogan v. Edison Board of Education, decided by the Commissioner May 17, 1985; Cucolo v. Essex County Vocational School District, decided by the Commissioner June 27, 1985; and Shirley Vanderhoof v. Scotch Plains-Fanwood Regional School District, decided by the Commissioner April 15, 1987, aff'd State Board June 1, 1988, pending N.J. Superior Court, Appellate Division

Petitioner claims these cases lead to the conclusion that in-school suspension is an unrecognized job title which requires a job description to be prepared and adopted by the Board, which body must submit it to the County Superintendent. He claims the position is a teaching assignment and, therefore, he must receive seniority credit in the subject area in which he holds an endorsement on his instructional certificate. Petitioner asks the Commissioner to so find.

The Board's answer, which was filed on December 22, 1988, and its letter brief which was filed on January 17, 1989, maintain that

> 1) Petitioner's claim is time-barred; 2) the Middlesex County Superintendent assured Respondent's chief school administrator that no job description need be submitted to the County

> for In-School Suspension duty; 3) In-School Suspension is merely a duty within an overall teaching assignment and not a distinct teaching assignment; and 4) Petitioner's seniority rights are not adversely affected by his assignment to supervise In-School Suspension.
>
> (Board's Brief, at p. 1)

Claiming that N.J.A.C. 6:24-1.2 provides that a petition before the Commissioner shall be filed within 90 days from the date of receipt of the notice of a final order, ruling or other action of the Board, the Board first avers that petitioner received notice of the Board's action in September 1987, when his assignment first included half-day in-school suspension duty. Noting that the instant Petition for Declaratory Judgment was filed on November 30, 1988, the Board argues said petition is out of time.

As to the submission of "an unrecognized job description" (Board's Brief, at p. 3), the Board submits an affidavit from Dr. Richard Marasco, Superintendent of Schools, dated January 13, 1989 which it claims attests to the fact that the County Superintendent advised him that no such submission was required, because, in her opinion, in-school suspension is not an assignment which requires a special job description. The Board avers that in reliance upon the representations of the County Superintendent, if petitioner does not concur with the County Superintendent's determination, he should state his case against the State Department of Education, not against the local Board.

The Board also concurs with the County Superintendent that in-school suspension is like other responsibilities typically assigned to teachers. Citing Exhibit R-1, a document titled "EVALUATION - TENURED TEACHING STAFF," the Board avows that the "Board-approved generic job description for teachers included In-School Suspension as it does other assignments (i.e., mathematics, science, physical education, etc.)." (Board's Brief, at p. 4)

In the same affidavit, the Board avers it has stipulated that petitioner's tenure and seniority rights are not adversely affected by the assignment to in-school suspension duty. Moreover, the Board concurs with petitioner's citing Cucolo, supra, for the proposition that "any teaching staff member filling such position would have all the rights, benefits and emoluments enjoyed by regular staff members." (Board's Brief, at p. 4, citing Cucolo, supra, at pp. 14-15)

However, the Board would distinguish the decision in Rogan, supra, from this matter because petitioner therein had been riffed and sought reinstatement in an in-school suspension position. Similarly, the Board would distinguish Cucolo from this case in that the Monroe Board of Education has taken no action to adversely affect petitioner's tenure and/or seniority rights. The Board claims the in-school suspension assignment herein is the same as a

study hall or cafeteria supervision duty. "Petitioner remains a full-time teacher accruing full seniority rights under his instructional certificate." (Board's Brief, at p. 5)

Further, the Board avers that Vanderhoof, supra, does not stand for the proposition that school districts are required in all cases to submit a job description for in-school suspension duty to the County Superintendent. It cites language from the State Board's decision as follows:

> In this case, the County Superintendent determined that instructional certification [for in-school suspension] was required, and, like the Commissioner, we do not find the procedural defect in this case to be such as to call into question the County Superintendent's determination in that regard.
> (Board's Brief, at p. 5, quoting Vanderhoof, supra, at p. 3)

It claims the Board's action in Vanderhoof "***'did not constitute a transfer from a tenurable position, but rather a reassignment within the tenurable position of teacher'." (Board's Brief, at p. 6, quoting Vanderhoof, at p. 3) Moreover, the Board avows that Mr. Dowding is accruing seniority in his instructional certificate while performing in-school suspension duty and, thus, that there is no diminution of his tenure and/or seniority rights as a result of the Board's actions.

According to the Board, the dispute in this matter is whether in-school suspension requires submission of an unrecognized job title to the County Superintendent for approval. It claims the answer is no.

The Commissioner has carefully reviewed the submissions of the parties in this matter. Initially, he admits into evidence the five-page document labeled by the Board as Exhibit R-1, "EVALUATION - TENURED TEACHING STAFF."

Next, the Commissioner dismisses as being without merit the Board's argument averring a violation of N.J.A.C. 6:24-1.2, the 90-day rule. The Commissioner finds that while petitioner may have known of his assignment to supervise in-school suspension part-time in 1987, the beginning of the 1988-89 school year represents a new cause of action when, in fact, he was again assigned such schedule.

As to the merits of the matter, the Commissioner disagrees with the Board's position that in-school suspension is:

> "a duty that any teacher, including the holder of an elementary certificate or even a county substitute certificate, may supervise. And, ISS is just that, a supervisory duty and a supplement to regular teaching assignments (i.e. math, social studies, science)."
> (Petition of Appeal, at p. 2)

Case law has determined that in-school suspension is an instructional assignment which requires an instructional certificate. See Vanderhoof, supra; Cucolo, supra; and Rogan, supra. It is not a mere duty, such as a study hall, or lunchroom supervision that might be subsumed as part of the collateral duties in addition to instruction that teaching staff members assume.

Therefore, there is no need to submit this particular instructional assignment in respondent's district to the County Superintendent. Such submission would only result in a finding that an instructional certificate is required. Thus, the Commissioner concurs with the County Superintendent's response as stated in Mr. Marasco's affidavit at paragraph 5 that "there was no requirement to make such an application [for county approval of the In-School Suspension position as an unrecognized job title]. She stated that the assignment of teachers to In-School Suspension duty was appropriate provided that they held teaching certificates." (Affidavit, at p. 2)

Since the only certificate appropriate for ISS is an instructional one and because petitioner holds such an instructional certificate with an endorsement in math, he continues to acquire seniority within the area of his instructional endorsement.

The Commissioner finds that petitioner has raised a tempest in a teapot inasmuch as there never has been any claim made against his tenure and seniority rights. Thus, the Commissioner finds no basis for petitioner's requesting the relief sought in the instant matter.

Accordingly, the Commissioner dismisses the instant Petition for Declaratory Judgment.

COMMISSIONER OF EDUCATION

MARCH 7, 1989

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5688-88
(EDU 3121-88 ON REMAND)
AGENCY DKT. NO. 103-4/88

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.

Arnold Shep Cohen, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Lawrence S. Schwartz, Esq., for intervenor Michael Haggerty (Schwartz, Pisano, Simon, Edelstein & Ben-Asher, attorneys)

Record Closed: December 9, 1988 Decided: January 20, 1989

BEFORE **BRUCE R. CAMPBELL, ALJ:**

On remand from the Commissioner of Education for limited hearing. The initial decision of June 17, 1988, in OAL DKT. EDU 3121-88, found Michael Hegarty violated N.J.S.A. 18:14-97 concerning printed matter used in elections.

Haggerty did not attend the hearing in the original matter. Although the Commissioner determined the Old Bridge Board of Education "had ample knowledge of the proceedings," Commissioner's decision at 15, the Commissioner "determined that this matter shall be reopened to provide Mr. Hegarty an opportunity to defend himself

against the allegations herein. Therefore, the matter is remanded to the OAL for that limited and specific purpose." Ibid.

The remanded matter was set down for hearing on November 7, 1988. Mr. Hegarty did not appear but was represented by counsel. I heard brief arguments by counsel and took memorandums, the last of which was received on December 9, 1988. Marion Glantz, the original complainant in this matter, urges that no arguments by Hegarty may be considered on remand and that the residuum rule has not been violated as to any findings regarding Hegarty. Hegarty counters that his argument must be admitted on remand, that he has not violated N.J.S.A. 18A:14-97 and that the residuum rule has been violated.

OPINION

The Commissioner remanded this matter to the Office of Administrative Law "for the sole purpose of allowing testimony from Mr. Hegarty with respect to the allegations herein...." Commissioner's Decision at 16. Hegarty argues that the Commissioner meant to allow a defense to the charges and not merely testimony. He reasons that this eminates from the doctrine of fundamental fairness. Glantz argues that the remand procedure, N.J.A.C. 1:1-18.7, makes clear that the order of remand shall specify the reason and necessity for the remand and the issues or arguments to be considered. When the Commissioner said "sole purpose," that is what he meant and that dictates the nature of the proceeding.

I agree with Glantz that the Commissioner's words are clear. Fundamental fairness dictates the right to be heard. It does not dictate the shape of the proceedings. The essential elements of due process of law are notice, an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. DiMaio v. Reid, 132 N.J.L. 17, 18 (Sup. Ct. 1944).

This matter is an inquiry. Because administrative agencies need flexibility in exercising their executive roles through rule making and adjudication, "[a]n agency even in its adjudicatory role, 'is not a neutral forum whose sole function is to decide the controversy presented to it.'" In re: Uniform Adm'n Procedural Rules, 90 N.J. 85, 92 (1982). The agency also must effectuate its established public policy:

> The power exercised by administrative agencies, having legislative and executive as well as ajudicial characteristics, has been termed "quasi-judicial" when it takes the form of adjudication in contested cases.... Consequently, procedures and techniques developed to handle the operation and business of the courts may not be transported in toto or imported wholesale into administrative agencies. City of Hackensack v. Winner, 82 N.J. 1, 28-29 (1978).

The Supreme Court also held in In re Uniform Adm'n Procedures Rules, above, that because an agency head's powers of review in an administrative hearing relate to his regulatory authority, they are more expansive and flexible than those of an appellate judge in reviewing issues on an interlocutory basis. 90 N.J. at 90.

Hegarty claims he was denied his day in court. Yet when the Commissioner gave Hegarty his day, Hegarty declined to take it. He says his proferred arguments concern all of the testimony and evidence presented and represent his only opportunity to comment on them prior to a decision. "If this tribunal were to exclude these arguments, then it would be depriving Mr. Hegarty of any opportunity to defend himself in this matter." Hegarty's brief at 8. Accepting that argument at face value, receiving Hegarty's written response means giving Mr. Hegarty the opportunity to be heard.

In consideration of the whole record, I **FIND** that Hegarty had adequate notice of this inquiry and chose not to participate in person. As the Commissioner stated:

> However, it is also emphasized that the Board, through its Board Secretary, was duly noticed through numerous correspondence that an election inquiry was being conducted in this matter. Moreover, notice was provided to the Office of Administrative Law by the Board Secretary that the Board's attorney was not going to be present at inquiry. Thus, while no notice was given to Mr. Hegarty as an individual, and there is no legal requirement for that to occur, the Board as an entity has ample knowledge of the proceedings. Commissioner's decision at 15.

R. 4:4-4(g) provides for service on public entities as follows:

> (g) Public Bodies. Upon any county, municipality, or other public body, by delivering a copy of the summons and complaint personally pursuant to R. 4:4-4(a)(1) to the presiding officer or the clerk or secretary thereof.

While the Court Rule does not apply directly, its analogy is apparent. Service upon the secretary of the public body constitues effective service of process sufficient to meet due process requirements. That conclusion appears to derive from an implied duty of one holding such a position of responsibility within the entity to make known to other members of the organization the facts of any pending actions for which he or she has received appropriate notice. Were this assumption not a part of the rationale of R. 4:4-4(g), due process would require appropriate notice of pending actions to be served on each member of public bodies.

I further **FIND** that Hegarty has been provided an impartial decision maker and a decision based on a record as well as the right to counsel. A due process hearing need not take the form of a judicial or quasi-judicial trial. Goldberg v. Kelly, 397 U.S. 254 (1970).

Hegarty also asserts that N.J.S.A. 18A:14-97, literally read, does not require identification of the person who pays for postage costs of election campaign materials. The statute, in its entirety, reads:

> No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published.

Hegarty would have the Commissioner and this judge adopt a view that the disclosure of the source of postage costs is not required. I quite agree with his argument that the plain wording of a statute is to be given effect and that this statute requires identification of the person or persons causing or paying for printing, copying or publishing election material. The use of the word "publishing" is sufficient. The term "publishing" has both a business connotation meaning printing and distribution of written materials and a special legal connotation meaning communication of libelous matter to a third person.

Obviously, the latter is not appropriate to this opinion. But the former connotation, meaning printing and distribution of written materials is pertinent. More telling is the phrase "distributed in any manner of by any means...."

The manner in which the subject materials were distributed was through the mails. Hegarty states that only hearsay evidence exists that the postage meter used to distribute Carrington's letter on Hegarty's behalf was indeed Hegarty's. This is simply not the case. Exhibit P-2, Carrington's letter in support of Hegarty and the envelope in which it was sent, displays the same postage meter imprint as Exhibit P-3, Hegarty's letter and envelope on his own behalf. This with the earlier testimony of Johnson is more than sufficient to satisfy the residuum rule. What remains to be determined is whether the statute has been violated.

The statute is written disjunctively. Campaign materials are required to exhibit a statement of the name and address of the person or persons causing the materials to be printed, copied or published or the name and address of the person or persons by whom the cost of the printing, copying or publishing has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published. Taking either condition, publishing is involved. Under either application, Hegarty assisted in publishing the subject material.

Hegarty also argues that, "Because of the nature of the statutory violation alleged, every element of the violation must be proved beyond the reasonable doubt, including the state of mind of the actor." Hegarty's brief at 15. This statement does not bear scrutiny. In this forum, a preponderance of the credible evidence in the record is all that is needed to support a finding. What a prosecutor might do with the same evidence is another question and one with which I am not concerned here. My job is to conduct an inquiry and to report to the Commissioner of Education any irregularities.

Last, I note In the Matter of the Annual School Election held in the Township of Hillsboro, OAL DKT. EDU 2731-84 (May 10, 1984), adopted Comm'r of Ed. June 28, 1984). In that matter, signs had been posted on utility poles urging readers to "Vote Yes" on the school budget. The petitioner conceded it did not know who put the posters on the poles and was unable to connect the posting with any school board member. The Board contended there was no proof a Board member or employee was involved in the posting. Judge Weiss' decision agreed with that contention, but denied the Board's motion to dismiss on that ground. As the judge explained:

> With respect to the Board's contention that there is no proof that any Board member, agent or employee was involved, I must certainly agree. However, that does not close the inquiry. There is a duty placed upon school election officials to see to it that the school laws are obeyed and simply because there is no direct proof of participation by a Board member, agent or employee does not immunize the Board if there are statutory violations that can be demonstrated to have affected the outcome of the election. Id. at 6.

What applies to the Board applies to each member of the Board. This is, admittedly, a difficult task. However, when a person publishes campaign materials, he or she expects that they will be displayed. The display of campaign materials is an exercise of First Amendment free speech rights. But every right, even the most precious, is subject to reasonable time and place restrictions. In short, a person who publishes campaign materials can, under proper circumstances, be held responsible for what is done with the materials. As in my decision of June 17, 1988, however, I cannot find enough in this record to ascribe statutory violation of the 100 foot rule to Hegarty.

CONCLUSION AND ORDER

The findings and conclusions in my June 17, 1988 decision as to Board Member Patrick Salerno and Board Member Michael Hegarty remain unchanged. Salerno has violated N.J.S.A. 18:14-97 and N.J.S.A. 18A:14-97.2. Salerno's violations were admitted under oath in the earlier hearing. Board Member Hegarty has violated N.J.S.A. 18A:14.97. This conclusion is reached after careful consideration of the facts and analysis above.

N.J.S.A. 18A:14-104 provides:

> Any person violating any provisions of sections 18A:14-97, 18A:14-97.1 or 18A:14-97.2 shall be a disorderly person and shall be punished by a fine not exceeding $500 or by imprisionment not exceeding one year or both.
>
> Any person violating any provision of this chapter for which no penalty is provided shall be guilty of a misdemeanor.
>
> Any corporation violating any provisions of sections 18A:14-99 to 18A:14-102 inclusive, shall also forfeit its charter.

As stated in my earlier decision, the Commissioner of Education and, hence, this tribunal may make findings as to violation of the above-mentioned statutes. Neither, however, can invoke the penalties prescribed by the Legislature. I again **CONCLUDE** that, although the irregularities in this election were not sufficient to require that a new election be held, they must be addressed nevertheless. Therefore, it is **ORDERED** that a copy of the final decision in this matter be forwarded to the Middlesex County Prosecutor for further investigation at his discretion.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

20 JANUARY 1989
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1/23/89
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 25 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF OLD BRIDGE,	:	DECISION ON REMAND
MIDDLESEX COUNTY.	:	
	:	

The record and decision on remand issued by the Office of Administrative Law have been reviewed. Mr. Hegarty's exceptions and petitioner's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

Hegarty takes exception to the fact the ALJ continues to maintain in the decision on remand that he had adequate notice of the initial hearing. He avers that since his right to a Board seat was being assailed and not something which was an outgrowth of his duties as a Board member, individual notice of the hearing should have been served on him as well as the Board Secretary. Since this was not done, Hegarty asserts that he was not given adequate notice.

Hegarty also excepts to the ALJ's conclusion that he did not "elect to take his day in court" (Exceptions, at p. 2) maintaining he had a right not to testify at the hearing and that if he had testified he would have been placed in the unfair position of subjecting himself to cross-examination while his accusers would not.

Hegarty contends that the ALJ improperly construed N.J.S.A. 18A:14-97 essentially reiterating his position and legal arguments summarized by the ALJ on pages 4-5 of the initial decision on remand. He argues, inter alia, that the literal language of the statute does not require identification of the one paying the postage costs and that "publication" and "distribution" are two different things as indicated below:

> "Publication" and "distribution" are two different things, and the statute uses both words. Publication refers to the production of the communication, and distribution refers to the mechanics of dissemination. Clearly, the statute only requires identification of the one who publishes. Since the legislature chose to distinguish between the act of publication and the act of distribution, the only reasonable interpretation is that it meant to describe two different things. In reading "publication" to be synonymous with "distribution", or to include "distribution," Judge Campbell is impermissibly editing the statute. Read as it was written, the statute requires that "No person shall...cause to

> be distributed in any manner...printed matter... unless such... printed matter shall bear upon its face a statement of the name and address of the person...causing the same to be printed, copied or published..." If the legislature had wanted to require a statement of the name and address of the person printing, copying, publishing, or distributing, it could have done so, but it did not. Since the legislature did not, Judge Campbell cannot.
>
> Thus, if the printed matter bears the name and address of the person who publishes it, as was the case here, the one who pays for the distribution need not be disclosed....The ALJ's decision to the contrary is unsupportable.
>
> Further exception is taken to the ALJ's conclusion that under either interpretation of the disjunctively stated demands of the statute (See Hegarty Brief, Point II, B at p. 13) a violation has taken place. The validity of this conclusion rests entirely upon the erroneous interpretation of the term "published." For the reasons set forth supra it must follow that the section of the statute requiring identification of the person causing election material to be printed, copied, or published...has been satisfied here by the inclusion of Mr. Carrington's signature and return address on the face of the letter. Since the statute is disjunctive, only its initial requirement must be satisfied. (Exceptions, at pp. 2-3)

Hegarty also avers that the ALJ erred in his analysis of the adequacy of the proofs maintaining that the residuum rule (N.J.A.C. 1:1-15.5(b)) has not been satisfied. He asserts that not one scintilla of competent evidence was presented to prove that he knew or should have known about the use of the meter or that Carrington did not reimburse the Hegarty Funeral Home, a corporate entity separate and distinct from himself. As to this, Hegarty maintains that the ALJ relied on the hearsay testimony of the teachers' union president while he was unable to defend himself having been denied the right to confront and cross-examine his accusers at either hearing. Consequently, Hegarty avers that a credibility determination could not be made by the ALJ.

Upon review of the record, the exceptions and reply exceptions, the Commissioner adopts the ALJ's recommended decision on remand as the final decision in this matter. It is emphasized that this matter was remanded for the sole purpose of allowing Hegarty an opportunity to defend himself against the allegations and the ALJ's determination that he violated the provisions of N.J.S.A.

18A:14-97. The original initial decision was adopted in all respects by the Commissioner except for this singular issue which he reserved judgment on, pending testimony from Hegarty. The original decision states:

> ...this matter is remanded to the Office of Administrative Law for the sole purpose of allowing testimony from Mr. Hegarty with respect to the allegations herein so as to allow the ALJ an opportunity to reconsider his findings and conclusions with respect to any violations of N.J.S.A. 18A:14-97 by Mr. Hegarty. (emphasis supplied) (Slip Opinion, at p. 17)

Upon examination of the augmented record, the Commissioner accepts the ALJ's interpretation of N.J.S.A. 18A:14-97 as well-reasoned and correct. Further, he finds as meritless Hegarty's arguments that his due process rights were abridged in this matter and that the ALJ erred in his findings and conclusions or acceptance of Glen Johnson's testimony.

Accordingly, the petition in this matter is hereby dismissed and, as indicated by the ALJ, a copy of both the original decision and the decision on remand shall be forwarded to the Middlesex County Prosecutor's Office for the reasons expressed therein.

COMMISSIONER OF EDUCATION

MARCH 8, 1989

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	
TOWNSHIP OF OLD BRIDGE,	:	STATE BOARD OF EDUCATION
MIDDLESEX COUNTY	:	DECISION
	:	

Remanded by the Commissioner of Education, July 27, 1988

Decided by the Commissioner of Education, March 8, 1989

For the Petitioner-Respondent, Oxfeld, Cohen, Blunda, Levine & Brooks (Arnold Shep Cohen, Esq., of Counsel)

For the Intervenor-Appellant, Schwartz, Pisano, Simon, Edelstein, & Ben-Asher (Nicholas Celso, III, Esq., of Counsel)

In this case, Marion Glantz, a defeated candidate for a position as member of the Board of Education of Old Bridge Township, requested an inquiry of violations of the election law alleged to have occurred with respect to the annual school election held on April 5, 1988. Following hearing in the matter, the Administrative Law Judge (ALJ) found that several statutory violations had occurred, but concluded that they were not sufficient to require a new election.

In reaching his conclusion, the ALJ found that two board members had violated particular statutory provisions. Specifically, he found that Patrick Salerno had violated N.J.S.A. 18A:14-97 in failing to identify on campaign material the printer and name and address of an individual acting for the Cheesequake Village Civic Association, and that Michael Hegarty had violated N.J.S.A. 18A:14-97.2 in that, although a postage meter imprint on the envelope in which compaign material was mailed indicated that he had defrayed some of the cost, the literature did not include his name and address. In that the Commissioner did not have the authority to invoke the penalties prescribed for these violations by N.J.S.A. 18A:14-104, the ALJ recommended that a copy of the Commissioner's decision be forwarded to the Middlesex County Prosecutor.

Upon his review of the record, the Commissioner concurred with the ALJ that the irregularities in the matter did not warrant the conduct of a new election. In reaching this conclusion, the Commissioner considered exceptions filed by Michael Hegarty, one of the two board members with respect to whom the ALJ had found statutory violations. Mr. Hegarty had been a successful candidate in the election, and had not been party to the proceedings before the ALJ. On the basis of Mr. Hegarty's exceptions, the Commissioner directed that the matter be reopened so as to provide Mr. Hegarty

with the opportunity to defend himself against the allegations that he was responsible for violations attributed to him by the ALJ. The Commissioner, however, rejected Mr. Hegarty's assertion that the Commissioner did not have the authority to refer the violations to the county prosecutor if "the violations are so serious as to warrant that action by the Commissioner." Commissioner's decision of July 27, 1988, at 16.

Mr. Hegarty did not appear at the proceedings conducted pursuant to the Commissioner's remand. Following argument by counsel representing Mr. Hegarty and Marion Glantz, the original complainant, the ALJ found that Mr. Hegarty has violated N.J.S.A. 18A:14.97 in that, while he had paid for postage costs for election materials, his name and address did not appear on those materials. The ALJ again found that the irregularities were not sufficient to require a new election, but concluded that they must be addressed, and he again recommended forwarding a copy of the final decision to the Middlesex County Prosecutor for further investigation "at his discretion." Initial Decision on remand, at 7.

The Commissioner, rejecting Mr. Hegarty's arguments that his due process rights had been abridged and that the ALJ had erred with respect to his factual findings, accepted the ALJ's interpretation of N.J.S.A. 18A:14-97. He directed dismissal of the petition, and, for the reasons expressed by the ALJ, determined to forward a copy of the original decision in the matter and the decision on remand to the Middlesex County Prosecutor.

Mr. Hegarty has appealed to the State Board, arguing that he has not been provided adequate opportunity to defend himself against the "charges" in that the facts relating to the violation at issue can be adequately reviewed only with full reconsideration of the arguments of law made on Mr. Hegarty's behalf. See Brief on behalf of Michael J. Hegarty, November 17, 1988. Mr. Hegarty also challenges the Commissioner's interpretation of N.J.S.A. 18A:14-97, contending that the statute does not require identification of those who pay the costs of postage for the mailing of campaign literature. He further maintains that responsibility can not be ascribed to him in that the postage meter used for the mailing belongs to Hegarty Funeral Home, Inc., and not to Mr. Hegarty personally, and that there is not a residuum of competent evidence that Mr. Hegarty knowingly failed to disclose uncompensated use of the postage meter. On the basis of these arguments, while agreeing with the Commissioner's conclusion that the election results should not be disturbed, Mr. Hegarty seeks to purge the record of the finding pertaining to him.

Initially, we emphasize that Mr. Hegarty was the prevailing candidate in the election challenged by Marion Glantz, and that Ms. Glantz has not appealed the Commissioner's determination upholding the results of the election. The sole questions raised by this appeal are whether failure to disclose the name and addresses of those who defray the cost of mailing campaign literature violates N.J.S.A. 18A:14-97, and whether the finding that such violation is attributable to Mr. Hegarty was proper.

After careful reading of the pertinent statutory provisions, we conclude the the circumstances presented here provided a sufficient basis upon which ALJ could properly conclude that a technical violation of the election law had occurred during the election campaign, and that the Commissioner could properly consider whether such violation affected the outcome of the election. However, N.J.S.A. 18A:14-63.12 does not entrust the Commissioner with the responsibility for or the authority to adjudicate the guilt of individuals who may be responsible for violations of N.J.S.A. 18A:14-97 occurring during an election subject to inquiry pursuant to that statute. Given his determination that the irregularities in the election at issue did not warrant a new election, we conclude that the Commissioner erred both in remanding the matter for adjudication of whether Mr. Hegarty was responsible for violation of N.J.S.A. 18A:14-97 and in adopting the ALJ's findings in that respect.

Accordingly, that aspect of the Commissioner's decision relating to whether Mr. Hegarty was responsible for the irregularity at issue must be considered to be merely dicta, and his decision does not in any way represent a legal conclusion as to culpability of any individual for purposes of imposition of the penalities prescribed by N.J.S.A. 18A:14-104. We, however, find nothing that would preclude the Commissioner from forwarding his decision to the County Prosecutor for his assessment of whether the matter should be pursued with respect to securing penalities pursuant to N.J.S.A. 18A:14-104. Finally, we have reached our conclusion in this matter only after fully considering all legal arguments Mr. Hegarty has put forward and reject his contention that he has not in these proceedings been afforded the due process to which he is entitled.

Therefore, in that the Commissioner's determination with respect to the validity of the results of the election is not implicated by this appeal, and for the reasons stated, the appeal in this matter is dismissed.

July 6, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6444-88
AGENCY DKT. NO. 262-8/88

F.R., INDIVIDUALLY AND AS PARENT OF L.R.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON,
Respondent.

F.R., petitioner, pro se
Daniel J. Graziano, Jr., Esq., for respondent (Smithson & Graziano, attorneys)

Record Closed: December 21, 1988 Decided: January 24, 1989

BEFORE **BRUCE R. CAMPBELL, ALJ:**

F.R., petitioner, alleges and the Hamilton Township Board of Education, respondent, denies that the Board violated its own policy in the assignment of a grade to L.R. for a physical education segment in the 1987-88 school year.

The petitioner seeks an order directing the Board to recalculate the final grade for L.R. for physical education in the third marking period of the 1987-88 school year, recalculate L.R.'s final average, make appropriate changes in L.R.'s official transcript and notify the petitioner of the changes.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 7, 1988. The issue to be resolved is whether L.R.'s physical education grade for the third marking period of the 1987-88 school year was properly calculated and, if not, to what relief the petitioner is entitled. The matter was set down for hearing and was heard on December 7, 1988. Both parties made timely prehearing submissions and the record closed on December 21, 1988.

FACTUAL BACKGROUND

During the third marking period of the 1987-88 school year, L.R. was assigned to a volleyball and swimming segment of physical education instruction. She participated in the volleyball portion but was medically excused from the swimming portion. In lieu of participation in the swimming portion, L.R. was assigned to write a paper. This she did. No grade was assigned to the paper, however, and her marking period grade was C, the grade she received in the volleyball portion.

THE CONTROVERSY

Guideline Memorandum S-512.4 of the Hamilton Township schools deals with grading and reporting procedures. In §3, the memorandum states that the grade M, Medical, is to be used for students who cannot meet course requirements due to medical reasons. In Section 4, Letter Grades, the memorandum states, "Letter grades shall be placed on all tests, papers and quizzes returned to students, sent home to parents or retained in files for conferences." The following rationale is given:

> A fixed conversion of a percentage to a letter grade is subject to many uncontrolled variables and therefore unrealistic and misleading. Letter grades are universally understood and should be placed on tests, papers and quizzes. However, if percentages or other symbols are used and placed on a paper, these numbers or symbols should always be accompanied by a letter grade. [emphasis in original.]

F.R. claims that if L.R. had received a letter grade for the report she did in lieu of participating in the swimming portion of instruction, she would have been

graduated with a higher class rank. The Board argues that the M grade has no numerical value. Because L.R. received a C in volleyball, C was her grade for the third marking period.

RELEVANT EVIDENCE

The petitioner testified to a series of events concerning L.R. and the Physical Education Department over the years. However, only certain testimony and documentary evidence is relevant to the present petition.

During the third marking period of the 1987-88 school year, L.R. was medically excused from participating in pool activities. She was assigned to write a report related to water safety, which she did. Her teacher testified that he retained the report in his files until the end of the school year. Either no grade was placed on the paper or a P, designating "pass" was assigned to it. The paper was not returned to L.R.

The teacher also testified that the paper was satisfactory. He stated further that L.R.'s grade was calculated by combining an M in pool with a C for volleyball. Because the M grade is assigned no weight, the average grade was C and C was the assigned grade for the third marking period.

From evidence adduced by the petitioner, it appears the school applied a pool policy as follows. When a pupil assigned to a swimming segment presented a medical excuse, the pupil was given a report to write and the reports were not considered in grading nor were they returned to the pupils (P-6 at 3).

A district administrator testified that the Letter Grades section of P-1 is inapplicable to the present case. The papers in lieu of pool participation are not returned to pupils as a matter of course. They can have no effect on any other grade. There is no district-wide policy on this matter, however. The "pool papers" originally were assigned as a deterrent because large numbers of pupils did not want to take swimming. The papers were designed to create participation instead of merely looking on. The district has been aware of problems in the area and was making changes slowly. Progress was not even in each of the district's high schools. The M grade carries no weight. Whether a pupil does a paper or not, and a pupil is medically excused from a physical education segment, the grade is M.

In the 1987-88 school year, policy was not uniform across the district. In L.R.'s case, a paper was required. It has been and still is the district's policy that no one who is medically excused from a physical education segment shall receive other than an M grade. Medical excuses must be accepted if valid.

F.R. had a series of meetings with the teacher, school administrators and district administrators. On May 17, 1988, he appeared before the Board of Education. None of the meeting results were acceptable to F.R.

FINDINGS, CONCLUSIONS AND ORDER

Having heard and observed the witnesses as they testified and having reviewed all evidence in this matter, I **FIND:**

1. L.R. was medically excused from participation in the swimming portion of third marking period physical education activities in the 1987-88 school year.

2. L.R. was assigned to write a paper on a water safety-related topic in lieu of participation in swimming activities.

3. L.R. was assigned a grade of M for the swimming portion of the third marking period and a C for the volleyball portion of the third marking period. Because the M grade has no numerical value, the averaged grade for the third marking period was C.

4. Guideline Memorandum AS-512.4, Grading and Reporting Procedures, provides that letter grades shall be placed on all tests, papers and quizzes returned to students, sent home to parents or retained in files for conferences.

5. Guideline Memorandum AS-512.4 also provides for the grade of M "to be used for the students who cannot meet course requirements due to medical reasons."

6. At the time under consideration, district policy concerning pupils medically excused from physical education was unclear as to activities in which the excused pupil would engage and how, if at all, those activities would be graded.

F.R. and L.R. obviously were intensely concerned with L.R.'s grades and class rank. Their sense of dissatisfaction and frustration apparently grew with each meeting between them and Board agents.

I cannot find in this record any animus toward L.R. The same physical education teacher who assigned the grade of C for the third marking period also gave L.R. four consecutive grades of A in a health course in the same school year.

I **CONCLUDE** that, although this matter was handled badly, neither the Board nor its agents violated the grading and reporting procedures in Guideline Memorandum AS-512.4. That guideline provides that letter grades shall be placed on all work returned to pupils, sent home to parents or retained in files for conferences. The credible testimony of the physical education teacher was that L.R.'s paper was merely checked to assure that it had, in fact, been done and was of acceptable quality. The paper was not returned to L.R.

I further **CONCLUDE** that the combination of an M and a C in physical education in the third marking period of the 1987-88 school year correctly yielded a grade of C. That is the grade that was assigned.

Although from an administrative point of view—and particularly from a public relations point of view—this matter was badly handled, neither the Board nor its agents violated any statute or regulation. The petitioner may take some consolation from the fact that the Board undoubtedly will reexamine and, if necessary, amend its policies in this area. Nevertheless, I **CONCLUDE** that the physical education grade assigned to L.R. for the third marking period for the 1987-88 school year was properly calculated. Accordingly, the petition of appeal is **DISMISSED**. It is so **ORDERED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

24 JANUARY 1989
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1/25/89
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 27 1989
DATE

Ronald L. Lee
OFFICE OF ADMINISTRATIVE LAW

km

F.R., individually and as parent of L.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply were timely filed pursuant to N.J.A.C. 1:1-18.4.

Upon review of the record and exceptions, the Commissioner agrees with and adopts the ALJ's findings and conclusions in this matter that petitioner's grade was properly calculated. The Board is legally entitled to award a grade of medically excused, "M," for physical education when a student is exempted from that subject for medical reasons. It is also legally entitled to require that students complete educational assignment(s) in that subject area when unable to participate in the physical activity aspect of the program notwithstanding the fact that a grade of M shall be awarded.

Contrary to petitioner's arguments, a project or assignment given "in lieu" of swimming does not therefore mean that the awarding of an M grade is illegal or improper.

What concerns the Commissioner in this matter, however, is the apparent practice of assigning a paper to students medically excused from swimming which is at best treated in a perfunctory manner. As to this, the Commissioner would stress that even if a pass/fail grade were assigned, great care must be exercised to see that the paper is evaluated by the teacher and that the evaluation of the work effort be shared with the student, not merely filed in a drawer.

The Commissioner, therefore, fully concurs with the ALJ that the Board reexamine its policies and practices with respect to the disposition of educational assignments given to students medically excused from physical education so as to assure that each student's work is examined by the teacher, evaluated, corrections and/or comments indicated, and that the student be informed of the quality of the product. To do otherwise makes the assignment virtually meaningless educationally and has the potential for being punitive in nature. If the Board is concerned about the number of students seeking medical excuses from participation in swimming, the

appropriate "deterrent" is to assure that the medical examiner concurs that a medical necessity exists to exclude the student from pool activities. Assigning a paper which may be interpreted to be a "deterrent" is inappropriate.

Accordingly, the Petition of Appeal is hereby dismissed and the Board is advised to take whatever steps are necessary to eliminate the concerns discussed above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 13, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5693-88
AGENCY DKT. NO. 115-4/88

TRENTON BOARD OF EDUCATION,
Petitioner,
v.
PATRICIA HOULROYD,
Respondent.

Gregory G. Johnson, Esq., for petitioner (Lemuel H. Blackburn, Jr.)

No appearance by or on behalf of respondent

Record Closed: January 24, 1989 Decided: January 24, 1989

BEFORE **DANIEL B. MC KEOWN, ALJ:**

The Trenton City Board of Education (Board) certified to the Commissioner of Education on April 26, 1988 for determination under N.J.S.A. 18A:6-10 charges of incapacity and unbecoming conduct against Patricia Houlroyd (respondent), a janitor with a tenure status in its employ. The Board submitted proof of service of the charges upon respondent on April 28, 1988. On August 1, 1988 the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was scheduled for September 20, 1988 which had to be adjourned because of the absence of a telephone number for respondent. A letter was sent respondent requesting her telephone number. No response was received. Accordingly, the matter was scheduled for plenary hearing to be conducted January 23, 1989 at the Office of Administrative Law, Mercerville.

Respondent failed to appear at the scheduled hearing for which notice was issued her at her last known address. The finding and conclusion is reached in this initial decision that the charges against respondent are proven true by a preponderance of credible evidence and that termination of employment is warranted.

CHARGES

The superintendent filed charges of incapacity and unbecoming conduct against respondent with the Board alleging that during 1987 respondent's occasional absenteeism rate exceeded 5 percent, that between July 1, 1987 through February 2, 1988 respondent was absent a total of 12 1/2 days; and, that from June 29, 1987 to February 2, 1988 respondent's absences for personal illness, combined with her vacation day absences, family illness days, and 1 personal business day resulted in respondent having been absent 30 1/2 days.

PROOFS

The principal of Junior High School Number 2 testified under oath that because of respondent's attendance record during 1986-87 he recommended, which the Board approved, the withholding of respondent's salary increment for 1987-88. The principal testified that because of respondent's absence during 1986-87 her work performance was unsatisfactory.

The principal testified that respondent's attendance at her duties did not improve during 1987-88 in fact, the principal explained that from July 1, 1987 through March 20, 1988 respondent had taken 18 sick days, 2 1/2 days for illness in her family, and 2 days which were unauthorized.

The principal advised respondent as early as July 1, 1987 that her continued excessive absenteeism was sufficient for him, the principal, to seek her termination of employment. (P-2)

This concludes a recitation of the proofs offered by the Board in support of the charges certified to the Commissioner against respondent.

FINDING OF FACT

I **FIND** that the Board established by a preponderance of credible evidence respondent's absences from her employment during 1986-87 and against during 1987-88 were 38 and 18 days respectively. Such absences should not be tolerated by any board of education absent some kind of reasonable explanation from the employee. In this case, there is no reasonable explanation from the employee. Therefore, the absentee record of respondent as established by a preponderance of credible evidence is such that the absences represent an incapacity by respondent to perform her duties and such absences, I **FIND**, constitute unbecoming conduct.

CONCLUSION

The Board established by a preponderance of credible evidence that the absentee record of respondent in her employment with the Board constitutes an incapacity for her to perform her duties in a satisfactory manner and such an absentee record constitutes unbecoming conduct. Such charges are serious in nature and must be dealt with in a serious manner. Absent some reasonable explanation from respondent regarding her absentee record, the inference is drawn that no reasonable explanation exists. Accordingly, termination of respondent's employment as a janitor with the Trenton City Board of Education is warranted in the circumstances.

Therefore, the employment of Patricia Houlroyd with the Trenton City Board of Education as a janitor is hereby **TERMINATED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 24, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

1/25/89
DATE

Receipt Acknowledged:

Seymour Weiss
DEPARTMENT OF EDUCATION

JAN 31 1989
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE HEARING OF PATRICIA HOULROYD, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. It is duly noted that respondent, a tenured janitor, failed to defend herself against the tenure charges levied by the Board.

Upon review of the record, the Commissioner adopts the ALJ's findings and conclusion as the final decision in this matter. Respondent therefore is dismissed from her tenured position of janitor as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 13, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6264-88
AGENCY DKT. NO. 210-7/88

TRENTON BOARD OF EDUCATION,
Petitioner,
v.
BARBARA DONOHUE,
Respondent.

Gregory G. Johnson, Esq., for petitioner (Lemuel H. Blackburn, Jr.)

No appearance by or on behalf of respondent.

Record Closed: January 24, 1989 Decided: January 24, 1989

BEFORE DANIEL B. MC KEOWN, ALJ:

The Trenton City Board of Education (Board) certified to the Commissioner of Education on June 30, 1988 for determination under N.J.S.A. 18A:6-10 charges of incapacity and unbecoming conduct against Barbara Donohue (respondent), a janitor with a tenure status in its employ. The Board submitted proof of service of the charges upon respondent on July 1, 1988. On August 23, 1988 the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was scheduled for September 30, 1988 which had to be adjourned because of the absence of a telephone number for respondent. A letter was sent respondent requesting her telephone number. No response was received. Accordingly, the matter was scheduled for a plenary hearing to be conducted January 23, 1989 at the Office of Administrative Law, Mercerville. Respondent failed to appear at the scheduled hearing for which notice was issued her at

her last known address. The finding and conclusion is reached in this initial decision that the charges against respondent are proven true by a proponderance of credible evidence and that termination of employment is warranted.

CHARGES

The superintendent filed charges of incapacity and unbecoming conduct against respondent with the Board because of alleged excessive absenteeism from her duties as a Light-Cleaner at Junior High School Number 2.

Proofs

The principal of Junior High School Number 2 testified under oath that respondent began her employment on or about January 30, 1987. She acquired a tenure status of employment when the Board inadvertently reappointed respondent as a Light-Cleaner some time in June 1987 without a fixed term.

The principal testified that he counseled respondent on or about November 6, 1987 regarding her absences which for the year beginning July 1, 1987 showed respondent had accumulated by the end of October 1987 ten absences for personal sickness, and 2 1/2 days for family illness. Respondent was thereafter absent 1/2 day on November 10, a full day December 7, 1/2 day December 18, two full days in January 1988, and 1/2 day in February 1988. The school principal warned respondent of possible disciplinary action in writing regarding her absences on July 1, November 6, and December 8, 1987 and again on January 5, 1988.

This concludes a recitation of the proofs offered by the Board in support of the charges certified to the Commissioner against respondent.

FINDING OF FACT

I **FIND** that the Board established by a preponderance of credible evidence respondent's absences from her employment from July 1, 1987 through February 2, 1988 totalled 18 1/2 days. Such absences should not be tolerated by any board of education absent some kind of reasonable explanation from the employee. In this case, there is no reasonable explanation from the employee. Therefore, the absentee record of respondent

as established by a prepondernance of credible evidence is such that the absences represent an incapacity by respondent to perform her duties and such absences, I **FIND**, constitute unbecoming conduct.

CONCLUSION

The Board established by a preponderance of credible evidence that the absentee record of respondent in her employment as a Light-Cleaner with the Board constitutes an incapacity for her to perform her duties in a satisfactory manner and such an absentee record constitutes unbecoming conduct. Such charges are serious in nature and must be dealt with in a serious manner. Absent some reasonable explanation from respondent regarding her absentee record, the inference is drawn that no reasonable explanation exists. Accordingly, the termination of respondent's employment as a Light-Cleaner is warranted in the circumstances.

Therefore, the employment of Barbara Donohue with the Trenton City Board of Education as a Light-Cleaner is hereby **TERMINATED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 24, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

1/25/89
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Feb. 1, 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF BARBARA DONAHUE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Commissioner duly notes that respondent, a tenured janitor, has failed to defend herself against the tenure changes certified against her.

Upon review of the record the Commissioner agrees with the ALJ's findings and conclusion regarding respondent's excessive absenteeism. He therefore adopts the recommended decision to dismiss respondent as the final decision in this matter.

Accordingly, respondent is terminated from her tenured janitorial position as of the date of this decision for the reasons expressed by the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 13, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5143-88
AGENCY DKT. NO. 190-6/88

**IN THE MATTER
OF THE TENURE
HEARING OF MARY
SNYDER, SCHOOL DISTRICT
OF THE BORO OF LONGPORT,
ATLANTIC COUNTY,**

Catherine Tuohy, Esq., for petitioner (McGahn, Friss & Miller, attorneys)
William Wallen, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: December 11, 1988 Decided: January 20, 1989

BEFORE **EDGAR R. HOLMES,** ALJ:

STATEMENT OF THE CASE

Mary Snyder, school nurse, is alleged to have repeatedly administered the wrong dose of medicine to a student at the Winchell School. She is also alleged to have failed to report and document her error to the Superintendent as required by school rules and policy.

PROCEDURAL HISTORY

The Board of Education of the School District of the Borough of Longport, Atlantic County, certified tenure charges (seeking termination of her employment)

to the Commissioner of Education on May 25, 1988, pursuant to N.J.S.A. 18A:6-9 et seq. She was suspended on June 22, 1988.

An Answer was filed on July 11, 1988 and the matter was transmitted to the Office of Administrative Law to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on August 17, 1988 and the issues to be determined at the hearing were identified as (1) whether respondent was guilty of gross negligence by improperly administering prescribed medicine to a handicapped pupil under her care and supervision; (2) whether respondent failed to notify the Superintendent of Schools of the alleged improper administration of medication to the handicapped pupil; and (3) whether respondent failed to cooperate in the investigation of the alleged improper administration of medication to the handicapped pupil.

A plenary hearing convened on October 25 and 26, 1988 and the record was held open for 30 days in order to give counsel an opportunity to brief the issues. Because respondent's counsel was substituted subsequent to the trial, an additional 15 days leave was granted in order to complete the brief.

SUMMARY OF STIPULATION OF FACTS AND ANSWERS TO INTERROGATORIES

The parties stipulated to the operative facts and to the respondent's answers to interrogatories.

The Longport Board of Education operates the Winchell Orthopedic School for handicapped pupils where the respondent has been employed as a school nurse since 1983. She is tenured. M.K. was a student at Winchell during the 1987/88 school term. She was at that time a four and one half year old girl, weighing approximately 25 pounds and severely developmentally handicapped. She does not speak and was bound to a wheelchair.

M.K.'s neurologist prescribed one cubic centimeters (cc) of liquid Depakene (valproic acid), an anticonvulsant drug, to be taken each day at noon. A side effect of Depakene is possible liver damage.

M.K.'s mother (mother) provided respondent with the medication and with instructions for administration of the medication; her own and the physician's. The method of choice for administering the medication was that it was to be taken orally by means of a 3 cc syringe.

The respondent administered the drug each day at noon to the child M.K.

On January 26, 1988, mother sent an "EZY DOSE" syringe to respondent with instructions. An "EZY DOSE" syringe is an over-the-counter syringe to be used by non-health professionals in administering oral medication to children. It is marked in milliliters and teaspoons. The note of instructions was accompanied by a new bottle of Depakene. The note of instructions pointed out that the physician said the bottle was enough to medicate M.K. to the end of the year.

The "EZY DOSE" syringe has a large encircled numeral one on the barrel of the syringe. The numeral one, however, does not represent the filling line for one cc, the prescribed dose, but for one teaspoon. A teaspoon is equivalent to 5 cc's.

From January 26, 1988 until May 6, 1988, or a total of 63 days when M.K. was in school, respondent administered a one teaspoon dose rather than a one cc dose to M.K. She never rechecked the doctor's instructions for the administering of this medication. In addition, when the respondent ran out of medicine in April and asked mother for more, she was not alerted to the fact that she was using the medication too fast. (The mother's note referred to above said that one bottle should last the school year).

The error was discovered by a substitute nurse when respondent was absent from school on May 10, 1988. When the substitute nurse told respondent that she had wrongfully administered medication to M.K. respondent immediately told mother to have the child examined by her physician. On May 11, 1988, M.K. was examined for liver damage and for her blood level of Depakene. On May 12, 1988 mother reported the mistake to the Superintendent and so advised respondent.

Thereafter the respondent personally told the Superintendent about her mistake. The Superintendent asked respondent to prepare an incident report. She declined to do so until she could consult an "adviser." Thereafter, on the advice of counsel, she continually refused to file an incident report.

A board policy requires that "...an accident...involving any type of injury to a student..." (emphasis supplied) must be reported to the school nurse and the Superintendent. The policy also requires a written incident report.

This completes the stipulation of facts. The respondent testified and admitted the mistake. It appears that she wrongfully assumed that the large encircled numeral one was the correct dose. There was no testimony that M.K. was adversely affected. Over the years the respondent has received excellent evaluations; some actually praise her administration of medicines to pupils.

EXPERT TESTIMONY

The respondent's expert, Maryjane Spuller-Gauglan, R.N., described protocols for administering medicines. The protocols she described, even if modified to accommodate for the differences between hospital and school nursing, would have prevented this series of overdoses if employed at the Winchell School. As an absolute minimum, a nurse should review the physician's order prior to pouring the medication and compare the physicians order to the bottle or container at regular intervals. In administering oral medications by means of a syringe, the proper marking should be identified on the barrel of the syringe. In this case the "EZY DOSE" syringe was marked in milliliters and teaspoons, the medication was prescribed in cc's. Therefore a conversion had to be made to administer the medicine properly in this instrument.

Although Spuller had experience in detecting and identifying medication errors made by nurses in the course of her duties in performing quality assurance studies at several hospitals and for an independent agency, she did not identify any studies made either by herself or others which would indicate the type and frequency of medication errors.

She simply indicated that this error, 63 consecutive overdoses, was "gross negligence" and "unheard of".

Petitioner's expert Barbara K. Norton, R.N. emphasized the differences between school nursing and hospital nursing. The school nurse has a wide range of educational and investigative tasks to perform in addition to administering medications. Norton testified that medication errors are fairly common and that this error was the result of a faulty perception. She did not refer to any studies which identified causes, frequency or kinds of medication errors made by nurses.

LAW AND DISCUSSION

In this matter the respondent's acts are characterized in the petition as "gross negligence." "Gross negligence" is a term of art not applicable to this setting. *In the matter of the Tenure Hearing of Carolyn D. Baley, School District of the Township of Mansfield, Warren County*. Commissioner's Decision 76 SLD 841, aff'rmd. State Board of Education, 77 SLD 1277, Carolyn Baley, a school nurse, administered Ritalin to the wrong student. In substantiating his reasons for determining "...that the compensation lost by respondent during the initial 120 days of suspension (was) sufficient penalty." the Commissioner stated that Baley "... immediately recognized her error... and made a voluntary report of it to the school administrator." Respondent did neither. This error, in contrast, was discovered only by a substitute some 63 days after respondent began to overdose M.K. She did not tell her Superintendent until the child's mother made a report to him. She never filed an incident report.

In respondent's favor is the fact that she reported the problem to the mother and suggested that M.K. be examined immediately. Also in respondent's favor are the many favorable comments made in her evaluations over the years. Nevertheless, the rationale of *Baley* persuades me that the only proper penalty for the respondent's negligence is forfeiture of her rights to tenure in the School District of the Borough of Longport.

ORDER

It is therefore **ORDERED** that respondent is **DISMISSED** effective as of the date of her suspension.

This recommended decision may be adopted, modified or rejected by the **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION,** who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN,** does not so act in 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.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

January 20, 1989
DATE

EDGAR R. HOLMES, ALJ

1/25/89
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 25 1989
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF MARY SNYDER, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
LONGPORT, ATLANTIC COUNTY,	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that respondent's exceptions to the initial decision, as well as the Board's replies to those exceptions, were timely filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

It is further observed that the Board's exceptions to the initial decision which were filed with its reply exceptions are deemed to be untimely pursuant to the above-cited regulations. Consequently, neither the Board's exceptions nor respondent's replies to those exceptions will be considered in the final decision to be rendered by the Commissioner herein.

Respondent in her exceptions maintains that certain portions of the ALJ's findings and conclusion set forth in the initial decision are in error for the following reasons:

1. Ms. Saccone was not a "substitute nurse" as found by the ALJ in the initial decision ante. Ms. Saccone was a second nurse employed by the Board, who, as the result of assuming respondent's duties during a period of absence, discovered respondent's mistake in measuring the dosage of medication respondent had been giving to the handicapped pupil, M.K. (Respondent's Exceptions, at p. 1)

2. Respondent did not refuse to write an incident report on May 12, 1988 as requested by the Superintendent. The only time she made such refusal was on May 16, 1988 after the Superintendent attempted to obtain her resignation. Such refusal was based on the advice she subsequently received from her union representative.

3. The ALJ erred in not relying on the expert witness, Barbara Norton, who testified that although respondent made a mistake in the measurement of the dosage of medication to the pupil M.K., said mistake did not constitute gross or ordinary negligence or carelessness, but rather it was a mistake of continuing misperception of the measurement scale on the syringe furnished by M.K.'s mother.

4. The Baley decision relied upon by the ALJ does not warrant respondent's dismissal from tenured employment but rather, Baley stands for the proposition that dismissal from employment under the circumstances recited herein is an unduly harsh penalty. This is so especially due to the fact that the record establishes that the overdose of medication administered by respondent to M.K. for the period of time controverted herein had no adverse effect upon M.K.

5. Although the ALJ did not find respondent guilty of "gross negligence," he fails to dismiss the same despite the fact that respondent was expressly charged with that degree of culpability by the Board. (Id., at p. 3)

6. The ALJ erred in failing to conclude that respondent's mistake constituted a single isolated instance for which dismissal is unduly harsh and unwarranted. This is especially true when considering her prior record of service and the fact that she immediately reported the incident.

7. The ALJ erred in failing to find that the requirement for the incident report contained in the Board's "Guide/Operating Procedures" mentioned in Stipulation 5 was inapplicable to the facts of this matter. The stipulation of reference reads as follows:

> 5. Part of the duties of Respondent Mary A. Snyder is to administer medication to pupils in the Winchell Orthopedic School.
>
> The Winchell School has in effect "Winchell School Staff Guide/ Operating Procedures" which are given to staff members each school year. There is a special provision on Page 9, paragraph 10 of the Standard Operating Procedures which reads: "Accidents or injuries to students or staff. From time to time accidents occur to either students or staff. The following procedures must be adhered to in the event of an injury and for proper treatment and to protect against liability claims.
>
> a. Student injury - in the even (sic) an accident occurs involving any type of injury to a student, the first obligation of the staff member is to notify the school nurse and Mr. Stewart immediately. The school nurse will determine the extent of the injury and any required medical treatment. Parents will be notified of the incident by the school nurse. These contacts should be documented and copies submitted to the appropriate

> personnel. Also, the staff member observing or reporting the incident should complete an INCIDENT REPORT [caps in original], which may be obtained from the main office. The completed form should be given to the principal."
>
> (Stipulation of Facts, at pp. 1-2)

In reply to respondent's exceptions, the Board relies on respondent's own testimony which it claims establishes that respondent was aware of the requirement to immediately report incidents of pupil accidents to the superintendent; that she declined to prepare a written report of the incident to the superintendent when he made such request and contrary to petitioner's definition of the word "decline," "Webster's Dictionary defines 'decline' as 'to bend downward; to refuse; to avoid'.***" (Board's Reply Exceptions, at p. 2)

In replying to respondent's exceptions 3 and 6 (pages 2 and 3), the Board avers that:

> (3) In reply to Respondent's exceptions numbered "3" and "6" and as a cross-exception to the judges finding that "gross negligence" is a term of art inapplicable to this setting in page 5 of his initial decision, Petitioner proposes that based on Petitioner's expert testimony, a finding be entered of gross negligence against Respondent Mary Snyder. Petitioner hereby incorporates by reference its post-trial brief dated November 29, 1988***.
>
> 4) In reply to Respondent's exceptions numbered "4", "5" and "7", Petitioner submits that Judge Holmes was correct in his analysis of the case law. The Petitioner hereby incorporates its discussion and analysis of the governing case law with the facts in this case as stated in Petitioner's post-trial brief at pages 6, 7 and 8 for the Baley and Redcay cases are discussed and support Judge Holmes determination in this case.
>
> (Id., at p. 3)

Additionally, the Commissioner also observes that the Board in its post-hearing brief filed in support of its reply exceptions points out that:

> Based on the stipulation of facts and the exhibits annexed thereto, as well as respondent Mary Snyder's admissions and answers to the interrogatories propounded upon her by the Board of Education surrounding the incident, as well as examining both syringes, Ms. Spuhler-Gaughan was able to form an opinion based on a reasonable degree of nursing certainty as to the standard of

> care rendered by Mrs. Snyder in this case. In her opinion, Mrs. Snyder was grossly negligent in administering the medication to the child, "M.K.", and in failing to document the error. Her opinion was based on Mrs. Snyder's gross violation of nursing standards of care in regards to the administering the medication as well as the duties of a professional nurse pursuant to N.J.S.A. 45:11-23(d), wherein the practice of nursing is defined to include "executing medical regimen as prescribed by a licensed or otherwise legally authorized physician or dentist".
>
> (Board's Post-hearing Brief, at p. 3)

And;

> The court's attention is respectfully called to Mrs. Snyder's answer to this interrogatory wherein Mrs. Snyder stated "I did not, during the dates in question, recheck the instructions for the administration of the medication." However, after Mrs. Snyder had the opportunity of hearing the testimony of petitioner's expert witness concerning the proper administration of medication in accordance with nursing standards, Mrs. Snyder took the stand and testified that although she did not include it in her interrogatory answer, she always checked the medication label on the bottle of depakene before administering the medication to "M.K.". it is respectfully submitted that Mrs. Snyder's testimony in this regard should be discounted in that it differs from her interrogatory answer. However, it is questionable whether or not even if she had read the label prior to giving the medication to the child that this was a sufficient compliance with good nursing practice. Also, it is submitted that even if Mary Snyder did look at the label each and every time, it is incredible to believe that after reading the label and seeing that it called for lcc to be administered to "M.K.", that she proceeded to draw up 1 teaspoon, 5 times the prescribed amount, each and every day the child was in school, for 63 days.
>
> (Id., at p. 4)

And further;

> Included in the stipulation of facts, at paragraph 15, reference is made to a letter marked as Exhibit "C", which was dated January 26, 1988, and was a letter from the mother of "M.K." to the respondent Mary Snyder, instructing Mrs. Snyder how to use the Ezy Dose syringe. The mother

> forwarded a new bottle of depakene with the Ezy Dose syringe to the nurse, because she had found it easy to use. Also, in that letter, the mother of "M.K." points out to the nurse that the child's doctor stated that the bottle of medication should be enough to take "M.K." to the end of the year. Despite this letter, Mrs. Snyder requested a new bottle of depakene sometime in April. It is submitted that after going through a great deal of medication, and the letter from the mother, it is incredible that a "red flag" did not go up in the mind of nurse Snyder. (Id., at p. 5)

Finally, in rejecting respondent's argument that the penalty of dismissal is unduly harsh with regard to the incident involving M.K., the Board distinguishes Baley, supra, from the factual circumstances pertaining to the instant matter by pointing out that nurse Baley immediately notified her principal of her mistake in administering the medication Ritalin to the wrong pupil (W.S. instead of R.S.).

The Board maintains that Baley was charged with a single isolated incident whereas:

> The fact that she [respondent] administered 5 times the amount of medication over 63 school days, failed to immediately notify the superintendent upon realizing the error and failing to this date to document the error, certainly seems sufficiently flagrant to warrant dismissal by the court's rational[e] in the Baley case. (Id., at p. 7)

The Commissioner upon review of the respective positions advanced by the parties to the initial decision and upon independent review of the transcripts and exhibits in evidence is not persuaded by those arguments of respondent that a reversal of the ALJ's findings and conclusion in the initial decision is warranted. In reaching this determination the Commissioner relies on the precise language of the Court in Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affirmed 131 N.J.L. 326. The Court in Redcay held that:

> 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. (at 371)

In the Commissioner's judgment, the record of this matter establishes that respondent negligently and improperly administered medication to a multiply handicapped pupil for a period of

approximately 63 school days and would have continued doing so for the remainder of the 1987-88 school year had this action not been called to her attention by another school nurse employed by the Board to act in her behalf during a period of respondent's absence on or about May 9, 1988. The record further establishes that respondent failed to immediately notify the Superintendent of Schools of the incident involving her improper administration of medication as required by "Winchell School Staff Guide/Operating Procedures" and set forth in the Stipulation of Facts (No. 5) incorporated and made part of the record herein. The record clearly reveals that respondent delayed giving oral notification of the incident to the Superintendent until May 12, 1988 (Stipulation No. 29) and, further, that she has not as of this date provided the required written report of the incident to the Superintendent. Respondent's reason for "declining" to submit the requested written documentation to the Superintendent was that she was so advised by her union representative. In taking this advice respondent acted at her own peril and in violation of the written procedures which were required to be followed by all teaching staff members under similar circumstances.

In the instant matter respondent's failure to closely monitor the amount of medication that she administered to the pupil M.K. placed this pupil at risk to the extent that each day she was given the improper dosage could have resulted in serious internal damage to her liver. The fact that this did not occur, in no way excuses respondent from the heavy responsibility she had in order to ensure that M.K. received the proper amount of medication prescribed by her physician.

Moreover, the Commissioner deplores respondent's behavior in failing to provide the Superintendent with a written account of the incident to this day on the advice of her union representative.

It is apparent from a review of the record that respondent's action was predicated upon her own self-interest rather than the interest of the pupil, the school, and the community at large.

Accordingly, the Commissioner adopts as his own the findings and conclusion set forth in the initial decision as supplemented above. He finds and determines that the incidents of respondent's misconduct as set forth in the tenure charges against her are sufficiently flagrant to warrant a forfeiture of her tenured position as school nurse in the Board's employ.

The initial decision on page 6 is so modified to the extent that respondent is hereby dismissed from her tenured position as of the date of the Commissioner's decision herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 13, 1989

IN THE MATTER OF THE TENURE	:	
HEARING OF MARY SNYDER, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
LONGPORT, ATLANTIC COUNTY.	:	
	:	

Decided by the Commissioner of Education,
March 13, 1989

For the Petitioner-Respondent, McGahn, Friss & Miller
(Catherine Tuohy, Esq., of Counsel)

For the Respondent-Appellant, Selikoff & Cohen
(Joel S. Selikoff, Esq., of Counsel)

On May 25, 1988, tenure charges were certified against Mary Snyder (hereinafter "Respondent"), a tenured school nurse serving at the Winchell Orthopedic School. The charges alleged that Respondent was guilty of gross negligence in administering the improper dosage (one teaspoon rather than one cc) of a prescribed anticonvulsant drug to a severely handicapped 4¼-year-old pupil for the period from January 26 through May 9, 1988; that Respondent failed to immediately notify the Superintendent of Schools once the error was discovered as required by the school's "Staff Guide/Operating Procedures"; and that Respondent refused to cooperate in the investigation by submitting a written report of the incident.

Both the Administrative Law Judge and Commissioner determined that Respondent's actions warranted her dismissal. After a thorough review of the record, we agree with the Commissioner's findings and conclusions on the tenure charges and conclude that dismissal was warranted under the circumstances.

Notwithstanding Respondent's good evaluations and other personal factors she alleges on appeal, we find that her action in administering approximately five times the prescribed dosage of medication to a multiply handicapped 4¼-year-old child for a period of 63 school days was sufficiently flagrant to warrant her dismissal. See In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). Unfitness for a position may be shown by a series of incidents or by one incident, if sufficiently flagrant. Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), affirmed o.b. 131 N.J.L. 326 (E. & A. 1944).

Respondent was supplied with instructions from the child's mother along with a prescription from the doctor. The syringe used by Respondent during the period at issue is clearly marked in teaspoons and milliliters, and is designed for use by even those

individuals not professionally trained in administering medication. Despite the fact that she was administering five times the prescribed dosage, which we find would have been quickly apparent from a check of the prescription or the label on the bottle, the mistake was only discovered after a second nurse assumed Respondent's duties during a period of absence. While we make no finding as to whether Respondent's actions amounted to "gross negligence" for purposes of civil liability, we do find that she demonstrated extreme negligence as a school nurse charged with the critical responsibility for properly and carefully administering medication to severely handicapped young children under her care and supervision at an orthopedic school and that she failed to exercise the high degree of care required in such a position.

Furthermore, while we conclude that the nature and gravity of that recurring error was alone sufficient grounds for dismissal, we note, in addition, that the Respondent waited two days after learning of the mistake to notify the Superintendent, in contravention of the school's written operating procedures, and refused to submit a requested written report of the incident to the Superintendent. Although Respondent acted quickly to notify the child's mother, she only reported the incident to the Superintendent after the child's mother had met with him.

In addition, we find it unnecessary for our determination to give further consideration to whether or not the child suffered or could have suffered liver damage as a result of Respondent's error, and deny her request to reopen on this issue. It is undisputed that liver damage can be a side effect of the drug. We agree with the Commissioner that whether or not such damage actually occurred "in no way excuses respondent from the heavy responsibility she had in order to ensure that M.K. received the proper amount of medication prescribed by her physician." Commissioner's decision, at 15.

We also deny Respondent's request to reopen the hearing for the taking of additional evidence in assessing the proper penalty under Fulcomer, supra. A full hearing was previously held in this matter, and, as noted, notwithstanding Respondent's good evaluations and other personal factors, we find the nature and gravity of her offense so flagrant under the circumstances as to warrant her dismissal.

Accordingly, for the reasons expressed in the Commissioner's decision and herein, we affirm the decision of the Commissioner dismissing the Respondent.

August 2, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION FOR SUMMARY DECISION
MOTION TO AMEND PETITION
OAL DKT. NO. EDU 5258-88
AGENCY DKT. NO. 184-6/88

FRANK GAYESKI, JOHN F. DONOVAN, CAROLYN DAVIS, MARCIANNA CAPLIS, AND CONCERNED CITIZENS FOR BETTER SCHOOLS,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,
Respondent.

Patrick C. English, Esq., for petitioners (Dines and English, attorneys)
Lester Aron, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)
Wayne J. Oppito, Esq., for Intervenor Ann Small

Record Closed: January 6, 1989 Decided: January 20, 1989

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

STATEMENT OF THE CASE

Petitioners, who include a member of the Hackensack Board of Education ("Board"), three residents of Hackensack and an organization made up of residents of Hackensack, seek an order voiding the Board's appointment of Ann Small as principal of the Board's Fairmont Elementary School. It is alleged in Count I of the petition that the appointment

resulted from a vote which violated the Open Public Meetings Act ("Act"), N.J.S.A. 10:4-6 et seq., because one Board member who voted for the appointment stated that he had considered information obtained during an earlier meeting held without notice required by the Act. It is alleged in Count II that the Board wrongfully prevented reasonable "public debate" on the appointment. It is alleged in Count III that Ms. Small was an "unsuitable candidate." And it is alleged in Count IV that the Board wrongfully refused to comply with its own previously announced appointment "process" because the appointment was made without an independent Assessment Center evaluation of candidates for the position.

The Board denies petitioners' allegations and submits that its appointment of the principal was lawful. The Board has moved for an order for summary decision dismissing the petition.

Petitioners have moved for an order permitting amendment of Count I of their petition to include an allegation of "continuing" noncompliance with the Act and a demand for an order requiring the Board "to stop future violations" of the Act.

The Board objects to petitioners' motion.

PROCEDURAL HISTORY

On June 20, 1988, a verified petition was filed with the Commissioner of Education. N.J.S.A. 18A:6-9. On July 1, 1988, Ms. Small's request to intervene was filed. N.J.A.C. 6:24-1.7. On July 15, 1988, the Board filed an answer to the verified petition.

The matter was transmitted to the Office of Administrative Law where on July 18, 1988, it was filed as a contested case. N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held and on September 28, 1988 a prehearing order was entered.

On October 31, 1988, the Board filed a notice of motion for summary decision, with supporting certification. N.J.A.C. 1:1-12.5. The petitioners' attorney requested an extension of time to respond and, on November 28, 1988, the petitioners' brief and certifications were filed in opposition to the Board's motion. On December 13, 1988, the Board filed a letter rebuttal brief and affidavits. On December 30, 1988, petitioners filed a supplemental brief, motion to amend petition with an affidavit and certifications in opposition to the Board's motion for summary judgment and in support of the motion to amend. To allow full development of the record, I have considered all of these submissions.

On January 6, 1989, a taped telephone conference was conducted to distinguish disputed from undisputed facts. At that time, the Board also objected to the petitioners' motion to amend the petition.

FACTUAL DISCUSSION

A. The following **FACTS** are not in dispute:

1. During the fall of 1987, the Board learned that the principal of its Fairmont Elementary School would retire on June 30, 1988.

2. On February 8, 1988, the Board established a process for appointment of a replacement for the principal whereby (a) applicants would be screened and evaluated by a "Staff Committee" of teachers and administrators in the Board's district; (b) finalists would be assessed by an entity known as the "Assessment and Development Center" ("Assessment Center"); (c) finalists would be interviewed by the Board; and (d) a recommendation to appoint would be made to the Board by the Superintendent of the Board's schools. The Board would then vote on the appointment.

3. During March and April 1988, the Staff Committee screened and evaluated 13 applicants. The Superintendent then interviewed five finalists and scheduled them for interviews by the Board.

4. In April 1988, testing of the finalists by the Assessment Center was scheduled but then cancelled because of the Assessment Center's internal problems. The Assessment Center's testing was then rescheduled for May 18, 1988.

5. On May 11 and 12, 1988, without notice required by N.J.S.A. 10:4-9, the Board held closed/executive meetings during which it interviewed the five finalists.

6. Assessment Center testing of the finalists was cancelled at the Superintendent's request and did not take place.

7. On May 19, 1988 in Superior Court, petitioner Gayeski filed a verified complaint in lieu of prerogative writ against the Board. N.J.S.A. 10:4-15. Gayeski alleged in the complaint, inter alia, that the Board, during its May 11 and 12, 1988 meetings, had decided to amend its previously adopted appointment process and that it had decided to appoint Ms. Small principal of the Fairmont School. Gayeski also alleged that, during his two and one-half years of Board membership, there had been "numerous violations of the Open Public Meetings Act." Gayeski demanded injunctive relief including: (a) an order enjoining the Board's "action" "relative to appointment of a principal" of the Fairmont Elementary School, pending resolution of the Superior Court matter; (b) an order voiding the Board's actions taken on May 11 and 12, 1988; (c) an order directing the Board to act de novo relative to matters acted on on May 11 and 12, 1988. (P-1, paragraphs 5, 7, 9, 12, 13 and "wherefore" clauses.)

8. On May 20, 1988, the Honorable James T. Murphy, J.S.C., entered an order directing the Board to comply with the Open Public Meetings Act relative to appointment of a principal of the Fairmont School. Judge Murphy declined to restrain the Board from taking any action relative to appointment of the principal and declined to order the Board to show cause "why it should not be permanently enjoined from acting to appoint the principal unless there is full de novo consideration and why all actions taken on May 11 and May 12, 1988, should not be voided..." (See, P-2).

9. On May 23, 1988, the Board adjourned another meeting because there had been no notice as required by N.J.S.A. 10:4-9.

10. After notice pursuant to the Act, the Board met on May 31, 1988. During that meeting, the following occurred:

(a) Board President Saccaro opened the meeting by noting that candidates for principal had previously been interviewed by the Board during closed meetings for which the Board secretary had failed to send notice pursuant to the Act and that, after suit in that regard was filed by Mr. Gayeski, the Board was ordered to comply with the Act. He also announced that the appointment of the principal would be voted on during the meeting and that "Everyone will have a chance to be heard on both sides of the issue." (See, R-1, page 2.)

(b) Superintendent Anthony Marseglia described the appointment process. He stated that the Assessment Center step of the process was delayed as a result of rescheduling by the center; that testing by an alternate assessment center could not be scheduled until late June, which was "much too late"; and that based upon his "professional judgment" of the candidates, he recommended Ms. Small for appointment as principal. (See, R-1, pages 2 to 6.)

(c) Petitioner Gayeski, a Board member, discussed the fact that there had been no Assessment Center evaluation as originally contemplated in the Board's appointment process. He disagreed with the Board's reliance upon the Superintendent's recommendation without benefit of the Assessment Center's evaluation. Against the Board's attorney's advice that he would be breaching the candidates' expectations of confidentiality, he displayed materials, including the Staff Committee's rankings of the finalists, and pointed out that Ms. Small was near the bottom of that list. He unsuccessfully moved to "stop" the process and to establish a "completely new process." (See, R-1, pages 6, 10 to 15; P-4, paragraph 20 and P-8, paragraph 5.)

(d) Board member Jackson expressed concern about the harm that could result in delaying the appointment and Board President Saccaro expressed his opinion that the Board could prudently choose a principal based upon the information it had. (See, R-1, pages 17 to 19 and R-1(a), pages 17 and 18.)

(e) Many of the citizens present spoke regarding the appointment. The president of the Fair Lawn Board of Education also spoke and he alleged that Ms. Small had withdrawn her acceptance of a principal's appointment in that district. He urged the Board not to appoint Ms. Small principal of the Fairmont Elementary School, although he described her as a "fine educator." (See, R-1(a), pages 7 and 8.)

(f) The Board voted 3 to 2 to appoint Ms. Small principal of the Fairmont Elementary School, in the absence of an Assessment Center evaluation of the candidates.

B. The following allegations appear in certifications submitted by petitioners:

1. During the Board's May 12, 1988 meeting, the Superintendent stated that he believed the Assessment Center would be unable to complete its testing of the finalists before June 1988. (P-4, paragraph 13.)

2. During the Board's May 12, 1988 meeting, the Superintendent stated that he recommended Ms. Small for the appointment as principal. He stated that Ms. Small was considering another job offer and urged the Board to immediately decide whom it would appoint. (P-4, paragraph 13.)

3. During the Board's May 12, 1988 meeting, the Board voted 3 to 1 to waive the assessment center step in the appointment process and by a "poll" of 3 to 1 "indicated" that Ms. Small would be appointed as principal. The Superintendent then stated that he would prepare a formal motion to that effect. (P-4, paragraph 14.)

4. The Staff Committee evaluations were made available to the Board only shortly before the May 31, 1988 meeting, despite petitioner Gayeski's earlier demand. (P-4, paragraph 18 and P-8, paragraph 3.)

5. During the Board's May 31, 1988 meeting, the Superintendent and the Board's attorney advised the Board not to publicly discuss the Staff Committee evaluations of the finalists. (P-4, paragraphs 17 and 18 and P-8, paragraph 4.) Gloria D'Arminio requested a

delay of the appointment so that she, a Board member who had assumed her position at that meeting, could learn more about the finalists and the selection process. A majority of the Board rejected the request and the vote to appoint Ms. Small followed. (P-4, paragraph 20 and P-8, paragraph 5.)

6. Since the Board's May 31, 1988 meeting, the Reverend Gregory Jackson, one of the Board members who voted to appoint Ms. Small, has stated that he based his vote to appoint Ms. Small in substantial part on the discussions which occurred during the Board's May 11 and 12, 1988 meetings. (P-4, paragraph 21.)

C. The following allegations appear in the certification and affidavits submitted by the Board:

1. The Superintendent developed and suggested the appointment process, including the Assessment Center step, adopted by the Board on February 8, 1988. (R-4, paragraphs 1, 2 and 3. See also, R-1 and Brief, Statement of Facts, paragraphs 2 and 3.)

2. Due to its own internal problems, the Assessment Center originally contacted cancelled testing of candidates which had been scheduled for April 1988. The testing was rescheduled for June 5, 1988 but then the Assessment Center rescheduled the evaluations for late June, 1988. (R-4, paragraphs 3 and 4 and R-1, page 5.)

3. In an effort to expedite the process, the Superintendent contacted Mr. Carl Hayes, who had left the Assessment Center and who was setting up his own center. Mr. Hayes proposed testing the candidates on May 18, 1988. However, a Montclair State College professor advised the Superintendent that Mr. Hayes was not equipped to perform well in that regard. (R-4, paragraphs 5 and 6.)

4. The Superintendent also contacted Mr. Hank Miller, Director of the Principals and Supervisors Association, in an effort to locate an assessment center for timely testing of the finalists. Mr. Miller advised the Superintendent of the New York Assessment Center; however, that center could not test the finalists until June 1988. (R-4, paragraph 8.)

5. To bring about a smooth transition between principals, the Board wished to expedite the appointment process. That is, the Board wanted to appoint a new principal so she would have time with the retiring principal before his departure on June 30, 1988. (R-4, paragraph 7.)

6. During the May 31, 1988 Board meeting, in keeping with the Board's wish to appoint as soon as possible, the Superintendent recommended that the Board waive the Assessment Center step and recommended the appointment of Ms. Small, whom he found to be the best candidate. (R-4, paragraph 9.) After debate on the matter, the Board accepted the Superintendent's recommendations and voted accordingly. (R-1, pp. 17-20.)

7. The Superintendent denies that a vote or poll of the Board had been taken on May 11 and 12, 1988, and submits that the Board's decisions to waive the Assessment Center step and to appoint Ms. Small were made on May 31, 1988. (R-4, paragraph 12.)

LEGAL DISCUSSION AND CONCLUSIONS

I. THE BOARD'S MOTION FOR SUMMARY DECISION

The motion for summary disposition is an efficient means of disposing of litigation which is available when there are no genuine issues of material fact, leaving a decision to be made on legal issues. In deciding whether there are such issues of fact, all reasonable inferences must be drawn against the movant and in favor of the opponent of the motion. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954); R. 4:46-1; N.J.A.C. 1:1-12.5.

Given the above **FACTUAL DISCUSSION** and the requirement that inferences favor the petitioners, I will make conclusions assuming the following specifically:

1. The Board's May 11 and 12, 1988 meetings were held without the notice required by the Act.

2. During the May 11 and 12, 1988 meetings the Board interviewed the five finalists for the appointment. Also, the Superintendent told the Board that he believed the Assessment Center testing of the finalists could not be accomplished before June 1988; that he recommended Ms. Small for the appointment as principal; that Ms. Small was considering another job offer; and that the Board should immediately decide whom to appoint.

3. During the May 11 and 12, 1988 meetings the Board voted to waive the Assessment Center step in its appointment process and "indicated" by way of a "poll" that Ms. Small would be appointed principal.

4. After notice pursuant to the Act, the Board met on May 31, 1988 and during that meeting the matter of the appointment was publicly discussed. Specifically, (a) the Board president announced that the May 11 and 12, 1988 meetings took place without benefit of notice required by the Act and that, during the May 31, 1988 meeting, "everyone" could be heard relative to the vote on the appointment. (b) The Superintendent described the original appointment process, stated that the Assessment Center step had not been taken, and recommended the appointment of Ms. Small. (c) Petitioner Gayeski, a Board member, described his disagreement with the proposed appointment in the absence of the Assessment Center step, displayed and discussed materials relative to the finalists' qualifications, and was rejected in his motion to delay the appointment until a new appointment process could be established and fully complied with. (d) Other Board members expressed the desire to accept the Superintendent's recommendation to avoid further delay in the appointment. (e) Citizens of Hackensack and the president of a neighboring board of education were heard on the subject. (f) The Board voted 3 to 2 to appoint Ms. Small in the absence of an Assessment Center evaluation.

5. One of the Board's members voting for Ms. Small's appointment considered information he received during the May 11 and 12, 1988 meetings.

Given the above, it must be decided whether the Board's appointment during the May 31, 1988 meeting must be voided.

In the Open Public Meetings Act ("Act"), the Legislature declared the right of the public to witness in full detail all phases of the deliberation, policy formulation and decision making of public bodies, subject to certain exceptions. N.J.S.A. 10:4-7.

Action by a public body at a meeting which does not conform with the provisions of the Act is voidable by way of a proceeding in lieu of prerogative writ in the Superior Court within 45 days after the action sought to be voided has been made public; provided, however, that the public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with the Act and other applicable laws. N.J.S.A. 10:4-15. The Commissioner of Education, having complete power to hear and determine all controversies and disputes arising under school laws, N.J.S.A. 18A:6-9, may also determine issues arising under the Act as they relate to controversies under the school laws. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184, 187 (App. Div. 1979). Therefore, issues in this matter not previously in a case before the court may be determined by the Commissioner.

A. The Board's May 31, 1988 meeting and the requirement of de novo action.

The Board does not dispute that its May 11 and 12, 1988 meetings were held in violation of the Act, given the lack of notice required by N.J.S.A. 10:4-9. The petitioners do not dispute that the May 31, 1988 meeting was held in compliance with the Act's notice requirement.

Assuming arguendo that the Board did decide to appoint Ms. Small during the May 11 and 12, 1988 meetings, the question is whether the Board acted lawfully and engaged in a bona fide de novo consideration of the matter during the May 31, 1988 meeting. If the petitioners can show there was no such de novo action, the appointment should be voided. On the other hand, if a fair reading of the evidence relative to the May 31, 1988 meeting would lead to the conclusion that there was a bona fide de novo consideration and decision, the appointment should not be voided.

The courts generally construe the "de novo" language of N.J.S.A. 10:4-15 to require a public body to act anew in strict compliance with the Act, but also recognize that the remedial section contemplates "maximum flexibility" in rectifying action by the public body which falls short of the standards of the Act. Polillo v. Deane, 74 N.J. 562, 579-580 (1977); see also, Houman v. Mayor and Coun. Bor. Pompton Lakes, 155 N.J. Super. 129, 164-165 (Law Div. 1977).

In keeping with the notion of maximum flexibility, Judge Murphy therefore issued the broad order that the Board act "in compliance" with the Act relative to the impending appointment of a principal. Judge Murphy declined to enjoin the Board or order it to show cause why the May 11 and 12, 1988 "appointment" should be voided (P-2).

Relative to Count I of the petition, during a de novo meeting, in its sound discretion the public body may utilize so much of the testimony and evidence acquired in its original effort as it deems appropriate, so long as the decision is arrived at in public. Polillo v. Deane, at 580. See also, Voll v. B.O.E. of Ridgewood and Stewart, OAL DKT. NO. EDU 2772-85 (Feb. 26, 1986), Comm'r of Ed. (April 14, 1986), State Bd. of Ed. (July 1, 1987), wherein the Commissioner also endorses this practical approach. Note also, relative to the May 11 and 12, 1988 meetings, that the interviewing of job applicants in closed meetings has been upheld by the courts. Jones V. East Windsor Reg. Bd. of Ed., 143 N.J. Super. 182 (Law Div. 1976). Therefore, I **CONCLUDE** that the Board did not violate the Act when a Board member voting for the appointment considered information obtained during a prior meeting which was not held in conformance with the Act.

Relative to Count II of the petition, even drawing all inferences in favor of petitioners, I must also **CONCLUDE** that the Board's May 31, 1988 meeting constituted valid de novo action. The minutes of the meeting demonstrate a candid admission of the lack of proper notice concerning the May 11 and 12, 1988 meetings; a review of the originally contemplated appointment process; a disclosure and debate relative to the absence of the Assessment Center step in the process; a review of the Staff Committee's rankings of the candidates and the Superintendent's recommendation; expression of the desire to avoid delay and to accept the Superintendent's recommendation; comments from citizens of Hackensack and a neighboring board president; and a vote to appoint held in public view.

The Commissioner has previously pointed out that the right of the public "to be present" at a meeting should not be confused with "public participation" in the public body's action. Voll v. B.O.E. of Ridgewood and Stewart, at 49. Therefore, it may even be said that the Board went beyond its duty under the Act when comments from the public and neighboring board president were allowed during the May 31, 1988 meeting. In any event, I **CONCLUDE** that the Board did not wrongfully prevent public debate concerning the appointment of Ms. Small.

Relative to Count III of the petition, the petitioners' allegation that the Board members wrongfully refused to recognize that Ms. Small was an "unsuitable candidate" because she "renegged" on a promise to serve as principal in a neighboring board's school is really a disagreement with the Board's appointment process and judgment.

Absent proof of illegality or impropriety, a board's broad discretionary authority to employ someone is entitled to the usual presumption of correctness. Schinck v. Bd. of Ed. of Westwood Consol. School Distr., 60 N.J. Super. 448 (App. Div. 1960), Quinlan v. Bd. of Ed. of North Bergen, 73 N.J. Super. 40, 46 (App. Div. 1962). I must **CONCLUDE** on this record that the Board reasonably considered and rejected the possibility that Ms. Small was unsuitable and instead found, as the president of the Fair Lawn Board of Education admitted, that she was a "fine educator" and worthy of the appointment as principal.

B. The Board's appointment without benefit of the Assessment Center evaluation step contemplated in the original appointment process.

Relative to Count IV of the petition, petitioners allege no violation of statute or state regulation in the selection process, only of the Board's own policy.

Local boards of education have authority to make, amend and repeal rules for their own government, but a board is not bound by its own rules where, as here, no vested right is shown to be involved. See, Polonsky v. Red Bank B.O.E., et al. 1967 S.L.D. 93, at 95; Blessing v. B.O.E. of Palisades Park, et al., 1974 S.L.D. 1133, Monsees v. Bloomingdale B.O.E., 1982 S.L.D. 1384. Contrast with, Buzinky v. B.O.E. of Clifton, OAL DKT. NO.

EDU 2899-86 (Sept. 4, 1986), Comm'r of Ed. (Oct. 20, 1986), State Bd. of Ed. (March 4, 1987) wherein the Board failed to comply with state regulations.

Moreover, the Board lawfully deleted the Assessment Center step from its selection process by its May 31, 1988 vote to appoint Ms. Small in the absence of the Assessment Center step.

I therefore **CONCLUDE** that the Board did not act wrongfully in making its appointment without benefit of an Assessment Center evaluation.

The Board's motion for summary decision is hereby **granted.**

II. THE MOTION TO AMEND THE PETITION

Generally, the OAL acquires jurisdication over a matter only after it has been determined to be a contested case by an agency head, who has transmitted it for filing in the OAL. N.J.A.C. 1:1-3.2(a).

On June 20, 1988, the petition here was filed with the Commissioner. See, N.J.A.C. 6:24-1.2. The petition, which sought only that the appointment of Ms. Small be voided, was transmitted by the Commissioner to the OAL, where it was filed on July 18, 1988.

Generally, pleadings may be "freely amended" in the interest of efficiency and expediency. However, if the amendment is substantially distinct from the original claim, jurisdiction over the new matter starts with the agency head who may act on it or transmit the matter to the OAL, which only then obtains jurisdiction. N.J.A.C. 1:1-3.2(a).

In the proposed amended petition, petitioners allege violations of the Act which began well before the May 31, 1988 Board meeting and "continue." Petitioners do not seek to void any additional actions by the Board during this period and such claims may be out-of-time for many of the Board actions anyway. See, N.J.S.A. 10:4-15 and N.J.A.C. 6:24-1.2. Instead, petitioners demand that the Commissioner order the Board "to stop future violations."

Although the May meetings form a part of the alleged pattern of violations, I **CONCLUDE** that the claim and relief sought in petitioners' proposed amended petition is quite distinct from that of the petition filed with the Commissioner. For that reason, I **CONCLUDE** that OAL should not arrogate to itself jurisdiction over the new matter. If it cannot be amicably resolved, it may be instituted pursuant to N.J.S.A. 18A:6-9 and N.J.A.C. 6:24-1.2. The Commissioner may then take appropriate action.

Moreover, this matter was the subject of a prehearing order entered on September 28, 1988, which provided that discovery would be completed by October 31, 1988 and which provided for hearing dates of February 6, 7 and 8, 1988. I **CONCLUDE** that in these circumstances it would prejudice respondent to allow amendment and a new claim at this late date. N.J.A.C. 1:1-6.2.

The motion to amend and institute the new petition here must be **DENIED**.

ORDER

I **ORDER** that the Board's motion for summary decision be granted and the petition **DISMISSED** with prejudice.

I **ORDER** that the petitioner's motion to amend the petition be **DENIED** without prejudice.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

Jan 20, 1989
DATE

JOHN R. TASSINI, ALJ

1/25/89
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 25 1989
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

ro/e

FRANK GAYESKI ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto. Petitioners' reply to the Board's reply exceptions was not considered, however, as there is no provision in law permitting such submissions.

Petitioners first proffer a Statement of Facts as they perceive them. Such recitation is a verbatim restatement of their version of the facts as set forth at pages 2-7 of their Brief in Opposition to Motion for Summary Judgment. Such language is incorporated herein by reference.

Thereafter, petitioners submit three exceptions which are summarized in pertinent part below.

Exception I states:

> THE RECOMMENDED DECISION COMPLETELY FAILS TO ADDRESS MAJOR ARGUMENTS ADVANCED BY PETITIONERS.
>
> A. The Recommended Decision Relies on Polillo v. Deane and Voll v. Board of Education of Ridgewood, Failing to Understand That There Are Major Factual Differences Between That Case (sic) and The Instant One.
>
> (Exceptions, at p. 7)

Petitioners' position in this exception is summarized in its conclusion. They contest the ALJ's reliance on Polillo v. Deane, 74 N.J. 562 (1977) and Voll v. Board of Education of the Village of Ridgewood, decided by the Commissioner April 4, 1986. Petitioners would distinguish those two cases from the instant facts.

> ***[I]n both Polillo and Voll the action sought to be voided was in fact voided. Further, and more significantly, while testimony and evidence addressed at earlier meetings was (sic) permitted

> to be used in subsequent considerations, that testimony and evidence had been advanced at either properly noticed meetings or meetings which were noticed but to which there were technical deficiencies. Further, there was a written transcript/record open to public inspection in both those cases. Those facts were an express basis for allowing the previously addressed testimony/evidence to be used. Here the meetings were held without any notice at all to the public and there was no record public or otherwise of the information advanced at the May 11 and May 12 meetings. Hence Polillo and Voll are completely inappropriate.
>
> (Exceptions, at p. 21)

> B. By May 31 Action Had Already Been Taken By The Board to Alter The Selection Process. This Action Count (sic) Not Be Cured Retroactively. The Administrative Law Judge Failed to Recognize This. (Id., at p. 13)

Petitioners claim that the public had a legitimate expectation that independent assessments would take place as scheduled for May 18, 1988. "It is impossible how, when the assessments were scheduled to be conducted on May 18, a motion enacted on May 31 to waive the assessment process can be construed as de novo. It could only be construed as what it was, an ex post facto attempt to justify an action already taken." (Id.) Petitioners add that they find nothing factually similar in either Polillo or Voll.

Exception II states:

> THE ADMINISTRATIVE LAW JUDGE CONFUSES "PUBLIC DEBATE" WITH "DEBATE BY THE PUBLIC."
>
> (Id., at p. 14)

Petitioners contend that their argument that it was the Board's debate, not public debate, which was the focus of the second count of their Petition of Appeal was not even addressed in the initial decision.

Petitioners then explicate a nearly verbatim review of the argument posited at hearing and in its Brief in Opposition to the Motion for Summary Judgment at pages 14-17. Averring that Board counsel's advice that it not disclose or discuss the ranking sheet of applicants for the position of principal in public session was inappropriate, petitioners claim the Board's public debate was chilled in considering qualifications and merits of each candidate by such advice.

Exception III states:

> THE ADMINISTRATIVE LAW JUDGE ERRED IN FAILING TO PERMIT AMENDMENT OF THE PETITION. (Id., at p. 19)

Petitioners would amend paragraph 5 of the petition to read

> 5. The Board of Education of the City of Hackensack has had a long and continuing history of noncompliance with the Open Public Meetings Act. [underlined portion represents new material]. (Id., at p. 20)

Petitioners claim such an amendment is minor and appropriate to show the continuing nature of the violations it contends are ongoing relative to OPMA at respondent's Board meetings. They claim such amendment would create no prejudice to respondent and would not unduly complicate the case. Thus, they claim, the action denying the amendment makes no sense and should not be adopted by the Commissioner.

The Board's reply exceptions would have the Commissioner affirm the initial decision. More specifically, it submits five points of rebuttal to petitioners' exceptions, which are summarized in pertinent part below.

Point I states:

> PETITIONERS DO NOT TAKE EXCEPTION TO JUDGE TASSINI'S FACTUAL FINDINGS
> (Reply Exceptions, at p. 2)

The Board notes that petitioners' exceptions include a verbatim recitation of the Statement of Facts from their brief. The Board claims such recitation is irrelevant because they did not take exception to the ALJ's findings of fact. The Board claims the Commissioner must accept as undisputed the ALJ's factual findings given petitioners' failure to take exception to them.

Point II states:

> JUDGE TASSINI PROPERLY INTERPRETED AND APPLIED THE POLILLO AND VOLL DECISIONS (Id.)

The Board avers that the ALJ correctly framed the issue in this case in stating "***if a fair reading of the evidence relative to the May 31, 1988 meeting would lead to the conclusion that there was a bona fide de novo consideration and decision, the appointment should not be voided." (Id., quoting initial decision, ante) The Board further avows Polillo, supra, and Houman v. Mayor and Council of Pompton Lakes, 155 N.J. Super. 129, 164-165 (Law Div. 1977) "contemplate 'maximum flexibility' in allowing public bodies to cure violations of the Open Public Meetings Act ('OPMA')." (Id., at p. 3) The Board takes the position that petitioners erroneously equate the requirement for a public decision with the necessity of releasing the previously garnered information when it acts to correct a voidable action. To cure a defective action in both Polillo and Voll the prior testimony in evidence had to be made public because it was not protected under any exception to the Open Public Meetings Act, the Board claims. In contrast, candidate

interviews may be held in private "'unless all the individual employees or appointees whose rights could be adversely effected (sic) request in writing that such matter or matters be discussed at a public meeting'. N.J.S.A. 10:4-12(b)(8)." (Id.) The Board claims no such request was ever made in this matter.

As to petitioners' reliance on Rice v. Union County Regional High School Bd. of Ed., 155 N.J. Super. 64, 75 (App. Div. 1977), the Board asserts that the Appellate Division held that the "'statutory privilege [to request public discussion of personnel matters] cannot be transferred to a third party by implication'." (Id., at p. 4) It argues that while a request from the public that candidate interviews be held in public is conceivable, a board might choose to ignore the request, as petitioners correctly observe in their exceptions.

The Board claims petitioners mischaracterize Polillo and Voll in other ways as well. The Hackensack Board, it claims, in contrast to the Board in Polillo, held a public meeting complete with extensive Board debate and public comment. Its only prior misstep, it avows, was to hold lawful private interviews without first advising the public of those dates rather than excluding the public from an appropriate public discussion, and it cites Exhibit R-1 in support of this position. In Voll, the Board quotes, the Commissioner "permitted the public body to 'use so much of the testimony in evidence acquired over the course of general district consideration of the question of reorganization in original investigatory efforts as hereafter it deems necessary and appropriate'." (Id., at pp. 5-6) It submits that the ALJ correctly held that effective cure occurred pursuant to N.J.S.A. 10:4-15 when the Board acted to cure its technical OPMA violation, and also in finding that the information at issue need not be made public to be relied upon.

Moreover, the Board suggests that petitioners' attempt to distinguish Jones v. East Windsor Regional Bd. of Ed., 143 N.J. Super. 182 (Law Div. 1976) by citing Gannett Satellite Information Network v. Bd. of Ed. of Borough of Manville, 201 N.J. Super. 65 (Law Div. 1984) does not withstand scrutiny. It avers that the Gannett court did not follow Jones because of the facts in the Gannett case. "The Jones holding that public bodies may interview perspective (sic) employees in executive session, absent a request for public hearing, remains good law. Respondent did not exclude the public from the entire deliberative process but only from candidate interviews. The Jones case expressly protects such action." (Reply Exceptions, at p. 7)

Point III states:

> JUDGE TASSINI CORRECTLY FOUND THAT THE BOARD ACTED PROPERLY IN ALTERING ITS OWN PROCEDURES AT THE MAY 31 PUBLIC MEETING (Id.)

In response to petitioners' allegation that the Board could not retroactively cure its decision to amend the selection process,

the Board argues that their argument fails, even assuming arguendo that the Board altered the selection process at the earlier private sessions. It claims it has the right to alter its own procedures, and that it did so here after extensive public debate at the May 31 meeting. "Mr. Gayeski and the public were given a full opportunity to present their arguments in favor of rescheduling the assessment testing, but the Board acted otherwise. It is now inappropriate to challenge the Hackensack Board's discretionary judgment merely because their preference did not carry the day." (Id., at p. 8)

Point IV states:

JUDGE TASSINI PROPERLY CHARACTERIZED PETITIONERS' "PUBLIC DEBATE" ALLEGATION

Citing Count II, Paragraph 15 of the Petition of Appeal, the Board alleges that petitioners' allegation as to which public debate is in question is not at all clear. Count II, Paragraph 16 states, the Board claims, "inaccurate legal advice *** chilled the public debate to the extent that there could not be a free flow of ideas and inhibited the opportunity to change the opinions of Board members." The Board construed this to mean that public debate refers to the debate of citizens attending the Board meeting rather than the debate of other Board members.

Moreover, the Board claims nothing in R-1 reveals that the Board's debate was inhibited by legal advice, nor that Mr. Gayeski or Mrs. D'Arminio could have, but for the advice, persuaded the majority of the Board to oppose the resolution. Further, the Board asserts that the advice of Board counsel not to release the material was legally correct, and cites its Brief in Support of Motion for Summary Decision at pages 13-14 in support of this contention. It claims the public has no inherent right to demand public discussion of personnel matters.

Point V states:

JUDGE TASSINI CORRECTLY DENIED PETITIONERS' MOTION TO AMEND THE VERIFIED PETITION

Alleging that this matter concerns the appointment of Ann Small to a principalship position, the Board claims the ALJ properly prevented petitioners from impermissively expanding the scope of the case. To allow amendment after summary judgment issues had been fully briefed and a decision pending would have unduly prejudiced respondent, the Board claims.

For the foregoing reasons, as well as the argument contained in its Summary Judgment brief, the Board submits that the Commissioner should adopt the ALJ's decision to dismiss the Petition of Appeal with prejudice.

Upon his careful and independent review of the record, the Commissioner affirms the initial decision for the reasons expressed therein. He adds the following.

First, the Commissioner notes the uncontested fact that on May 11 and 12, 1988 the Board held closed/executive meetings without notice required by N.J.S.A. 10:4-9, during which it interviewed the five finalists for the principalship at the Fairmount School in respondent's district, thus creating a voidable action, in deciding to appoint Ms. Small principal at the May 11 and 12 meetings. (See Initial Decision, ante, Finding of Fact No. 5.) Having recognized its error, it was appropriate that the Board take remedial action to rectify the failure to conform with N.J.S.A. 10:4-6 et seq. which it claims it did on May 31, 1988.

The Commissioner agrees with the ALJ that the Board "acted lawfully and engaged in a bona fide de novo consideration of the matter during the May 31, 1988 meeting," (Initial Decision, ante)

As stated by the ALJ, the remedial section of the OPMA, N.J.S.A. 10:4-15, "contemplates 'maximum flexibility' in rectifying action by the public body which falls short of the standards of the Act. Polillo v. Deane, 74 N.J. 562, 579-580 (1977); see also, Houman v. Mayor and Coun. Bor. Pompton Lakes, 155 N.J. Sup. 129, 164-165 (Law Div. 1977)." (Initial Decision, ante) The Commissioner further agrees with the ALJ's findings that the public body may use whatever testimony and evidence was acquired in its original deliberations as it deems appropriate, so long as the decision is arrived at in public. He further agrees with the ALJ that the interviewing of job applicants in closed meetings has been upheld by the courts. (See Initial Decision, ante) As to the use of information gleened at the meetings of May 11 and 12 in reconsidering its decision to hire Ms. Small taken at the May 31 meeting, the Commissioner notes that there is no suggestion in the record that there was anything wrong with the information attained during the earlier two meetings; rather, the problem presented in this case is whether the meeting where such information was considered was conducted in compliance with the OPMA, allowing adequate public involvement. Hence, the Commissioner finds no merit in petitioners' attempt to distinguish Jones, supra, from the instant matter by citing Gannett, supra, by suggesting that "[w]here, as here, the interviews pertain to what are policy questions the public has every right to request that the interviews take place publicly." (Exceptions, at p. 12)

As noted by the Board in its reply exceptions, "[t]he Gannett court distinguished Jones because 'the personnel exception is not an excuse for excluding the public from the entire process', which the public body had done in that case." (Reply Exceptions, at p. 6 citing Gannett, supra at p. 69) In the instant matter, the Board did not exclude the public from the entire deliberative process, but only from the candidate interviews, which it may do for reasons of maintaining confidentiality. See Jones, supra.

The Commissioner further finds that the Board was well advised by its counsel not to disclose ranking sheets or other information relative to the comparative qualifications of the candidates for the position for the sake of preserving the

privileged nature of such information. It need only have returned to public session, after duly informing the public of its intent to discuss personnel matters in closed session, and on public record state its resolution pertaining to such deliberations should it have decided in closed session to take formal action on that which was discussed. N.J.S.A., 10:4-12(b)(8) While recognizing that Rice, supra, speaks to an individual employee's right to forego private-session discussion of his personnel matter in favor of providing a public forum in which to discuss such concern, Rice is not applicable to the instant matter. First, the option of requesting that a personnel matter be heard in public session is exclusively that of the affected employee, not of a third party or the public in general. Moreover, any decision on Ms. Small's part to request that the matter concerning her appointment as principal be debated publicly would not free the Board from considering the other candidates' privacy and to protect the confidentiality of such privileged information, unless requests from all candidates indicated that all desired the deliberations be made public. No such showing exists in the record presented by petitioners herein. Along this line of argument, the Commissioner adds his accord to the ALJ's conclusion that the right of the public to be present at the open portions of a meeting of a Board "should not be confused with 'public participation' in the public body's action. Voll v B.O.E. of Ridgewood and Stewart, at 49." (Initial Decision, ante) For the reasons expressed in the initial decision at pages 11-12 as amplified herein, the Commissioner finds and determines that the Board did not wrongfully prevent public debate concerning the appointment of Ms. Small as principal of Fairmount School.

Moreover, the Commissioner determines that the May 31, 1988 meeting was indeed a valid de novo action notwithstanding the affidavit from one Board member that he relied on information acquired from the May 11 and 12 meetings in deciding how to vote on Ms. Small's appointment. As noted on the bottom of page 11 of the initial decision:

> The minutes of the meeting demonstrate a candid admission of the lack of proper notice concerning the May 11 and 12, 1988 meetings; a review of the originally contemplated appointment process; a disclosure and debate relative to the absence of the Assessment Center step in the process; a review of the Staff Committee's rankings of the candidates and the Superintendent's recommendation; expression of the desire to avoid delay and to accept the Superintendent's recommendation; comments from citizens of Hackensack and a neighboring board president; and a vote to appoint held in public view.

Aside from these remedial actions, albeit that public release of personnel information was inappropriate under the instant circumstances, the Commissioner is at a loss to understand how a Board member can be compelled to forget what had transpired at earlier meetings. Moreover, the Commissioner reiterates that the

content of the discussion at the May 11 and 12 meetings is not at issue in this matter; rather, whether the May 31 meeting was held according to the dictates of the OPMA is the concern at bar. Consequently, the Commissioner adopts as his own the conclusion of the ALJ that the Board did not violate the OPMA when it voted on May 31, 1988 to appoint Ms. Small notwithstanding the fact that one Board member, according to his own affidavit, considered information gleened during a prior meeting which was not conducted in conformity with the OPMA. See generally, Voll, supra at 57. The Commissioner thus dismisses as being without merit both Counts I and II of the Petition of Appeal.

As to Count III of the petition, the Commissioner adopts as his own the finding of the ALJ that "[a]bsent proof of illegality or impropriety, a board's broad discretionary authority to employ someone is entitled to the usual presumption of correctness." [citations omitted] (Initial Decision, ante) He further agrees with the ALJ's assessment that whether Ms. Small was an unsuitable candidate for the position of principal is one for the Board's consideration, not the Commissioner's. Based on the record before him, the Commissioner concurs that there is no showing of illegality or impropriety in the Board's determination in this regard and, thus, Count III is dismissed as being without merit. Schinck v. Bd. of Ed. Westwood Consol. School Distr., 60 N.J. Super. 448 (App. Div. 1960)

As to Count IV, alleging that the Board's appointment without benefit of the Assessment Center evaluation step contemplated in the original appointment process was arbitrary, the Commissioner notes that the use of an Assessment Center in this hiring was not a Board policy at all but, rather, as noted in R-4, Affidavit of Anthony Marseglia, Superintendent of the Hackensack Schools, was "procedure for hiring a principal***." (emphasis supplied) (R-4, at p. 1) As such, it was within the Board's prerogative to abandon such procedure should the circumstances warrant it as occurred in this case due to the inability to obtain a timely and satisfactory assessment.

Finally, for the reasons expressed in the initial decision, the Commissioner adopts the conclusion of the ALJ concerning petitioners' Motion to Amend their Petition of Appeal for the reasons stated in the initial decision, ante.

Accordingly, the Commissioner adopts the initial decision for the reasons stated therein as implied in this decision and directs the Board's Motion for Summary Decision be granted and the Petition of Appeal be dismissed with prejudice. It is further directed that petitioners' Motion to Amend the petition be denied without prejudice to petitioners to file anew if they believe there are allegations to be made after the events mentioned in the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

March 13, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6388-88
AGENCY DKT. NO. 204-7/88

GLOUCESTER COUNTY
EDUCATIONAL SERVICES COMMISSION,
Petitioner,
v.
SALLY JAMROGOWICZ,
Respondent.

Wayne C. Streitz, Esq., for petitioner (Ware & Streitz)

Morris G. Smith, Esq., for respondent (Freeman, Zeller & Bryant)

Record Closed: December 14, 1988 Decided: January 30, 1989

BEFORE DANIEL B. MC KEOWN, ALJ:

On June 28, 1988 the Gloucester County Educational Services Commission (or Board) certified charges of incapacity and unbecoming conduct to the Commissioner of Education on July 1, 1988 for determination pursuant to N.J.S.A. 18A:6-10, the Tenure Employees' Hearing Law, against Sally Jamrogowicz (respondent), a teacher with a tenure status in its employ. The Board simultaneously suspended respondent from her teaching duties without pay pursuant to N.J.S.A. 18A:6-14. On August 12, 1988 a representative of the Commissioner reminded respondent that she had not yet filed with the Department an answer to the charges as is required at N.J.A.C. 6:24-5.3 and 6:24-1.4. After respondent filed her answer on August 25, 1988 the Commissioner then transferred the matter on August 29, 1988 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was conducted in the matter September 27, 1988. Between that date and December 5, 1988 when it was

agreed that a hearing in the matter would commence, respondent's motion to dismiss the charges and a motion to adjourn the hearing was denied. The hearing commenced December 5, 1988 and concluded December 12, 1988 at the Mantua Municipal Court. The record closed December 14, 1988. This initial decision, prepared without benefit of a stenographic transcript of testimony, concludes that the proofs fail to establish respondent is incapable or incapacitated from performing her duties as a teacher. The conclusion is further reached that respondent's conduct from time to time over the years manifested unbecoming conduct which warrants some discipline, but not termination of employment.

BACKGROUND FACTS

According to Dorothy Van Horn, the supervisor of special services for the Board during the past nine years, the Gloucester County Educational Services Commission operates county-wide educational projects including pre-school education programs for handicapped youngsters. All teachers employed by the Board for each of four pre-school locations operated by the Board are properly certified as teachers pursuant to rules and regulations of the State Board of Education. Respondent has been assigned at all time to the Board's pre-kindergarten program which is housed at the Memorial School which is under the jurisdiction of the Pitman Board of Education.

Ms. Van Horn met respondent during the 1980-81 academic year. Ms. Van Horn testified that she observed respondent in the classroom and evaluated her performance at least three times a year while respondent was a probationary teacher, and at least once each year since respondent acquired tenure. Respondent taught a variety of handicapped youngsters including communication-handicapped, physically impaired, autistic, and youngsters who are afflicted with Downs syndrome. Ms. Van Horn never observed any misconduct by respondent although she, Ms. Van Horn, is the complaining party against respondent here on behalf of the Board.

Respondent was initially employed by the Board for 1978-79 academic year as a teacher of the handicapped on the pre-kindergarten level. Respondent taught auditorily-handicapped youngsters in the morning session and communication-handicapped youngsters in the afternoon. Pre-kindergarten youngsters range in age from 3 to 5 years. Respondent describes the youngsters with whom she works as having very little if any

language skills or social skills. Respondent therefore attempts to get the youngsters accustomed to the social setting of being with others while simultaneously getting them to know, understand, and use basic sign language words.

Respondent's established classroom goals are to insure each pupil becomes independent, responsible, and communicative. Respondent believes that the goals of pupil independence and responsibility are necessary because she believes parents of her pupils refuse to accept as fact their child is handicapped and must learn or acquire knowledge in the face of such handicap. Respondent believes parents baby the child and thus the child lacks self-sufficiency. Respondent does try to work with the parents in getting the children to be self-sufficient.

Respondent is assisted in her classroom by a teacher's aide, plus students from the Gloucester County Community College who do, individually throughout the year, five week field assignments as part of regular college studies. The college aide changes every five weeks. In addition, respondent's classroom is visited by a speech pathologist on a regular basis. According to the testimony of witness Joan Traenkner respondent had five pupils in the morning session and nine pupils in the afternoon session during, it is presumed here, 1987-88. No specific evidence of pupil enrollment for other years is in this record.

Respondent was undergoing a very difficult pregnancy during the September-January semester of 1987. Finally, respondent had to go on a maternity leave of absence on January 11, 1988. When replacement teacher Mary Wichert was named, and Ms. Van Horn was assisting her become organized in respondent's classroom, Ms. Van Horn learned of respondent's alleged misconduct. Ms. Van Horn spoke with teachers' aides who worked with respondent in prior years as well as those presently assigned her, speech pathologists and therapists, as well as parents. Persons who testified before me and whose testimony shall be reported are those persons who agreed to testify against respondent and who had something to say according to Ms. Van Horn.

The charges certified by the Board against respondent on June 28, 1988 are as follows:

STATEMENT OF CHARGE: Incapacity and unbecoming conduct.

Sally Jamrogowicz, a teacher under tenure of position within the employment of the Gloucester County Educational Services

Commission, has exhibited conduct unbecoming a school teacher and has demonstrated an incapacity to hold a teaching position within the responsibilities of her position for the following reasons:

1. The teacher has abused preschool children under her supervision and care through unreasonable disciplinary actions, intentionally secreted from supervisory personnel. These abuses have occurred on a continuing basis from approximately 1980 to 1988 when the teacher was granted a maternity leave and are more specifically set forth as follows:

A. The preschool students under the supervision and care of the teacher are handicapped students with auditory and other physical and mental impairments. During the applicable time period, the teacher would occasionally pull the hair of her students in order to gain their attention or to stop the student from demonstrating some behavior that offended the teacher.

B. On numerous occasions during the applicable time period when a student was not completing an assigned task to the satisfaction of the teacher or was conducting himself or herself unsatisfactorily in the teacher's opinion, the student would be physically pulled from his or her chair and physically escorted to the corner of the room, required to stand with his or her nose to the wall for long periods of time, often exceeding an hour in duration. On many occasions the student would be repeatedly told by the teacher in a loud and offensive manner that the student was a "bad girl" or "bad boy," as applicable to the gender in question. On many occasions, in addition, the student would be thereafter directed back to his or her seat and required to sit without a snack while the other students were enjoying their customary snack. On some occasions the physical manner in which the teacher handled the children by pulling the children from their seats and escorting them to the corner for punishment was so rough that the student would fall one or more times to the floor.

C. One impaired child in 1985 had a problem controlling her bladder. The teacher became annoyed with this student and on one occasion made her sit for a lengthy period of time in her wet pants and demanded that she clean up her mess, after repeatedly telling her that she was "bad." On other occasions the teacher would pull the hair of this child under the pretext that she needed to do so in order to obtain the child's eye contact.

D. On another occasion, in 1985, one of the students who was an autistic child would occasionally laugh for no apparent reason. The teacher would often on these occasions pull the student's hair while repeating to the student in a very loud voice to "be quiet."

E. On many occasions during the applicable period the teacher would not permit selected students to eat the customary snacks with the rest of the students as punishment for

not completing an assignment to the satisfaction of the teacher. On many of these occasions the teacher would not provide the necessary instruction to the student so that he or she would be able to understand how to complete the task.

F. On one occasion in the 1986-1987 school year the teacher was apparently upset over a student improperly flushing the toilet and thereafter physically escorted the student into the bathroom in a rough and abrasive manner, resulting in the student's head colliding with a hard surface in the bathroom, causing a large lump on the student's head with uncontrollable whimpering and crying thereafter. This injury was not reported to the administration.

G. On many occasions when a student did not complete an assigned task to the satisfaction of the teacher, the teacher would isolate the student in a seat behind a portable barrier for the remainder of the class time, leaving the student in a frustrated and bewildered state, unable to complete the task and presumably not knowing how to do anything about it.

2. The teacher within the applicable time period (from 1980 to 1988) would often demean the students through unreasonable verbal statements having no semblance of educational value. Specific examples of conduct in this regard are as follows:

A. Over the applicable period of time the teacher would repeatedly tell one or more of the students that "I am going to beat your brains out."

B. On one occasion during the applicable time period, the teacher sternly told a student during a time when some food was being prepared: "The water is boiling now. Put your hands in it."

C. The mother of one student apparently did not insure that the student's socks were changed enough according to the opinion of the teacher, resulting in the teacher continuously ridiculing the student about wearing the same socks. This ridicule greatly upset the student who did not have the ability or understanding to overcome the problem perceived by the teacher.

D. On another occasion during the applicable period, a student was told that Santa wouldn't come because the student didn't keep his hands clean.

E. On numerous occasions throughout the applicable time period, the teacher would repeat (often continuously) in a very loud voice that the student was "bad" when it was apparent that the student had no idea what the teacher was shouting about.

F. On repeated occasions during the applicable time period, the teacher would loudly command that a student "hurry up" to complete a task or an assignment when it was obvious that the student did not understand what he or she was to complete. Often this would result in the student crying or rigidly sitting motionlessly with an expression of bewilderment or fear on his or her face.

3. The teacher demonstrated unprofessional and unbecoming conduct toward personnel assigned in the classroom to assist her. Specific acts of misconduct are as follows:

A. In the 1987 school year the teacher struck a student teacher under her supervision across the arm and chest to prevent the student teacher from organizing activity cards which were thrown by the teacher in a haphazard manner in front of a student while at the same time loudly reprimanding the student teacher to "leave the cards alone." The student thereafter sat there in a rigid manner with a bewildered look, unable to even begin the assignment.

B. In the 1987 school year a student with cerebral palsy was having great difficulty picking up pieces of wet strips of paper to complete his portion of an assigned task to assist in the making of a pinata. The student teacher attempted to fluff up the strips of wet paper so that the student, who was becoming very frustrated, could at least begin the assigned task. The teacher abruptly and forcefully slapped the top of the student teacher's hand as she began to fluff the strips of paper, verbally reprimanding the student teacher in a very loud voice.

C. On one occasion in 1980 the teacher left the classroom early on a Friday, leaving an aide in charge, indicating to the aide that she was going to visit an old classmate in West Virginia. The teacher did not return to the classroom until Tuesday, leaving the aide in charge of the classroom on the following Monday as well as the remainder of Friday. The teacher's supervisor and the administrators had no knowledge of this absence.

D. On frequest occasions in 1980 and thereafter, the teacher would be late in coming to the morning classes. She would tell the aide that she stopped by the Commission office or was accomplishing some other educationally related duty while in fact the teacher's supervisor and other administrators had no knowledge of her alleged visits to the Commission office or knowledge of any other educationally related duties preventing her from appearing on time in the classroom.

E. The teacher would on occasion during class periods dedicate time to her personal business, such as writing checks, paying personal bills and balancing her checkbook while her aide would assume the primary responsibility of teaching the students.

F. On some occasions after the birth of the teacher's child, she would bring the infant into the school with her, often giving more attention to her infant child, leaving the primary duties of teaching to her aide.

4. On many occasions throughout the applicable time period (1980-1988) the teacher intentionally misled the aides who assisted her, as well as other support staff, that she had a "social and good friend" relationship with her immediate supervisor which went beyond the normal employee-employer relationship. This deception was wilfully used to cause the support staff to feel their positions would be in jeopardy if the teacher's conduct was reported to the supervisor.

Thus, the Board claims respondent engaged in specific acts which constitute unbecoming conduct and/or conduct which shows her incapacity to satisfactorily perform the functions of a teacher. The Board's proofs in support of the specifications to the charges and respondent's defense entered in opposition to the charges shall now be considered, after which findings shall be presented, followed by a discussion and conclusion. It is noted that the executive director of the Commission reported respondent's alleged conduct to the Division of Youth and Family Services which, following an investigation, found no basis to proceed against respondent.

PROOFS IN SUPPORT OF CHARGES

Supervisor Van Horn testified that during January 1988 when she was assisting respondent's replacement teacher, Mary Wichert, in organizing the classroom, she discovered respondent, class records were in a highly disorganized state. Van Horn testified that she became angry and began to question Wichert and aides who worked with respondent. Van Horn explained that it was at that time that she began to learn how respondent treated children in her care. Van Horn then instituted steps to bring the present charges against respondent. Supervisor Van Horn admits she and respondent were "friends" though not social friends. They shared the same babysitter and respondent did loan Van Horn baby clothes.

Evaluations prepared by supervisor Van Horn on respondent's teaching performance over the years shows that Van Horn consistently rated respondent's performance as satisfactory and, in many if not most instances, as being very good. (R-2, R-3, R-4, R-5, R-6, R-7, R-8). In fact, the Board itself adopted a resolution praising respondent for her outstanding effort on behalf of parents whose children are auditorily handicapped. (R-9)

June Gruber was employed by the Board for 10 years as a teacher's aide. She was assigned to respondent's classroom in 1979-80 and remained there for 4 1/2 years. Ms. Gruber testified that respondent would arrive on many occasions after the 8:30 a.m. arrival time and that respondent would state she was at the Board's office. Ms. Gruber's recollection is that respondent reported after the 8:30 a.m. starting time several times a month. Nevertheless, Ms. Gruber testified that she did not report to supervisor Van Horn respondent's tardiness because respondent would deny being late and that she, Ms. Gruber, did not want to "make waves". Ms. Gruber testified that one time during the 1980 spring she recalls respondent having told her she was traveling to Virginia for the weekend. Respondent did not return to school until the following Tuesday, missing school on Monday. Ms. Gruber explained that she had expected respondent to return to school on Monday. No substitute teacher was called for respondent on that Monday. Ms. Gruber testified that on other occasions she recalls that during 1980 respondent having gone to the "beach" and not reporting for work the following Monday because respondent explained she had sun poisoning. Ms. Gruber recalls having taught respondent's pupils on those days when respondent failed to appear. Nevertheless, Ms. Gruber did not report respondent's absences, or the fact she had to teach respondent's pupils, to any supervisor.

Ms. Gruber testified that during 1983 or 1984 respondent would oftentimes bring her newborn baby boy to school, although Ms. Gruber cannot say with accuracy how many occasions. Ms. Gruber does recall that respondent brought her baby to school during the 1984 months of September and October because she, Ms. Gruber, was then transferred to another school system. Ms. Gruber complains that respondent fed her baby in the classroom and changed his diapers. In Ms. Gruber's view, the entire class was disrupted because of respondent having her baby in the class. Ms. Gruber claims that the Board had no knowledge of the presence of respondent's baby although Ms. Gruber does recall supervisor Van Horn being present in the classroom when respondent had her baby there.

Ms. Gruber recalls respondent being extremely strict with pupil discipline but that if she, Ms. Gruber, ever saw "real physical abuse" she would have done something. Ms. Gruber contends that respondent deprived certain pupils of snack; that respondent intimidated pupils; that on one occasion respondent made a female pupil stand 2 1/2 hours because the pupil would not unbutton her coat; that respondent told her, Ms. Gruber, not to watch pupils while they were on recess playing on a jungle gym and that she should turn her back to them as she, respondent, does; and, that one time in 1981 respondent brought her three-year-old niece to school a couple of weeks.

Elma Harrick has been employed by the Board since September 1985 as a part-time speech therapist. She was assigned respondent's classroom during 1985-86 and 1986-87. During 1985-86, Ms. Harrick was in respondent's classroom 5 mornings per week, while in 1986-87 she was in respondent's classroom 5 mornings plus 2 afternoons per week. Ms. Harrick worked with her assigned youngsters in a section of the room divided by shelves during 1985-86; a room divider and a cabinet set off her space for teaching in 1986-87.

Ms. Harrick recalls observing what she calls inappropriate conduct during the afternoon session which was attended by communication-handicapped pupils. All these youngsters were pre-schoolers who were about 4 years of age. Ms. Harrick testified that while she was teaching her pupils speech, she heard respondent tell one youngster in the early part of December 1986 that Santa Claus would not visit him because his hands were dirty. She heard respondent remind a youngster that he was wearing the same socks every day. Ms. Harrick testified she heard respondent tell another youngster that his clothes were all wrinkled because his mother did not iron his clothes.

With respect to physical misconduct, Ms. Harrick testified that respondent treated one youngster, Heather, more roughly than others. As an example, Harrick says respondent would hurry Heather who was physically impaired. Heather, according to Ms. Harrick, would fall down when pushed or lifted out of the chair. Ms. Harrick testified that respondent would put Heather into the corner to stand for 30 minutes or more. If Heather turned around, respondent would communicate in sign language to her that she was "bad". When Heather was called "bad", Heather would cry. Ms. Harrick says she saw respondent push, pull, and put Heather in the corner two times a month and she had seen Heather fall down. Ms. Harrick did not report anything to supervisor Van Horn because she felt respondent and Van Horn were friends. She recalls having learned that Van Horn and respondent went to a Halloween party and that they shared a babysitter and each other's baby clothes.

Nevertheless, Ms. Harrick testified that Heather did have habits which she, Harrick, found annoying. From time to time, Heather did not want speech therapy. Ms. Harrick admits having sent Heather to a corner for discipline. However, Ms. Harrick is quick to note that she did not have Heather in the corner for longer than 10 minutes at a time. Ms. Harrick also explains that on one occasion Heather did vomit while getting speech therapy and she, Ms. Harrick, made Heather clean up the resulting mess.

Irene Sanders, employed by the Board on a part-time basis as a speech pathologist and audiologist since 1983, was assigned respondent's classroom during 1987-88. Ms. Sanders' schedule called for her to be in respondent's classroom two full days between September through December 1987.

Ms. Sanders had concerns with respondent in that Ms. Sanders believes respondent singled out youngsters for differential treatment by treating some youngsters more favorably than others. Ms. Sanders testified she observed respondent tug on the back of a pupil's hair, Michael's, during circle time. On one occasion, she observed respondent exclude the child Samantha from a group activity of bean-stringing. Ms. Sanders then observed respondent place Samantha behind a cardboard study corral for a lengthy period of time. However, Ms. Sanders admits that the cardboard study corral is often used to lessen a pupil's "distractibility" and to afford the pupil more time on task. Nevertheless, Ms. Sanders testified she heard or observed respondent often refer to Samantha as a "bad girl". In fact, Ms. Sanders testified she heard or observed respondent refer to Erica as "bad" for not having carried out respondent's direction of a preceeding day.

Ms. Sanders observed a female pupil in respondent's classroom standing near the door, very uncomfortable. Ms. Sanders testified that in her view the female pupil was comfortable when respondent was not present. Ms. Sanders observed snacks being withheld from this girl for failure to put her coat away. Ms. Sanders testified that school psychologist Ron Herman was called by respondent to the classroom regarding a pupil named Danielle. Danielle had a speech problem and she did not want to be separated from her mother. Ms. Sanders explained that occasionally Danielle was afraid to leave the coat room when her mother left in the morning. Consequently, Danielle remained in the coat room for a long period of time. The psychologist suggested to both Ms. Sanders and to respondent that to correct that fear, Danielle should be left alone while encouraging her to exit the coat room and to join the other children. Eventually, Danielle did begin to participate with other children.

On another occasion, Ms. Sanders testified that some time before Hallowe'en respondent, one of her aides, and a student teacher, presumably Mary Wichert, were making a papier mache pumpkin. Ms. Sanders heard the sound of a "slap". Mary, the student teacher, was then seen by Ms. Sanders rubbing her wrist saying, "That really hurt". Ms. Sanders then heard respondent say to Mary, "Don't you dare try to help him".

Ms. Sanders admits she brought her children to respondent's classroom and received permission from supervisor Van Horn to do so.

Ms. Sanders did not report any of the foregoing to supervisor Van Horn because respondent had been teaching for 8 or 9 years with the Board and supervisor Van Horn, in Ms. Sanders' view, knew exactly the way respondent treated her pupils. Furthermore, Ms. Sanders did not believe it appropriate to be critical of another professional. In response to inquiries from supervisor Van Horn, Ms. Sanders did prepare a memorandum (R-13) on February 7, 1988 in which is detailed the examples of respondent's alleged "inappropriate behavior". There, Ms. Sanders discusses respondent's pulling of Michael's hair in order to extinguish Michael's unacceptable behavior during a class activity although she admits Michael was being reprimanded for behavior that she did not observe; that she observed Michael being sent to stand in the corner with respondent "screaming" that he was a 'bad boy'; that she observed respondent grab Samantha from her chair and shove her into another seat while Samantha was offering passive resistance; she observed respondent isolate Samantha behind a cardboard study corral; that on one occasion while behind this cardboard study corral Samantha fell asleep; that respondent expected Samantha to complete activities without fresh directions; that respondent told Samantha she was a bad girl; that she had heard a slap and from Mary Wichert's reaction concluded that Mary was slapped by respondent.

Joan Traenkner is employed by the Board as a teacher's aide. In 1985, Ms. Traenkner was assigned to the afternoon class of respondent's while from 1986 to 1988 Ms. Traenkner is assigned full-time to respondent's classroom.

Ms. Traenkner testified she observed respondent have favorite pupils in the room to the detriment of others; she observed respondent withhold snacks from some but not from others; she observed respondent being rough with some pupils, and not with others. As examples, Ms. Traenkner offered that she observed respondent pull Heather out of a chair, she observed Heather fall, and she observed respondent direct Heather to stand in a corner with her nose to the wall. Traenkner explained respondent treated Heather in such fashion for failure to complete a task despite Heather not having understood directions. According to Joan Traenkner, Heather is afflicted with cerebral palsy, has an I.Q. of 42, wears corrective lenses, and uses a walker. She could neither speak nor hear. In Traenkner's view, respondent had very little patience with Heather because Heather could and did vomit as a manifestation of defiance. Furthermore,

Heather according to Joan Traenkner was in the habit of wetting her pants. One time, Joan Traenkner testified that she observed respondent take Heather to the bathroom after having wet her pants and directing Heather to sit in her urine for awhile and then ordering Heather to clean up the mess. Nevertheless, Ms. Traenkner admits that an occupational therapist, Donna Weiss, had been in respondent's classroom from time to time and was aware of Heather's propensity to wet her pants. It was Donna Weiss, Traenkner admits, who suggested that Heather be made to clean up after herself when she wet her pants or intentionally vomited. While admitting that Heather could neither speak nor hear, Traenkner testified that Heather could intentionally vomit when she became upset or did not want to do what had to be done. In fact, Traenkner admits that Heather could vomit several times a day in the classroom. Respondent and Traenkner both cleaned up Heather when she wet her pants on many occasions. On one occasion during her two years in respondent's classroom Traenkner testified she observed respondent pull Heather's pigtail to get her attention.

Traenkner testified that another pupil, Jonathan, was very nervous and stuttered. In her view, Jonathan was not one of respondent's favorite pupils. He came to school with dirty hands and his clothes were not clean. Traenkner testified that respondent was constantly scolding him. On one occasion, Traenkner testified that the pupils were making "hairy Harrys", grass seeds in a cup. Jonathan bent his leaves and because of that, respondent would not allow him to take his hairy Harry home. She, respondent, put Jonathan's "hairy Harry" in a trash can. Respondent then made Jonathan stand in a corner and deprived him of snack at snack time. Traenkner testified that Jonathan was told by respondent that Santa Claus would not visit his home because he had dirty hands.

Traenkner testified that another pupil, Steven, reported to school with the same socks on every day. While admitting respondent was not as hard on Steven as she was on Jonathan, Traenkner did testify that on one occasion respondent had some water boiling in the classroom and jokingly said to Steven, "Now, you can put your hand in." Traenkner admits that she doubts if Steven understood what respondent had said to him because he had no reaction. Another occasion, respondent was to have said to Steven in a joking manner, "I'll beat your brains out".

Traenkner testified that during the 1987-88 year, she observed respondent put children behind study corrals whom respondent believed to be stubborn; that respondent told her not to show these pupils any affection; and, that on occasion respondent would pull a pupil out of a chair and direct that pupil to go to a corner. Specifically, Traenkner testified that respondent did not feel Michael, whom Traenkner identifies as being autistic while speech pathologist says Michael exhibited autistic-like tendencies, belonged in her classroom. Curiously, Traenkner also had expressed the view Michael did not belong in the classroom. She also admits referring to Michael as "bad" and putting him in a corner to face the wall. Thus, Traenkner implies that respondent did not care for Michael. Traenkner testified that on one occasion respondent and Michael were in the bathroom. Traenkner heard a bang, and both Michael and respondent came out of the bathroom. Michael was crying. Traenkner admits Michael enjoyed running to the bathroom several times a day simply to flush the toilet and that occasionally Michael would resist exiting the bathroom. Traenkner testified that during 1986-87 she observed respondent pull Michael's hair to get his attention and respondent told her to use that method to get his attention. When Traenkner attempted to pull Michael's hair, respondent was to have told her she was pulling his hair too softly.

Ms. Traenkner understood that one of respondent's classroom goals was to get the children to be self-dependent. Nevertheless, Ms. Traenkner admits having worked with pupils in respndent's classroom in a manner directly contrary to respondent's instructions to her. As an example, Ms. Traenkner admits helping Heather walk along instead having Heather walk alone as best she could. In Ms. Traenkner's view, it was better to walk with Heather rather than to expect Heather to walk alone.

Traenkner testified that she observed respondent hit Mary Wichert, the substitute teacher, on two separate occasions for trying to help students. On one occasion Traenkner testified she observed respondent strike Mary Wichert on her right hand, while on the other occasion she observed respondent strike Mary Wichert on the upper left shoulder.

Traenkner testified that the official reporting time for employees in the morning presumably during 1986-87 and 1987-88 was 8:30 a.m. School began at 8:40 a.m. Traenkner testified that respondent reported late several days a week, claiming she was at the Board's office or at her babysitter's. Respondent, according to Traenkner, would arrive to school at about 8:40 a.m. Nevertheless, Traenkner cannot recall the year

respondent was to have been reporting late nor how many times she was to have reported late. Traenkner did testify that respondent brought her son to school on Fridays, while on Mondays and Wednesdays her babysitter would drop her son off at the classroom at approximately 2:50 p.m. School ended at 3 p.m. Respondent was to have said to her that Van Horn approved her son being dropped off at the classroom at 2:50 p.m. and furthermore that she, respondent, had permission to leave class early on Tuesdays and Thursdays.

Traenkner testified she never advised Van Horn of her observations of respondent because respondent evaluated her performance and she, Traenkner, was intimidated by respondent. She believed respondent and Van Horn were friends. Traenkner admits leaving her job early in order to get her son. Traenkner testified under oath that respondent is her "friend" or, that she was, until respondent realized she was going to testify against her. It is noted that the 1987 Christmas holidays saw Traenkner send to respondent a Christmas card (R-11) which on its front cover announces "For a Very Special Friend" with a traditional picture of a peaceful lighted candle scene with holly and red ribbon with evergreen. On the inside cover Traenkner wrote respondent:

> What a year this has been. I am so glad everything is working out okay for you. You are a "tuff girl". I admire you for sticking it out after all you have been through. Come February [1988] I am really going to miss you [while you are on maternity leave]. When you look at this gift - think of me. Have a healthy Christmas. May the new year bring Fran, you, and Steven the best of everything. Love, Joan [Traenkner]

The prepared message of the card introduced in Traenkner's handwriting by "Dear Sally", and closed with "Love, Joan [Traenkner] " is as follows:

> You're the kind of friend
> Who makes every day a holiday.
> The Christmas spirit
> Is something you share
> With others all year long.
> Your gift of self
> Has brightened the lives
> Of those who know you,
> Touched the hearts
> Of those who have met you.
> You are truly a person
> To be celebrated.
> Have a
> Wonderful Christmas
> (R-11)

Finally, Ms. Traenkner testified that she never had any personal problems with speech pathologist Irene Sanders although she admits having told respondent she, Ms. Traenkner, felt Ms. Sanders was "spying" on them during the 1987 fall semester. At hearing, Ms. Traenkner testified in an explanatory manner that she secretly had been hoping that Ms. Sanders was put in respondent's classroom by supervisor Van Horn in order to spy on respondent. Ms. Traenkner admits having brought her own son to respondent's classroom with supervior Van Horn's approval and she admits having reported allegations of child abuse against another employee in her prior employment to the Division of Youth and Family Services.

Delores Kupiec, Ms. Traenkner's cousin, has been employed by the Board upon Traenkner's recommendation as a teacher's aide for Michael during 1986-87 only. During the 1986-87 academic year Kupiec was assigned to respondent's classroom. Kupiec testified that she recalls a bathroom incident between respondent and the pupil named Michael. Kupiec testified that Michael thoroughly enjoyed running to the bathroom every chance he got in order to flush the toilet. Kupiec testified that one day she observed Michael run to the bathroom and respondent run after him. Kupiec heard a sound and then observed Michael exit the bathroom with a lump in the middle of his forehead screaming. Respondent was to have told Kupiec "don't worry about it". Nothing more was done by Kupiec.

Kupiec testified regarding another incident with Michael regarding feeding. Michael refused to eat food other than baby food. Respondent was to have told Kupiec to hold Michael while she, respondent, took a piece of apple and tried to force the apple into Michael's mouth. Later, Michael was to have vomited. This kind of feeding, which Kupiec called forced feeding, was attempted for one week by respondent and then stopped at Michael's mother's request.

Donna Weiss, the occupational therapist, instructed Kupiec on how to handle Michael along with Kupiec receiving instructions from respondent. Kupiec admits leading Michael from time to time because he had to be led. Kupiec further admits that Michael would run around respondent's classroom 20 to 30 times a day and she admits telling Michael that he was "bad". Kupiec dénies causing Michael to stand in the corner however.

Mary Wichert was a student teacher with respondent between September through December 1987 and upon the commencement of respondent's maternity leave during January 1988 became respondent's replacement. Wichert testified that she learned very much from respondent at the beginning of September and October 1987 but she became concerned because she observed that respondent pulled Michael's hair which was done secretively without anyone's knowledge. She observed respondent withhold snacks from pupils without parental permission or administrative approval. The pulling of hair, it should be noted, was done according to Wichert while she, Joan Traenkner, Irene Sanders, and a Susan, presumably a college aide, were present in the classroom.

Specifically, Wichert testified that Samantha was a stubborn pupil who failed to complete assignments. She observed respondent place what Whicker called a portable barrier around Samantha when, in fact, the barrier was a study corral. Samantha would cry while behind the study corral and finally fall asleep. Wichert testified that she observed respondent occasionally pull Samantha from her chair and place her in a corner.

Wichert testified that another pupil, Danielle, was slow and resistant. Danielle could hear and speak although she did little of either. Danielle would come to the classroom with her mother but refused to take her coat off.

Wichert testified that she was instructed by respondent to tug Michael's hair in order to get his attention but that she only pretended to do so. Wichert testified that she observed respondent put many pupils in the corner for disciplinary reasons with their face to the wall for one or more hours. Wichert testified she was told by respondent not to encourage the pupils.

Wichert testified that on two occasions respondent did strike her. On one occasion, pupils were making a pinata and when she tried to assist one of the pupils respondent slapped her across the left hand loud enough for others to hear. While the slapping hurt, Wichert testified she was shocked and embarrassed and that she and respondent joked about it at lunch time. On another occasion, Wichert testified that she tried to help another pupil and respondent yelled at her to stop and backhanded her across her chest.

Despite the foregoing, Wichert testified that she learned very much from respondent and that she and respondent became friends. In fact, Wichert sent respondent a Christmas card in 1987. The card features a Currier and Ives copy of a winter scene in New York Central Park. The cover of the card is "FOR A FINE TEACHER AT CHRISTMAS". Wichert wrote respondent on the inside of the card as follows:

> Where do I begin to thank you for all that you've given to me over the past few months? You have taught me so much in such a short period of time. Even though all that you have had to do this year, you still had the time and patience to put up with me and all my questions, etc.*** I couldn't have asked for a better placement to experience my student teaching. I'm really sad to see it end" Thanks for having so much faith and confidence in me and my abilities" I couldn't have done it without you. You've been great" Much love and happiness always to you and your "family" and of course the little one on the way. Love, Mary [Wichert]
> (R-12)

Dona Sandelier was employed by the Board as an interpreter aide for hearing impaired children during 1985. She testified that during April through June 1985 while she was in respondent's classroom, respondent brought her son to school three out of five days a week. Sandelier assumed Van Horn approved respondent's son being in the classroom. In addition, Sandelier testified that respondent was frequently late from 10 to 15 minutes. In Sandelier's view, respondent neglected class while her son was present and when respondent's attention was directed on her son, Sandelier took over a snack time. On one occasion, Sandelier testified that she brought strawberries to school on her birthday. According to Sandelier, all the pupils must taste strawberries. One pupil did not want strawberries and gritted his teeth in order not to take strawberries. Respondent was to have "mushed" a strawberry into the boy's mouth. Later, according to Sandelier's testimony that pupil vomited on respondent's shoes.

PROOFS IN SUPPORT OF RESPONDENT'S DEFENSE

Students from Gloucester County College who were enrolled in either human development or early childhood programs worked with respondent as part of their field experiences testified in support of respondent's defense. Connie Giovinazzi, who was with respondent in her classroom two days per week during the 1986 and 1987 fall, testified she learned much from respondent regarding how to discipline pupils without offending them. Kimberly Suarez testified she was assigned respondent's class two days per week also during the 1986 and 1987 fall. Ms. Suarez testified that she found as a student respondent

to be a very positive role model for her and for future teachers because respondent is friendly with all children and children appear to be very friendly with her. Corinne Evans, another student testified that she requested to be placed in respondent's classroom as her field experience because of respondent's reputation amongst other college students. While in respondent's classroom, Ms. Evans testified she felt very comfortable and learned much.

A mother, Maureen Dugan, of one of respondent's pupils who happens to be a teacher of perceptually impaired children in another district, testified she observed respondent's class while her daughter was present. Ms. Dugan was of the view that respondent has acceptably high expectations for the pupils in her classroom in light of their handicaps. Conversely, Ms. Dugan testified that respondent's replacement, Mary Wichert, is entirely too easy on the pupils. Another teacher, Melanie Tinsman, who is employed by the Pitman Board of Education as a speech therapist and has the classroom next to respondent's, testified that she had been in and out of respondent's classroom one or two times a day during 1986-87. She testified that she observed respondent use both positive and negative reinforcement skills with her pupils in order to praise or to discourage certain kinds of conduct. Ms. Tinsman testified that she too uses positive and negative reinforcement skills.

Professor Helen Derminna Salem, the coordinator for the human development program at Gloucester County College and who knows respondent quite well, testified that she placed her students in respondent's classroom in order to expose her students to the good example of teaching in special education. Professor Salem testified that her experience working with pre-school handicapped youngsters convinces her that there is a need from time to time to "touch" handicapped pupils with hearing impairments in order to get their attention. In this regard, Professor Salem demonstrated her meaning of touching pupils by touching herself lightly on her knee. With respect to negative compared to positive reinforcement techniques to be used on pupils, Professor Salem is of the view that negative reinforcement techniques, that is exposing a particular pupil to a negative experience such as being assigned to the time-out chair, is never appropriate although she acknowledges a wide difference of opinion among the professionals.

Finally, the mother of Michael, the pupil who has autistic-like tendencies and who has been discussed before in this opinion, testified that her son remains at the Pitman Program with Mary Wichert. Mother testified that her son has been diagnosed as being

developmentally delayed with autistic characteristics. Mother testified that when Michael was first enrolled in respondent's class, she received a call from respondent on the second day of his enrollment. Respondent told her that Michael must leave. Upon receiving that phone call, mother went to the school and talked with respondent and with supervisor Van Horn and the idea was reached that an aide would be employed specifically for Michael and that she, mother, would remain with Michael in respondent's class until such time that that aide was first employed.

Mother testified that Michael made dramatic progress in his first year with respondent but that he continued with an eating problem that he had. That is, Michael would only eat baby food.

Mother testified that in order to get Michael's attention from time to time she would hold his chin and bring her eyes to his eye-level. Under no circumstance, mother testified , would she allow Michael to have remained in a classroom where he was "touched" on the back of the head, or had his hair pulled or tugged without her permission. That kind of physical touching is, according to mother, not part of Michael's individual educational program. Mother testified that children who are non-violent but autistic are very sensitive on their skin. They do not like to be touched. Finally, mother testified she was not aware Michael was ever made to stand in a corner as punishment.

It is noted that the aide, Delores Kupiec who was employed for Michael, was dismissed from employment some time during September 1987 because of a disagreement with respondent. When respondent left the school during January 1988 Kupiec was rehired for Michael.

Leslie Swezy, a self-emloyed physical therapist, testified that respondent was her child's teacher for approximately five months during 1986-87. During the times Ms. Swezy was in respondent's classroom, she was impressed with respondent's knowledge and with her professionalism.

Finally, respondent testified in her own defense. Respondent testified that in her class she wanted her pupils to become self-dependent. She attempted to get them away from the idea of relying on someone else for the basic necessities of life and wanted to see her pupils learn to walk by themselves, eat by themselves, have fun by themselves, and in all respects become self-sufficient. Respondent related an experience she had with

one youngster to demonstrate the need for her pupils to become self-sufficient. Colin had cerebral palsy. Nevertheless, he was fully capable of walking; yet, his mother would bring him to school in a stroller. Respondent testified that she would refuse to carry Colin and insist that he walk. During 1987-88 Mary Wichert would insist upon carrying Colin into school during September and October. Respondent testified she would try to impress upon Mary the need for her pupils to become self-sufficient. In respondent's view, Colin was "babied" so much by his mother and others that he could not recognize when he placed himself in danger. As an example, respondent testified that one day while she and Colin's mother and Colin were walking out of the school, Colin ran away from them to the street. Respondent screamed at Colin to stop while others were simply directing Colin to come back in a very mild voice. Finally, respondent did catch up to Colin before he got into the heavily-traveled street. Respondent explains that her firm approach with Colin in this instance is similar to the firmness she would use from time to time in her classroom that other people mistake for being unkind to pupils. Respondent admits having communicated to certain pupils that certain conduct is bad in a very stern voice; nevertheless, respondent denies ever saying to any pupil that that pupil inherently is bad. While her pupils have the problems of their handicap to overcome, respondent testified that they are in all respects typical three to five year olds in that they get into mischief with each other.

Respondent testified that she began a very difficult pregnancy during July 1987. She had to leave school early every Tuesday in order to have her blood pressure checked and she did so with supervisor Van Horn's approval. During January 1988 respondent testified she went into premature labor and was taken to the hospital. From that time forward she has not returned to her classroom. When she left her classroom at that time she had many conversations with Mary Wichert, and Joan Traenkner, and supervisor Van Horn regarding pupils in her classroom. These conversations lasted well into February. At no time during any of those conversations did any one of those persons ever mention to her a problem existed at all. In fact, respondent testified she did not know that a problem existed until a representative from the Division of Youth and Family Services appeared at her home to investigate charges brought against her by Van Horn.

Respondent testified that Heather, who is hearing impaired with cerebral palsy, was in her classroom for 1985-86 and 1986-87. Heather had low intelligence who when she did not want to engage in some particular task, would vomit. During 1986-87

Heather was still wearing diapers and her mother wanted to train her out of the diapers. Heather would urinate in her underpants at least once a day in school. Finally, the school itself provided respondent diapers which would be put on Heather after she wet. Ms. Harrick would generally be assigned the task of cleaning up after Heather vomiting or wetting her pants.

According to respondent, occupational therapist Dona Weiss advised that when Heather wet her pants she was to be let alone. The idea, which was successful according to respondent, was to have Heather get up by herself and walk by herself instead of simply walking on her knees. Respondent denies having Heather sit in urine as any form of punishment or discipline. She denies specifically hurrying Heather to the point of Heather falling down. She denies specifically pushing or roughly lifting Heather out of a chair and she denies putting Heather into a corner to stand as a form of punishment. Respondent testified that Heather would fall only because of cerebral palsy; not from her roughly treating her.

Respondent testified that Samantha, who was hearing impaired and very stubborn, was in her classroom during 1987-88. On one occasion during a bean-stringing incident, Samantha chose not to want to string beans. When the other pupils were finished stringing beans they had the opportunity of going to a classroom area of their choice. Respondent explained that those children who went to various areas in the classroom created more distractions for those who were not yet finished stringing beans. Samantha was one of those pupils not finished with the bean stringing task. Accordingly, respondent explained she borrowed a study corral which she then put in front of Samantha in order to lessen the distraction so that Samantha could finish the task of bean stringing. When Samantha finished, she too went to an area in the classroom of her choice for play.

Respondent explained that on one other occasion she used a study corral with Samantha who proceeded to fall asleep. She and Ms. Traenkner then put Samantha on a mat in the classroom. According to respondent, the following day she talked with Samantha's mother who explained Samantha has difficulty getting to sleep at night which, in turn, makes her tired during the school day.

Respondent testified that Danielle is a shy person who suffers from separation anxiety. Respondent explains separation anxiety as that feeling of anxiety which comes over a youngster when the parent to whom they are attached leaves them in a foreign

setting, in this case in the classroom. Danielle's mother would bring Danielle to the classroom door where Danielle would remain screaming at the top of her lungs after her mother left. This conduct by Danielle occurred during September and October of 1987. When Danielle finished screaming she would simply stand there. Respondent testified that Irene Sanders unsuccessfully tried to get Danielle to come into the classroom on many occasions. Finally, respondent called psychologist Herman. Herman could not persuade Danielle to come into the classroom. Finally, respondent testified Herman told her to leave Danielle at the door until she decided to enter. Respondent testified that she discussed Danielle's standing at the door with Danielle's mother on many occasions.

Respondent testified that Steven is a very nice boy who has a smile for everyone. He is communication-handicapped and echolalic. Respondent defines echolalic as the repeating by a person of words spoken to that person. Steven had a favorite pair of blue soccer socks with a soccer ball design on the ankle portion of the sock which he wore regularly. Respondent denies ever having complained to Steven about his wearing the same socks every day; rather, respondent testified that she would tell him regularly how nice his socks were.

Respondent testified that Jonathan had a stuttering problem and he was a very physically dirty child. It was difficult to contact Jonathan's guardian because, according to respondent, the guardian had the phone disconnected. Nevertheless, during circle time which was a regular activity in respondent's classroom respondent testified she would tell all her pupils of the necessity to keep clean. If Jonathan was in school with dirty hands or anyone else had dirty hands for that matter, respondent explained she would take that person to the wash basin and wash their hands. Respondent denies ever having told Jonathan specifically that Santa Claus was not going to visit him in 1987 because he had dirty hands. She may have said to pupils from time to time that Santa Claus would not visit little boys and girls who had dirty hands.

Respondent testified that the presence of Michael in her classroom caused her real concerns because she had no knowledge of autistic or autistic-type youngsters. She voiced this concern to supervisor Van Horn who, in respondent's words, offered her no support whatsoever. It appears that Michael caused great distractions in respondent's classroom his first day there which was observed by supervisor Van Horn. Michael's second day was observed by occupational therapist Dona Weiss. She expressed some concern regarding the presence of Michael in respondent's classroom and supervisor

Van Horn returned to respondent's classroom for another observation. Finally, it appears that Van Horn, Weiss, and respondent all agreed that Michael should not continue in respondent's classroom. According to respondent, Michael's mother then came to the classroom in order to take Michael home. However, it appears that Michael's mother immediately began to work with school authorities and persuaded supervisor Van Horn to arrange to have an aide come in just for Michael. In the meantime, mother agreed to come in the classroom and work with Michael so long as Michael could stay. Finally, Delores Kupiec, Joan Traenkner's cousin, was employed as the aide to work specifically with Michael.

Respondent testified Michael had great difficulty sitting still for longer than two minutes at a time. Kupiec's job was to continuously bring Michael back to task. Unfortunately, according to respondent, Kupiec would tend to become distracted from Michael and begin to help other pupils instead of focusing on Michael. Michael would then get away from the direct supervision of aide Kupiec, run to the bathroom and flush the toilet. Those occurrences resulted in either Kupiec or respondent having to go to the bathroom to bring Michael out of the bathroom who did not want to make his exit therefrom. Respondent testified she was constantly reminding Kupiec to focus her attention on Michael and not to pay attention to the other pupils in the class. Respondent testified that when she complained to supervisor Van Horn regarding Kupiec's performance Van Horn would criticize her, respondent, for not asserting herself as the "boss". Respondent testified she is not good at being a "boss" although she explains she did try to tell Delores what to do. Unfortunately, according to respondent, Kupiec was strong-willed and her directions had no affect on her whatsoever.

Respondent absolutely denies ever mushing a strawberry through Michael's teeth. She does explain that she had 8 pupils in her classroom. A classroom rule is that whenever food is cooked or made in the classroom all must at least taste the food. Therefore, Michael was given a strawberry to taste and respondent insisted that he put it in his mouth. Respondent testified that rather than swallowing the strawberry, Michael kept the strawberry in his mouth until after play. She then asked him whether he still had the strawberry in this mouth, and after responding yes, Michael spit the strawberry out.

Respondent testified that she and Michael's mother talked frequently, at least one time each week, although respondent never told Michael's mother of her tugging Michael's hair to get his attention. Respondent also testified that she failed to tell

Michael's mother of Kupiec's habit of having Michael stand in the corner for discipline. In this regard, respondent testified she cautioned Kupiec on many occasions against having Michael stand against the wall. Nevertheless, respondent admits never having told Van Horn of her concern regarding Kupiec having Michael stand against the wall. Respondent testified she never had any pupils stand in a corner for disciplinary reasons. The only exception to that practice, respondent says, is when Heather would vomit she would have her stand by a wastebasket which was near the corner. In respondent's view, any witness for the Board who testified to that she disciplined pupils by having them stand in the corner is wrong. Furthermore, respondent testified she never pulled a child from the chair to the extent that that child fell and absolutely never pulled a child roughly from a chair, particularly Heather who had cerebral palsy. In respondent's view, other persons in her classroom including Delores Kupiec had pupils stand in the corner with their noses against the wall despite her direction to the contrary not to do so. Respondent explained she used a time-out chair where pupils would go if they did something bad. Respondent used the time-out chair on many occasions but never isolated a youngster. A youngster could always see what was going on in the classroom even if they were behind a study corral.

Respondent explained that her policy in the classroom regarding aides and others was that if you, the staff, put a child into discipline you take that child out of discipline. The most any child, in respondent's recollection, ever spent on the time-out chair was 5 to 10 minutes. One time, however, she forgot that another Michael, not the Michael discussed hereinbefore, was on the time-out chair until supervisor Van Horn came to the door. Respondent then said to other staff, "Why did you not remind me I had Michael on the time-out chair?" In respondent's view, the staff in her classroom also forgot he was on the time-out chair.

On one occasion, Michael who has been mentioned in this decision earlier, was put in the time-out chair by all staff on four separate occasions in one day. That particular day, Michael ran around the room 10 or 20 times and would not sit still. During 1987-88 respondent testified it appears Michael was worse because he did more running, screaming, distracting, and lining, all activities characteristic of an autistic child.

Respondent testified that during the fall of 1987, she began to lightly tug on Michael's hair in order to get him back on task. Respondent justifies this behavior by explaining everyone on staff tugged Michael's hair to get his attention, not to hurt him.

Respondent testified that Michael never expressed displeasure, or cried, or expressed pain at anyone tugging at his hair. Rather, his hair was tugged only to get his attention and to get him back on task. Prior to that time, respondent explained Michael's attention was secured by touching the inside and outside of his elbows.

In sum, respondent testified that she acknowledges her organization is not strong and that she has difficulty being a "boss". She admits her communication skill with other staff members and she admits that in 1986-87 and forward she was late to school approximately two times a week for very short periods of time but never after pupils arrived. Her lateness was occasioned by being at the babysitter's and supervisor Van Horn knew exactly where she was whenever she was late because Van Horn was also at the babysitter's dropping her child off. In regard to witnesses who testified that respondent would simply explain being late by saying she was at the Board office is wrong if they attempt to establish that she was not, in fact, at the Board office.

Respondent specifically testified that she never went to Virginia or West Virginia, contrary to the testimony of June Gruber, nor did she ever say anything regarding the beach or sun poisoning to June Gruber. Respondent denies ever having missed any Monday work day in the context of Virginia. With respect to her children in the classroom, respondent testified that whenever she brought her children into the classroom which she did on occasion she always had supervisor Van Horn's permission. In fact, respondent testified that when her children were young she went to supervisor Van Horn and told her that she would either have to take vacation days, or sick days, or administrative leave days in order to stay home with her children. It was Van Horn who suggested to her that rather than remain away from the job that she, respondent, should bring her children to school. Moreover, respondent points to the established fact in this record that other staff members brought their children into the classroom with Van Horn's permission including Mary Wichert, Irene Sanders, Dona Sanaliere, and others.

Regarding Mary Wichert's testimony that she, respondent, slapped her on two separate occasions, respondent testified that one day when they were making the pinata all pupils had to pick up dry strips of paper in order to participate in the construction of the pinata. According to respondent, Mary Wichert always wanted to help pupils do things despite directions to the contrary that the pupils must become self-sufficent. On this particular day, Mary went to help Colin with his strip of paper and she, respondent, "touched" Mary's hand in a waving motion. Respondent explains that if Irene Sanders

heard a slap it was something other than she slapping Mary because she just about touched Mary's hand. In fact, respondent explained, no one said a word regarding the touching of Mary's hand at that time. Joan Traenkner was present as was Irene Sanders when the incident occurred and both Mary and Joan laughed about the matter. Respondent testified that no one said you hurt me or you hit me; in fact, Mary simply said I was trying to help again. Respondent testified she did not hear anouther word about that incident until April 1988 when the investigator from the Division of Youth and Family Services visited her home.

Respondent testified that she has absolutely no recollection at all of hitting Mary Wichert in the chest at any time for any reason. Moreover, respondent testified that if the incident did occur it would have been discussed at lunchtime because the entire day's work was always discussed at lunchtime. Respondent testified that Mary said absolutely nothing to her at lunchtime regarding hitting her in the chest.

Regarding the testimony that she told a child to put his hands in hot water, respondent testified that while a hot plate is available for use in the classroom and that she is always concerns about the use of the plate with pupils present, she is forever telling pupils when the plate is being used that it is hot and not to touch. Respondent absolutely denies ever telling anyone at any time to put their hands in hot water.

This concludes a recitation of all proofs presented at hearing by the parties in support of their respective positions.

FINDINGS OF FACT

Each of the individuals who testified before me on behalf of the Board forthrightly and honestly presented what they believed to be their recollections of occurrences observed while they were in respondent's classroom from 1979-80 through December 1987. Human experience tells us that the passage of time has a way of minimizing or enlarging certain past occurrences which we store in our memories. In this case, some of the matters testified to regarding respondent's conduct I am sure have been unintentionally exaggerated by witnesses while others may have been diminished in severity. So, too, with respondent's testimony in defense of the charges brought against her. I believe that certain of the recollections to which respondent testified were diminished in severity in her mind through the passage of time and that other instances

were exaggerated in importance. It is difficult to discern the exaggerated from the non-exaggerated, the real from the imagined. Nevertheless, considering the proofs as a whole certain facts are clear and are as follows:

1. Respondent has on more than one occasion demonstrated that she is a superior teacher of youngsters in need of special education.

2. Respondent has on occasion demonstrated an impatience with pupils assigned her and, as such, used techniques which are not suitable for any public school classroom, much less a classroom dealing with youngsters in need of special education.

3. I am persuaded by a preponderance of all credible evidence that from time to time respondent would as a disciplinary measure have youngsters stand in a corner for various periods of time ranging from 10 minutes up to and including more than 30 minutes at a time. How youngsters ranging in age from 3 to 5 years would stand in one spot for such an excessive period of time is evidence of respondent's capacity to run her classroom in a very strict manner.

4. Specifically, respondent would from time to time become impatient with Heather and pull her from her chair in order to get her to stand in the corner despite the fact Heather had cerebral palsy and used a walker. From time to time Heather would fall as the result of being hurried by respondent.

5. Respondent in her zeal to get her pupils to be self-sufficient openly criticized a pupil for wearing the same socks every day and suggested to another youngster that his mother should iron his clothes. Respondent would from time to time communicate either in sign language or in oral communication or through body language that she perceived a particular student to be bad or that his or her conduct at a particular time was bad.

6. Respondent was particularly impatient with Heather who aside from her affliction of cerebral palsy also managed to vomit and urinate almost on demand when she decided she did not want to perform a particular task.

7. Respondent's impatience with some of her pupils was manifested in placing pupils behind study corrals in order to lessen their distractibility while respondent would forget that the youngster was behind the study corral.

8. Respondent's impatience with some of her children in achieving self-sufficiency was manifested in respondent's slapping student teacher Mary Wichert on two separate occasions when Ms. Wichert attempted to assist pupils respondent did not want to be assisted.

9. Respondent's impatience with her children was also manifested in respondent's tugging of Michael's hair in order to get his attention. Surely, there are ways other than the physical touching of a pupil to get their attention regardless of the difficulty with communication experienced by that pupil.

10. I am persuaded by the evidence in this record that at least on one occasion respondent ran after Michael into the bathroom and physically slapped him from flushing the toilet and proceeded to roughly direct his exit therefrom. I am not at all persuaded by the evidence in this record that anyone observed a lump on Michael's head.

11. I am persuaded by all of the evidence in this record that respondent was late reporting to school from time to time. Nevertheless, it appears that respondent's lateness was tolerated by supervisor Van Horn to the extent that the two

met each other from time to time at their jointly-used babysitter at times when it was clear both would be late reporting to their school duties.

12. Both Joan Traenkner and Mary Wichert sent respondent Christmas cards during December 1987 with messages prepared by each and as recited above.

13. I am not at all persuaded by the evidence that respondent at any time ever "mushed" a strawberry into a pupil's mouth.

This concludes a recitation of relevant and material facts found to exist on the evidence in this record.

DISCUSSION AND CONCLUSION

The facts in this case show a teacher who is very competent, skillful, and effective in a classroom with youngsters in need of special education. The facts also show, however, a teacher who from time to time loses patience with her pupils particularly when those pupils because of their physical or mental limitations cannot quite attain the goal of self-sufficiency as quickly as respondent would like. When respondent loses patience, she has a tendency to become physically aggresive with youngsters in order to let those youngsters know she means business. Regrettably, respondent's physical aggressiveness is exactly what got her into this situation she now faces.

The testimony of Joan Traenkner and Mary Wichert, revealing as it does respondent's weakness and her propensity to use physical aggression on those with whom she loses patience, is very curious. In large measure, their testimony constitutes much of the Board's proofs to show respondent did engage in conduct unbecoming a teacher over the years. However, these same two individuals who now come before me to testify under oath regarding respondent's conduct they now say is unprofessional send a Christmas card in December 1987, a short 12 months prior to the time each take the stand to testify against her. It cannot be doubted that Joan Traenkner created in respondent's mind with the 1987 Christmas message she writes that she, Traenkner, is respondent's "special friend". Who other than a special friend would tell another of their admiration for that

person and of the void created by that person's departure. Who other than a special friend makes every day a holiday. Nevertheless, Ms. Traenkner, who admits she told respondent that Irene Sanders was spying on them, now testifies under oath that respondent is an unprofessional teacher who engages in unbecoming conduct and incapacity.

Mary Wichert, who addresses respondent in a 1987 Christmas card as a "fine teacher" and who tells respondent how much she has learned from her and, in short, what a great teacher respondent is, now comes and testifies regarding the conduct of respondent Wichert now says under oath is unprofessional, unbecoming, and shows incapacity.

There is no doubt in this record that respondent did engage in conduct over the years which can be measured in terms of unbecoming conduct. That is, it is unbecoming conduct for a teacher to resort to physical aggression in the sense of pulling or tugging a pupil's hair to get their attention; it is unbecoming conduct for a teacher to discipline a youngster by having them stand in a corner with their nose to the wall and it is certainly unbecoming conduct for a teacher to have a three or four or five-year-old handicapped youngster stand in a corner with their nose to the wall for any period of time; it is unbecoming conduct for a teacher to physically rush a pupil otherwise suffering from cerebral palsy; and, it is unbecoming conduct for a teacher to ridicule any pupil because of the clothes they wear. Respondent did engage in this kind of conduct over the years.

Nevertheless, while respondent has engaged in conduct over the years that can only be classified in those instances when she resorted to such conduct as conduct unbecoming a teacher, I cannot find in this record that the conduct of respondent per se over the years as a teacher represents a teacher who regularly engages in unbecoming conduct. True, respondent has grown impatient with her pupils over the years and from time to time resorts to conduct she must not otherwise engage in. But, the record here shows that such times were few and far between.

Thus, while the finding and the conclusion is reached here that respondent's proven conduct over the years has occasionally represented conduct which is unbecoming a teacher, the instances of such conduct and the scope of such conduct is such that termination of her employment is not warranted. Respondent's performance as a teacher with this Board as a general rule has been outstanding. She had devoted her time, her

talents, and her efforts towards assisting the youngsters and the parents of youngsters who have communication handicaps to improve their skills in order to function in the society. If respondent learns from the discipline about to be imposed upon her and the embarrassment and humiliation she has suffered by being brought up on tenure charges, the record here shows respondent shall once again become a truly effective if not outstanding teacher.

Given all of the circumstances in the case before me, a proper and appropriate discipline to be imposed upon respondent for the transgressions of good conduct committed is the loss of salary increments she otherwise may have earned for 1987-88, and that she may have earned for 1988-89. In addition, respondent shall not receive any salary for the first 120 days of her suspension without pay by the Board. Respondent is well advised in the future to avoid engaging in conduct which is or which may be perceived by anyone to be unbecoming conduct.

In all other respects, respondent is to be reinstated to her position as a teacher in the employ of the Gloucester County Educational Services Commission.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 30, 1989
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

1/30/89
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 2 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF SALLY JAMROGOWICZ,	:	COMMISSIONER OF EDUCATION
GLOUCESTER COUNTY EDUCATIONAL	:	DECISION
SERVICES COMMISSION, GLOUCESTER	:	
COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Commission excepts to the fact that in his findings and conclusions the ALJ overlooked or oversimplified the considerable volume of evidence describing respondent's consistent pattern of unauthorized tardiness and early departures, as well as the numerous times she would bring her infant child to school without authorization. It believes this exception must be given proper consideration in imposing an appropriate remedy.

The Commission agrees that the credible evidence clearly supports the ALJ's conclusion that respondent did engage in unbecoming conduct over the years, but it excepts to the remedy recommended by the ALJ. It further maintains that the factual findings and conclusions in this matter fall clearly within the "four corners" of In the Matter of the Tenure Hearing of Lynn Jenisch Tyler, School District of Sussex Wantage Regional, decided on remand February 10, 1988, aff'd in part/rev'd in part State Board November 1, 1988 in which the Commissioner of Education ordered the dismissal* of a second grade teacher for slapping children on two different occasions and requiring a child to remove a toy from a toilet bowl. As to this, the Commission contends that when comparing the conduct of the teacher in that case with respondent, the conduct of respondent is even more intolerable, for in Tyler the second graders were at least capable of expressing what happened to them while, in the present situation, the impaired preschoolers with varying severity of disabilities are not.

The Commission goes on to state that it is not suggesting that respondent should necessarily lose her certification in that she could use her knowledge, skills and educational experience in a position better suited to her abilities and demeanor.

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*The November 1, 1988 State Board decision reversed the order of dismissal and levied a six month salary loss and increment withholding for 1987-88 and 1988-89.

Upon review of the record in this matter, the Commissioner fully concurs with the findings of fact reached by the ALJ that respondent has engaged in unbecoming conduct over the years through physically aggressive acts such as hair pulling and tugging to get a youngster's attention, slapping a child on at least one occasion; disciplining by having handicapped preschoolers stand in a corner with nose to the wall for sometimes lengthy periods; slapping a student teacher on two occasions, and other inappropriate behaviors toward her handicapped three to five year olds. While it may be true that respondent was in other regards considered a good, if not superior, teacher and that some handicapped pupils can display an array of difficult, troublesome and even bizarre behavior does not serve to lessen the egregiousness of the behaviors exhibited by respondent in this matter. These points certainly may, however, be considered in weighing the penalty to be levied for the unbecoming conduct exhibited by respondent.

As noted by the State Board in Tyler, supra, the balancing act necessary for the determination of a just and reasonable penalty has been set forth in In re Fulcomer, 1962 S.L.D. 160, rem. State Board 1963 S.L.D. 251, decision on remand 1964 S.L.D. 142, aff'd State Board 1966 S.L.D. 225, rev'/rem. 93 N.J. Super. 404 (App. Div. 1967), decision on remand 1967 S.L.D. 215, aff'd N.J. Superior Court, Appellate Division, 220.

> We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affirmed o.b. 131 N.J.L. 326 (E. & A. 1944).
>
> Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.
>
> Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. The Commissioner noted that the teacher received his full salary during his suspension by the township board. However, consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming

> conduct, in obtaining a teaching position in this State, with the resultant jeopardy to his equity rights in the Teacher's Pension Fund accruing from his 19 years credit.
>
> At the time appellant was suspended he had 23 years' teaching experience and held a master's degree. He had been employed since 1954 by the Holland Board. It appears that if this teacher, who is aged 56, is re-employed in New Jersey, he will be eligible for retirement in approximately four years with a pension for life of one-half of his last year's salary - in this case an annual pension of at least $3,500. We observe that the local board recognized that Fulcomer's teaching record was good and his teaching ability unquestioned. He had not been disciplined in any manner by the board prior to the date of the incidents involved in these charges and he had consistently received pay raises each year.
>
> The matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system.
>
> (93 N.J. Super. at 421-22)

After careful consideration of this matter including the Commission's exceptions, the Commissioner agrees with the ALJ's conclusion that forfeiture of respondent's tenured teaching position is an unduly harsh penalty to be imposed under the circumstances. As in Fulcomer, there is no evidence to suggest that respondent's acts were premeditated, cruel, vicious or done with the intent to punish or to inflict corporal punishment with the exception of having students stand in the corner which was clearly for the purposes of punishment but not necessarily to inflict corporal punishment. The record bespeaks of a teacher who is hasty, impatient and quick to use her hands to achieve behavioral responses she desires. It also bespeaks of a teacher who is misguided in her efforts to bring students to the level of self-sufficiency and performance that she believes should be achieved which may or may not be realistic, given the handicapping conditions of the youngsters in the preschool handicapped class, some of whom clearly have a multiplicity of problems.

On the other hand, the record bespeaks of a teacher who had no prior offenses and who was considered to be a "fine" teacher, even by one of the witnesses testifying against her.

Thus, in assessing the overall circumstances, the Commissioner determines to adopt the ALJ's determination not to dismiss her but he disagrees with the exact penalty to be invoked. In addition to the withholding of the salary increments ordered by the ALJ, the Commissioner increases the loss of salary from that of 120 days to six months, a penalty consistent with that invoked by the State Board in Tyler. This increase is recommended because the Commissioner finds the gravity of the offenses to be greater than that credited by the ALJ and that the occurrences of inappropriate behavior were more than "few and far between" as described by the ALJ. The treatment of pupils Heather and Michael cannot be seen merely as outgrowths of impatience or a desire to run a strict classroom. Rather, they are reflective of a lack of sensitivity to the needs of handicapped preschoolers and to a lack of self-restraint in the behavioral management of handicapped pupils which calls for a penalty more severe than that levied by the ALJ.

As to the broadly stated exception regarding respondent's tardiness, leaving early and bringing her child to school, the Commissioner finds support in the record as provided to him for the ALJ's disposition of those issues given the tolerance of the circumstances by her supervisor. However, it is noted that no transcripts were provided for the Commissioner's review.

The Commissioner, after extensive consideration of the record in this matter, would urge that the Commission review its policies and procedures with respect to documenting arrival and departure from school and the issue of bringing offspring to class, inasmuch as respondent was apparently not the only one to bring her child to class.

Moreover, the Commissioner strongly recommends that the Commission undertake inservice education of its staff on the behavioral management of handicapped preschoolers. The Commissioner is gravely concerned when reading that even one, much less more than one, teaching staff member made a youngster sit in her urine and clean up her vomit, called children bad, and had young handicapped children stand in the corner for 30 minutes at a time. (Initial Decision, ante) It is absolutely essential that all staff dealing with handicapped children be well-trained in the skillful and appropriate management of behavioral problems, including such manifestations as vomiting at will and compulsive toilet flushing for such are examples of the problems which are, in fact, exhibited by some handicapped students. Further, it is recommended that the child study team personnel and supervisory staff assure that the individualized education programs of the students specifically address the management of behavioral problems so as to aid the teacher in his or her strategies to deal with the students and to have such staff monitor closely the actual techniques employed.

Accordingly, the initial decision in this matter is adopted except for the modified penalty as indicated herein.

COMMISSIONER OF EDUCATION

March 15, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2127-88
AGENCY DKT. NO. 50-3/88

J.O'D. AND A.O'D. ON BEHALF OF A.F., A MINOR CHILD,
Petitioners,
v.
PEAPACK-GLADSTONE BOARD OF EDUCATION,
Respondent.

Burton L. Eichler, Esq., for petitioners (Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, attorneys)

William B. Rosenberg, Esq., for respondent (Blumberg & Rosenberg, attorneys)

Record Closed: December 13, 1988 Decided: January 27, 1989

BEFORE **JOSEPH LAVERY,** ALJ:

Petitioners A.O'D. and J.O'D. appeal from the refusal by **respondent Peapack-Gladstone Board of Education (Board)** to relocate the assigned pick-up point to which their child, **A.F.,** must walk in order to catch the morning school bus. Petitioners contend that the route A.F. must travel from her home is too dangerous. Consequently, it is arbitrary and capricious for the Board not to provide an alternative.

Respondent Board answers that in the particular circumstances of their rural school district, no other option is available.

Today's Initial Decision favors the Board.

PROCEDURAL HISTORY

After timely appeal to the Commissioner of Education, he declared this matter to be a contested case, pursuant to N.J.S.A. 52:14B-9 and 10, filing it with the Office of Administrative Law on March 30, 1988. The Acting Director and Chief Administrative Law Judge assigned the case for disposition, and prehearing convened on May 5, 1988. After adjournments for cause at the request of petitioners, the case convened on October 24, 1988, in the Newark hearing rooms of the Office of Administrative Law and on November 14, 1988, in the Peapack Municipal Court to permit viewing of the scene. Legal argument followed by letter, the last of which was filed on December 13, 1988.

ISSUES

The issues may be phrased as follows:

1. Whether the route which A.F. must walk contains a level of hazard which requires the Board of Education to:

   (a) establish a school bus stop directly across from her residence, or

   (b) make such other accommodation as will avoid the need for A.F. to walk the present route.

Burden of Proof:

The burden of proof in this matter falls on petitioners, who must by a preponderance of the credible evidence overcome a presumption of correctness in the Board's action and show that it was arbitrary, capricious and unreasonable, see Kopera v. West Orange Bd. of Education, 16 N.J. Super. 288, 298 (App. Div. 1960).

Undisputed Facts:

Many of the material facts are not in dispute:

J.O'D., stepfather, and A.O'D., natural mother of the pupil A.F., moved into the Peapack-Gladstone School District in July 1987. This area, still rural in nature, is

for the most part lacking in sidewalks and extensive traffic control devices normally found in urban areas. The school district for Peapack and Gladstone is a "sending district" which transports its children to Bernardsville. A.F. attends the Bedwell School there. She is now 12 years old, and in sixth grade.

Shortly after petitioners moved to Gladstone, at 100 Mendham Road, the Safety Committee of the Peapack-Gladstone Board of Education (hereafter Board) met, as it normally does once or twice per year, to assure the appropriateness of bus routes. With some exceptions, the route has remained the same since 1980.

In September 1987, on the day prior to school opening, A.O'D. met with Carole Day, the Board Secretary, and made a complaint. He stated that the current bus route failed to take into account the hazard encountered by his daughter, A.F., walking from her home on Mendham Road. Petitioners were dismayed not so much by the distance their daughter would have to walk, but by the danger which they perceived in walking along Mendham Road and/or Church Street. A.O'D. conveyed this concern to Ms. Day.

To reach the assigned bus stop, the child was required to walk approximately .4 miles from 100 Mendham Road to the bus stop in front of the Methodist Church near the corner of Jackson and Church Streets. She could do so either by traveling south on Mendham to Jackson Avenue, then turning right and walking along Church St., or by turning off Mendham and walking down Church Street to the Methodist Church. The distance from A.F.'s home at 100 Mendham Rd. to the turn-off at Church St. is .10 miles (Exh. R-16). At the Church St. stop, second on the bus route, (Exh. P-2), the children who gather for their daily ride are picked up, driven over the Jackson Avenue Bridge onto Chester Road. The bus then travels to Pfizer Drive, turns left, circles through housing development, makes one stop, again returns to Chester Road, and makes another stop at Brook Hollow Road. It then travels on to its destination in Bernardsville.

After this September 1987 conversation, having heard nothing from the Board, in October, A.O'D. again complained to Ms. Day. She advised him to put his concerns in writing. He did so in a letter of November 9 (Exh. R-10). He told the Board that A.F. was forced to travel .3 miles along Mendham Road which was heavily traveled, bordered on both sides by drainage trenches, and lacking sidewalks or road shoulders. Once reaching Church, she was required to cross, without guard or signal, where cars speed past at 40 to 50 miles per hour. These

vehicles have no clear vision of the road until the peak of a grade near Church Street. On Church Street itself, once Mendham is crossed, there is another .3 miles without sidewalks, and at least two blind curves. He complained further that he had not been told in September that a written petition to the Board was needed. Further, he suggested that the solution to the problem was simple: The bus could pick up the children at Church, makes its pick-ups on the Old Chester Road, pass over St. Bernard's Road and stop for A.F. in front of her house on Mendham. Alternatively, the bus could make the reverse "loop", again using St. Bernard's Road (Exh. R-10).

The Board at its meeting of November 17, 1987, not attended by petitioners, considered the letter. It responded through its then head of the Safety Committee, Judith Burgess, by correspondence of November 18, 1987 (Exh. P-4). It answered that, on July 7, 1987 the Safety Committee had discussed this very problem, but did not favor the option proposed. Re-routing through a narrow and winding Gill-St. Bernard School Road with blind curves and private school traffic did not seem a better alternative. It noted the rural nature of the community.

In answer, A.O'D., in a letter of November 24, 1987 (Exh. R-11), took issue with this result. He asked that the St. Bernard's Road passage be reconsidered, or some other solution found. He again emphasized the speeding traffic on Mendham Rd. and the impracticability of teaching A.F. to safely traverse the difficult terrain leading to the bus stop. He charged that the Board was more concerned with the convenience of the bus company, and asked for information relating to it. On December 2, 1987, he informed the president of the Board of an incident involving A.F. During an encounter on Mendham Rd., she became extremely frightened at the presence of strange cars outside her home. She was injured from a fall during a panicked attempt to climb the hill, trying to avoid the occupants of the cars involved (Exh. R-12).

In answer to these complaints, on December 9, 1987, the Safety Committee, composed of Judith Burgess of the Board, Board Secretary Carole Day, Harris Ransom, Bedwell School Representative, Patrolman Len Crocken, and the bus company owner Nick Mazzocchi, walked A.F.'s route with A.O'D. The Committee issued a report to the Board after its meeting on the morning of December 15, 1987. At its own meeting that same evening, the Board accepted the report, and reiterated its disinclination to use St. Bernard's Road, in the face of traffic from the Gill-St. Bernard's School buses and the nature of the roadway itself. It also restated

the objections of the bus company owner on grounds of safety for bus maneuvering. Petitioner was unable to attend this meeting. On December 16, 1987, the Board, through its president, so advised petitioners (Exh. R-3).

Finally, on January 12, 1988, with his attorney, A.O'D. presented his arguments in person at the Board meeting. The Board again refused his request. The president of the Board noted that the bus is not required to go off the main route for a child living within one and one-half mile of the stop. More important in the Board's view was its desire to avoid bus travel on St. Bernard's Road. A.O'D. adverted to a conflict of interest for the bus contractor to be on the Safety Committee. This was in response to Mr. Mazzocchi's objection to the prospect of a bus backing up and turning around from St. Bernard's Road on to Mendham Road.

Dissatisfied with this result, petitioners sought relief through the present appeal. Since that time, both the Peapack Police Department and the expert employed by petitioner for this hearing have taken traffic and speed measurements in the area (Exhs. P-6, P-7 and P-8A). On the second day of hearing, November 14, 1988, this administrative law judge and both counsel rode the proposed route across St. Bernard's Road in a school bus. The Bus was the actual size of that used for A.F. and her schoolmates.

ARGUMENTS OF THE PARTIES

Petitioners' argument:

Through testimony and post-hearing letter briefs, petitioners sought to demonstrate that the Board was arbitrary and capricious in its duty to A.F. Petitioners argued that the child was at risk, and the Board refused to provide any remedy, despite petitioners' best suggestions.

In addition to those aspects of the case recited above as not being in dispute, **A.O'D.** added that the lack of cooperation and understanding of the Board throughout supports a conclusion that the Board's approach was arbitrary and capricious. Petitioners never complained that their daughter had to walk. She did so in another school district. Moreover, it is not useful to point out that other children walk or have walked on Mendham to the current stop. Those who do so now live on the other side of Church St., and travel on a wider shoulder. The student who lived farther North in earlier years was of high school age.

As an alternative, A.O'D. suggested that the bus route be changed to pick up A.F. at her home, circle around to the Old Chester Road by crossing St. Bernard's Road, and then make the pick ups as usual on the way to Bernardsville. If this was unsatisfactory, that circle could be reversed (Exhibit P-2). The efficacy of this path is supported by the fact that the Chester BOE now makes 3 trips per day over that route to the Gill-St. Bernard's School, located just off the road. Petitioner argued that if these ideas were not persuasive, the Board should come up with others. The child's safe passage was its responsibility. Forcing A.F. to cross over Mendham Rd. and to walk with her back to high-speed traffic in the morning dark was unacceptable, and even unlawful, *see* N.J.S.A. 39:4-34.

A.O'D argued that in walking this route, the two-abreast Mendham Rd. width narrows with snow, even when "bladed" by the township. Cars commute on this road at a speed well above the limit, reaching 50 mph. Because of hills, they don't have a clear view,and veer over the center line when they do see a pedestrian. High bushes would drive A.F. into Mendham road, if she crossed Church to reach the wider shoulder of Mendham. If she turned on to Church, the child was faced with no sidewalks, narrower shoulders, and blind curves. The turn onto Church was also marked by a 45-degree angle, and no clear line-of sight. This encourages cars exiting from Mendham south bound to maintain their already high rate of speed.

In an effort to corroborate their case, Petitioners provided testimony from an expert, John E. Christ. A highway traffic engineer of long experience, he offered data on traffic counts and vehicle speed (Exhs. P-6 and P-7). He also narrated a film (Exh. P-8a) of the route as proposed by A.O'D. It was Mr. Christ' s opinion that the present walk which the child must take to the assigned bus stop was neither safe, sound, nor lawful.

By way of legal brief, petitioner concedes that a Board decision may be overturned only when it is arbitrary, capricious and unreasonable. On the other hand, where a Board violates the law, acts in bad faith, or abuses its discretion, the Commissioner of Education may overturn the Board. The central issue here is the hazard which the Board, under controlling decisional law, has responsibility to eliminate under its "thorough and efficient" constitutional duty. The facts prove that the danger exists, and petitioners have suggested practicable, reasonable alternatives. It is unconscionable and at odds with case law for the Board to take a position that traffic safety is not its concern. Since petitioners have not raised a

claim of discrimination, it is irrelevant for the board to object that it has treated students similarly situated in the same fashion. What the Board must address directly on appeal is the hazard posed to A.F. under the circumstances affecting her specifically. It has not. Finally, in evaluating the Board's action Exh. R-2 should not be considered, because this policy was never adopted by the Board.

Respondent's argument:

The Board, through testimony from its witnesses, answered that the route now in place should not be altered, A.F.'s walk was no more hazardous than any other child's in this rural community, and the alternative which petitioners propose endangers A.F. and the other children involved:

Judith H. Burgess, now President of the Board, recalled that, during her tenure as Chair of the Transportation Committee, she and her fellow committee members investigated the route adequately. The committee walked the route in December 1987 at 8 a.m. and she walked it again with counsel for the parties on May 20,1988, at about 2 p.m. She personally drove the alternative St. Bernard's Road route proposed by petitioners. From this experience, neither she nor the Committee were persuaded that petitioners' plan should be accepted. In its review, the committee adhered to transportation guidelines established in July of 1987 (Exhs. R-1, R-2). Uppermost in the members' minds were the kindergarten-grade school pupils. Four children younger than A.F. lived on Mendham Road, albeit South of Church St. Additionally, other parts of the school district had more hazardous pupil walking conditions (Exh. R-7C through F).

Ms. Burgess agreed that the bushes south of Church St blocked the road (Exh. R-7A). As a solution, the Board arranged with the home owners to have A.F. walk through their driveway on the west side of the bush. However, the Board still favored having A.F. take the Church St. cut-off. It was shorter, and experienced much less traffic (Exh. R-17). Neither she, nor the Committee, nor the Board favored use of St. Bernard's Road because of the congestion caused by Chester Tp. buses, and the inherent danger of the route.

Carole Day, Board Sec'y, confirmed that she had spoken to A.O'D., on the day before school started. However, she was sure she had told him at the time that the Board only acted on written complaint, which he should submit. She recalled that other elementary school children living on Mendham walked along Mendham to

Jackson and then Church. She told A.O'D. that the route would have to be changed for these children, to accommodate a St. Bernard's Road swing. She warned him that this road was already congested by school van traffic, and that the Board opposed its use.

Further, Ms. declared that the current plan was established for the most part in 1980, by a different board. No other Mendham parents had complained. Ms. Day testified that the Board had had made safety alterations to the plan on other occasions for a student on Rte. 206, and for some kindergarten children. Ms. Day remembered that, in the past, 2 homes north of the O'D.'s housed children who walked to the Church St. stop in earlier years. One was a high school student.

As to the guidelines in R-2, Ms. Day stated that the Board had knowledge of them as early as July 1987, though it did not vote on them. They were presented to the Board verbally many times thereafter.

The Board's bus contractor, **Nicholas Mazzocchi**, who had himself driven the route suggested by petitioners, opposed its use for safety reasons. The plowing there was done by a different township, in which the road lay (Chester Tp.). Large buses were forced to cross over the center line on the narrow St. Bernard's road. Moreover, travelling across the Jackson St. Bridge with a full load, the bus would be heavier than the ten-ton load limit. The two culvert bridges on St. Bernard's Road were 15-ton limits. On the other hand, if the bus circled over first north through Old Chester, it would be short of the 300 ft. visibility required when it made its Brook Hollow pick up, currently done while travelling *south*. If the bus came down Mendham, picked up A.F., pulled into St. Bernard's Road and backed out again onto Mendham, the maneuver would be far too hazardous.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

As to **UNDISPUTED** facts, I **FIND** those designated on pages 2 through 5 of this opinion.

As to matters which are **DISPUTED** or **CONTESTED**, I **FIND**:

1. Mendham Road from petitioner's home to Jackson Ave. has no crossing guard, traffic device, crosswalk, or sidewalk, like most of the school district.

2. The western road shoulder from 100 Mendham Road to Church Street is approximately 4 ft. wide. It can just accommodate two persons walking abreast. After crossing Church, and past the large bushes, it is wider.

3. Through misunderstanding in September, 1987, A.O'D. thought his complaint to the Board would be conveyed orally to the Board. Instead, Instead, Ms. Day had advised him that such complaints must be submitted in writing.

4. St. Bernard's Road is in part: winding, with changing grade, blind curve, and narrow-bridged over culverts. It requires extreme caution while driving, and causes a school bus to cross over the center line at some points.

5. Travel by the Board school bus on St. Bernard's Road would have to be timed to avoid other school vans sent to Gill-St. Bernard's School by Chester Tp.

6. There is less than 300 ft. of visibility for a school bus stopping at Brook Hollow when traveling *north* on Old Chester Rd.

7. The sunrise schedule in the school district is as set forth in Exh. C-1, which emanates from the U.S. Naval Observatory.

ANALYSIS

facts:

Some of this case turns on credibility. Credibility is established by testimony not only from the mouth of a believable witness but in itself inherently credible. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. In re Perrone, 5 N.J. 514, 522 (1950).

Both sides are credible to the extent that they assert their concern for the safety of A.F. The Board, through testimony of Ms. Day and Ms. Burgess especially, is sincere in its expression of that focus. Ms. Burgess' repeated inspection of A.F.'s route as well as St. Bernard's Road further buttresses the Board's attention to the problem raised by petitioners. The record discloses that, whatever its merits, the Board's actions were taken in good faith.

Nevertheless, the Board's motives, however well meaning, do not dispose of the charge that it acted arbitrarily, unreasonably, or capriciously. That decision turns on the inherent wisdom of its decisions affecting A.F. Further, in reviewing the Board's moves, it is not enough for this tribunal initially, or the Commissioner of Education in his final administrative decision, to conclude that other adjustments are superior. The Board's resolution cannot be displaced by substituted judgment. It can only be overturned when the effect of the exercise of its discretion is such as to be prohibited by the foregoing standard, Kopera v. West Orange Bd. Of Education, 16 N.J. Super. 288 (App. Div. 1960).

Petitioners persuasively assert that the case must turn on the the safety conditions which they object to affecting their child in particular. It is no answer for the Board to point to other children worse off. If A.F. were shown as having been arbitrarily and capriciously placed in unconscionable danger, the record would not be improved by the Board's demonstration that others are treated even more shabbily. Nevertheless, the Board *is* entitled to defend against a charge of arbitrariness by emphasizing the traffic safety shortcomings endemic in a rural community. The Board may also illustrate these problems, as it has, through photographic sampling of more dangerous walkways (Exhs. R-7C through F). The difficulties attending the charting of a school bus route in such an overall setting have been clearly demonstrated by the Board. Those difficulties cannot be ignored. They are real factors in its consideration.

Understandably anxious as parents, petitioners see the Board as intransigent, and possibly swayed by a need to suit the convenience of the contracted bus company. With their child walking the shoulder of a country road on darkened mornings, such parental distress is predictable. No doubt other parents, including Ms. Day and Ms. Burgess, share those fears. However, petitioners' dilemma is not proof that the Board has acted arbitrarily. Its representatives did investigate, more than once. The inquiry led the Board to conclude that changing the route in effect

since 1980 would only add to the already obvious hazard of a rural route. Other children have walked to the Church St. stop from beyond 100 Mendham Rd., although at least one was older than A.F. The shoulder from A.F.'s house to Church St. is wide enough for two persons. Local government snow plows do blade the road during storms. Traffic on Church St., a relatively short span, is limited. An alternative path through the private driveway next to the bushes on Mendham Rd. is safe and available. It leads to a much wider shoulder that at least 3 younger children use every day. On this record, the Board's conclusion cannot be termed arbitrary or capricious.

However, the key element in the Board's decision, it's reluctance to have the school bus travel on St. Bernard's Road, is an entirely convincing rationale, in itself. This is not offset by the fact that Chester Township sends its school vans (or even buses) to Gill-St. Bernard's school, located on that road. The road is patently dangerous for a car. A viewing of this narrow, dangerous road from within the large school bus which transports the children to Bernardsville easily discloses that not only A.F. but every child who is a passenger is at risk. The danger would be enhanced by bad weather, on the torturously narrow inclines from which the bus could stray in the course of a skid. A system which would rely on the accurate timing of bus traffic alternation with Chester Tp. would only heighten the possibility of harm.

In comparison to the undeniably worrisome prospect of A.F. walking back-to-traffic on the Mendham Rd. shoulder, the chance of disaster to many children on the St. Bernard's route emerges as a measurably greater problem. In dealing with this problem, the Board faced a Hobson's choice, at best. It cannot reasonably be thought that, in deciding against the St. Bernard's "loop" option (from *either* direction), the Board acted arbitrarily or capriciously.

law:

The law relied on by petitioner does not suggest that, in this fact setting, the Board should be overturned by the Commissioner of Education. The section of the Motor Vehicle Act proffered, N.J.S.A. 39:4-34, conditions walking against traffic on "when practicable." With a drainage ditch running along the east side of Mendham Rd., A.F. will not be violating that section by walking on the only shoulder available. The facts found and discussed above confirm that the "reasonable supervisory care" standard of Titus v. Lindburg, 49 N.J. 66 (1967) and

the other cases which petitioners cite has not been abdicated. The Board has followed the "Transportation Guidelines" of Exh. R-1 (Exh. R-2 has not been shown to have been adopted), which in turn conform to the State Policies and Procedures Manual for Pupil Transportation (Exh. R-8). The reference by the Board to Walters, *et al.* v. BOE of the Township of Mendham, 1977 S.L.D. 854, and Beggans, *et al.* v. BOE Town of W. Orange, 1974 S.L.D. 834, *aff. State BOE,* 1975 S.L.D. 1071, *aff. N.J. App. Div.* Nov. 6 1975, are apposite, and should control in the allocation of responsibility for traffic safety. Caltavutoro v. Passaic, 124 N.J. Super. 361 (App. Div. 1973), certif. den. 63 N.J. 583 (1973) is a fact specific case, whose general holding, even if applied here, has not been violated by the Board. That Body has taken all the precautions for the safety of A.F. of which it is has been shown to be capable, on this record.

CONCLUSION

I **CONCLUDE**, therefore, based on my review of the entire record, including the credibility of witnesses, that:

> The respondent Board has not acted in an arbitrary, capricious, or unreasonable fashion toward A.F. by maintaining its present bus route. Neither has it made its decision in bad faith or through an abuse of its discretion.

ORDER

I **ORDER** therefore that the petition for relief brought through petitioner's appeal be, and hereby is, **DENIED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

January 27, 1989
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

1/30/89
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 1 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

J.O'D. AND A.O'D., on behalf of A.F.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PEAPACK-GLADSTONE SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. It is observed that petitioners' exceptions to the initial decision and the Board's reply exceptions were filed pursuant to N.J.A.C. 1:1-18.4.

In their exceptions, petitioners renew those arguments made in their post-hearing submissions. By way of summary, the Commissioner refers to petitioners' specific exceptions enumerated at pp. 9-12, wherein it is claimed:

> 1. The private driveway at the corner of Mendham Road and Church Street does not present a viable, feasible, or desirable alternative to the route which A.F. presently utilizes to reach her bus stop.
>
> 2. The route which A.F. must utilize to reach the bus stop is unreasonably dangerous and poses a serious hazard to A.F.'s health, safety, and welfare. The Board's decision that the route which A.F. must utilize to reach the bus stop is safe was arbitrary, capricious and unreasonable, and constituted a violation of the Board's duty to ensure the safety of children riding on its school buses.
>
> 3. The Board's recommendation that A.F. walk on the righthand side of the road, with her back to traffic, when she is walking to the bus stop is unsafe, unsound, and contrary to New Jersey law. See N.J.S.A. 39:4-34.
>
> 4. The Board's denial of Petitioners' request that A.F.'s bus stop be moved in order to alleviate the hazard posed to A.F.'s health, safety and welfare by the conditions along the route which she must walk to reach her bus stop was arbitrary, capricious, and unreasonable.

5. Utilizing St. Bernards Road to enable the school bus to pick up A.F. in front of her home provides a reasonable, safe, feasible and more desirable alternative to A.F.'s current situation. The Board acted arbitrarily, capriciously and unreasonably when it failed to consider all alternatives to A.F.'s existing route, and when it specifically rejected the St. Bernards Road loop as an alternative.

6. The School Board's conduct and decision making violated the Board's own Transportation Guidelines (R-1), the State's Policies and Procedures Manual for Pupil Transportation, and the duties and obligations imposed by the New Jersey Supreme Court on school boards to protect the safety and well-being of school children. See Titus v. Lindberg, 49 N.J. 66 (1967); Jackson v. Hankinson, 51 N.J. 230 (1968).

7. The allocation of responsibility for traffic safety set forth in Walters, et al. v. BOE of the Township of Mendham, 1977 S.L.D. 854, and Beggans et al. v. BOE Town of W. Orange, 1974 S.L.D. 834, aff'd State BOE 1975 S.L.D. 1071, aff'd N.J. App. Div. November 6, 1975, does not relieve the Board from its duty to protect the safety and well-being of school children, nor from its corresponding obligation to move a child's bus stop if that bus stop, and the route which he or she must utilize to reach that bus stop, unreasonably jeopardizes that child's health, safety and welfare. (Exceptions, at pp. 9-11)

Petitioners conclude by stating:

The hazards posed to A.F. in this case, and the availability of a viable alternative, inevitably lead to the conclusion that the School Board's decision not to move the bus stop to the front of her home was arbitrary, capricious and unreasonable and contrary to the sufficient credible evidence in the record. Petitioners therefore respectfully request that the Commissioner of Education reverse the Administrative Law Judge's determination and order the School Board to take appropriate steps to arrange for A.F. to be picked up by her school bus at a location in front of her home or some other appropriate location. (Id., at p. 12)

The Board's reply exceptions counter, point for point, petitioners' enumerated exceptions as follows:

1. The private driveway does present a viable, feasible or desirable alternative for A.F. as borne out by the evidence as discussed above.

2. The route which A.F. must utilize is not unreasonably dangerous and does not pose a serious hazard to A.F.'s safety and welfare. The Board's decision as to A.F.'s route is reasonable and is not arbitrary or capricious and constitutes no violation of the Board's duties.

3. Walking on the right side of the road is not contrary to N.J.S.A. 39:4-34 if walking on the left side is not practicable. It is not practicable because of the ditch on one side of the street.

4. A.F.'s request to move the bus stop is unreasonable, and the Board acted in a reasonable manner in denying Petitioner's request that the bus stop be moved.

5. Utilizing St. Bernard's Road does not provide a reasonable, safe, feasible and more desirable alternative to A.F.'s current situation. The Board did consider alternatives to A.F.'s existing route. Specifically, rejecting the St. Bernard's Road loop is proof that the Board did consider that alternative; but because the decision was not to Petitioner's liking is not proof that the Board acted in an arbitrary, capricious and unreasonable manner.

6. The Board's conduct and decision making was in keeping with its Transportation Guidelines (R-1), and the State's Policies and Procedures Manual for Pupil Transportation, and its obligations to protect the safety and well-being of school children.

7. The present bus stop and the route suggested by Respondent which A.F. must utilize to reach the bus stop does not jeopardize A.F.'s health, safety and welfare. (Reply Exceptions, at pp. 5-6)

By way of the conclusion, the Board adds the following:

1. The route used by A.F. to reach the bus stop does not unreasonably jeopardize A.F.'s health, safety and welfare.

2. The alternatives presented by Petitioner were not viable.

3. Respondent's actions were not arbitrary, capricious or unreasonable.

> The burden of proof is on the Petitioner to prove that Respondent acted in an arbitrary, capricious and unreasonable manner. The facts support the findings of the Administrative Law Judge that the Petitioner has failed to sustain that burden of proof. (Id.)

Initially, the Commissioner would express his shared concern with the ALJ and the parties for the safety and well-being of the students of this State in coming to and going from school. However, as noted by the ALJ, case law has established the responsibility for traffic and road safety is that of the municipality. See Donald R. and Isabel M. Walters et al. v. Board of Education of the Township of Mendham, 1977 S.L.D. 854, 857 ("***the safety of the roads is a function of the municipality"); see also Beggans et al. v. Board of Education of the Town of West Orange, 1974 S.L.D. 829, aff'd State Board 1975 S.L.D. 1071, aff'd N.J. Superior Court, Appellate Division 1071 and John Richard Logsdon, acting for D.R.L. v. Board of Education of the Borough of Demarest et al., decided by the Commissioner August 11, 1980.

Upon review of the respective positions advanced by the parties pertaining to the matter of A.F.'s circumstances, the Commissioner cannot agree with those views presented by petitioners in support of their position that the Board was arbitrary, capricious or unreasonable in "failing to take appropriate steps to alleviate the hazards posed to Petitioners' minor child, A.F., by the route which she must use to reach her bus stop." (Exceptions, at p. 2) The Commissioner's determination is grounded upon the findings and recommendations in the initial decision which he hereby adopts as his own. In so doing, the Commissioner emphasizes the recitation in the initial decision of the many demonstrations on the Board's part to accommodate petitioners' concern, through hearings, investigations and consideration of the area in general wherein petitioners reside. (See also R-3, R-4, R-5, R-6, R-17.) The Commissioner also notes his approval of the ALJ's investigation of this case, including his riding on the school bus on St. Bernards Road. He further notes that there was no obligation on the Board's part to reconsider its December 1987 determination at its meeting of March 15, 1988. See Marvin J. and Susan M. Markman v. Board of Education of the Township of Teaneck, decided by the Commissioner August 22, 1986.

More specifically, the Commissioner's careful review of this matter convinces him that as to the driveway use, testimony was adduced at hearing at Tr. 33 that permission was granted from the homeowners for A.F. to use their driveway to avoid the high bushes in front of their property which grow alongside Mendham Road, should A.F. prefer to travel that alternative route instead of turning onto Church Street. Further, the Commissioner's reading of N.J.S.A. 39:4-34 comports with the Board's. Because there is what is described as a drainage ditch on one side of Mendham Road, it is "impracticable" to use that side for walking. Thus, walking on the right side of the road is not contrary to N.J.S.A. 39:4-34.

Moreover, the Commissioner cannot agree with petitioners that the Board failed to consider viable alternatives to their concern. Walking onto the driveway mentioned was one such "creative" measure for resolving the concern in response to petitioners' preference that A.F. continue walking on Mendham Road instead of turning onto Church Street, as the Board suggested. Moreover, the Board minutes reflect that there was considerable discussion of the St. Bernards Road alternative by the Board, albeit that that alternative was rejected as unsafe. See Initial Decision at page 11; See also R-3 and R-6.

Accordingly, for the reasons stated in the initial decision, as amplified herein, the Commissioner adopts the findings and recommendations in the initial decision and hereby determines that the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

March 15, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5543-88
AGENCY DKT. NO. 134-5/88

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL DISTRICT, MORRIS COUNTY,
Petitioner,
v.
MUNICIPAL COUNCIL OF THE TOWNSHIP OF DENVILLE, MUNICIPAL COUNCIL OF THE TOWNSHIP OF ROCKAWAY, MUNICIPAL COUNCIL OF THE BOROUGH OF ROCKAWAY, AND MUNICIPAL COUNCIL OF THE BOROUGH OF WHARTON, MORRIS COUNTY,
Respondents.

Sidney A. Sayovitz, Esq., for petitioner (Greenwood, Young, Tashis, Dimiero & Sayovitz, attorneys)

Stephen H. Shaw, Esq., for respondent Denville Township Council (Villoresi, Jansen and Shaw, attorneys)

Joseph J. Bell, Esq., for respondent Rockaway Township Council (Dorsey, Pryor and Bell, attorneys)

Catherine M. Langlois, Esq., for respondent Rockaway Borough Council

No appearance by or for Municipal Council of the Borough of Wharton

Record Closed: December 27, 1988 Decided: January 27, 1989

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

The Board of Education of the Morris Hills Regional District (Regional District), Morris County, is a regional high school district operating two public high schools for residents of the Township of Denville, Township of Rockaway, Borough of Rockaway, and Borough of Wharton, Morris County. On March 14, 1988, the Regional District adopted a proposed school budget for the 1988-89 school year calling for raising by taxation for

school purposes the sum of $13,380,283 for current expenses and $395,777 for capital outlay. On April 5, 1988, voters of the school district rejected the proposed budget. After the Regional District board met with representatives of the governing bodies, the municipal councils of the Township of Denville and the Borough and Township of Rockaway adopted resolutions reducing the Regional District's 1988-89 budget by a total of $789,258 for current expenses and capital outlay. The resolutions were dated April 27, 28, and 29, 1988. On April 29 1988, the municipal council of the Borough of Wharton wrote the Regional District that it had "no objection to the proposed cuts as recommended by the joint meeting of the [other] representatives of Morris Hills held on April 25, 1988." (The Borough of Wharton has not since passed any resolution reducing the 1988-89 budget.)

The Regional District appealed to the Commissioner of the Department of Education pursuant to *N.J.S.A.* 18A:6-9, *N.J.A.C.* 6:24-1.3, and *N.J.A.C.* 6:24-7 *et seq.* from the actions of the respective governing bodies in reducing by $639,258 in current expenses and $150,000 in capital outlay (a total of $789,258), the budgetary amounts necessary to be appropriated for the year 1988-89 for use of the public schools to provide a thorough and efficient education. The Regional District contended, and the governing bodies denied, the budget cuts were arbitrary, and the constitutional standard was thwarted thereby. *See, generally, Bd. of Ed. of East Brunswick Tp. v. Tp. Council, East Brunswick*, 48 *N.J.* 94, 106-7 (1966).

The Regional District's petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on May 19, 1988. The Commissioner transmitted the matter to the Office of Administrative Law on July 27, 1988, for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

The Township of Rockaway filed an answer to the petition of appeal on June 7, 1988. The Borough of Rockaway filed its answer on August 2, 1988. The Township of Denville filed an answer on August 25, 1988, adopting and joining in arguments of the Township of Rockaway. No answer or responsive pleading was filed on behalf of the Borough of Wharton.

On July 1, 1988, the Regional District filed a motion for summary decision in its favor granting restoration of the full reduction of its budget of $789,258 for current expense and capital outlay on the ground that the action of the governing bodies, in effecting across-

the-board reductions of three percent in the proposed current expense budget without adequate or underlying determination or supporting reasons at the time, was, as a matter of law, arbitrary, capricious and violative of constitutional standard.

On notice to the parties, the matter was first addressed at prehearing conferences in the Office of Administrative Law on September 6 and September 9, 1988. After the matter was continued at request and/or with consent of the parties, the administrative law judge was informed on October 3, 1988, the matter had been settled, subject to appropriate resolutions and ratification thereof by the constituent municipalities. Thereafter, on December 12, 1988, the administrative law judge was informed by the Regional District that settlement could not be achieved; it became in order, therefore, for reinstitution and reconsideration of its motion for summary decision in its favor. The parties having made submissions in support of their respective positions on the motion, the record on motion closed December 28, 1988.

RECORD ON MOTION

Factually, the Regional District's argument for summary decision in its favor begins and ends with language of the resolution of the Township of Rockaway on April 26, 1988, which reduced the budget by $789,258 in current expense and capital outlay. The resolution was annexed to the answer filed by Rockaway Township; essentially, Rockaway's municipal action was adopted by the other three municipal councils. The resolution contained this rationale:

> Following individual study and collective meetings held April 18, 23, and 25, 1988, and including financial expertise review, the joint municipal councils have determined that in areas such as salaries, total instruction and support/community services, tuition, employee benefits, substitute teachers, and capital outlay, $789,258 in expenses [*sic*] that could be removed from the budget without impairing thorough and efficient educational benefits to the students of the Morris Hills Regional District.

Annexed to the resolution was a worksheet listing proposed reductions of line item accounts. The worksheet showed three-percent reductions of 16 of 17 current expense line item accounts. The reducing factor of three percent is clearly evident, if not stated expressly. A tabulation follows:

		1988-89 Appropriations	Proposed Reductions	Reduction Factor
(1)	Salaries	$11,869,231	$482,177	.04
(2)	Purchased Services	1,524,908	45,747	.03
(3)	Supplies & Materials	865,007	25,950	.03
(4)	Property	390,327	11,710	.03
(5)	Other	41,686	1,251	.03
(6)	SUBTOTAL	14,691,159	566,835	.038
(7)	To Other School Districts within State	21,500	645	.03
(8)	To Nonpublic Schools Within the State	387,805	11,634	.03
(9)	Other	72,365	2,171	.03
(10)	SUBTOTAL	481,670	14,450	.03
(11)	Group Insurance	997,177	29,915	.03
(12)	Social Security Contributions	187,553	5,627	.03
(13)	Retirement Contributions	145,225	4,357	.03
(14)	Tuition Reimbursement	30,000	900	.03
(15)	Workmen's Compensation	85,000	2,550	.03
(16)	Employee Benefits	386,800	11,604	.03
(17)	SUBTOTAL	1,831,755	54,953	.03
(18)	Temporary Salaries	100,653	3,020	.03
(19)	Total Current Expenses	17,105,237	639,258	.037
(20)	Site Improvements	400,550	150,000	--------
(21)	Total of (19) and (20)		$789,258	

In written testimony filed by the Township of Rockaway by one of its council members (as required by *N.J.A.C.* 6:24-7.1 *et seq.*), a council member replied to a question as to how the council arrived at the reduction it imposed:

> Obviously, we were at some disadvantage in not having sufficient information for us, but I believe that we were able to arrive at an intelligent and supportable decision by using past budget histories and recognizing that there would be a decrease in the student enrollment. We had to impose a five percent formula [*sic*] in reducing the property line items. In the capital outlay portion of the budget, we proposed a reduction of $150,000 in the area of hall lockers, upgrade intercom, replacement of lockers, and exterior door replacement.

The Rockaway Municipal Council president, in written testimony in answer to the same question, said the council justified the proposed reductions "by comparing past budget histories as well as employing a decrease in proposed student enrollment. In property line items, a five percent formula [*sic*] was used."

The township clerk of the Township of Denville, in an affidavit filed in compliance with *N.J.A.C.* 6:24-7.1 *et seq.* on August 15, 1988, certified her telephone poll of Denville Township Council members certified that "in the property line items, five percent increases were adjusted over last year's 1987-88 budget which resulted in cuts to the current budget line items for 1988-89."

In written testimony filed on behalf of the Borough Council of Rockaway on September 6, 1988, a council member certified that as a result of conferences and meetings with Regional District representatives, "it was a general feeling that the budget could be reduced [by the Rockaway Borough Council] by an overall three percent to five percent amount." The total figure in reduction was $789,258 in the program categories of "salaries, total instruction, support/community services, tuition, employee benefits, substitute teachers, and capital outlay."

Annexed to the petition of appeal as Exhibit D was the following certification by the mayor of the Borough of Wharton to the business administrator of the Regional District on April 28, 1988:

> This will certify that the Mayor and Council of the Borough of Wharton has no objection to the proposed cuts as recommended by the joint meeting of the representatives of the Morris Hills Regional School District held on April 25, 1988.

DISCUSSION

Affidavits and certifications by municipal council members were as one in the complaint that Regional District representatives were uncooperative in meeting with council representatives following defeat of the budget, uncooperative, that is, in failing to furnish complete information necessary for consideration by the several municipal councils in addressing the problem of "mandated" school budget reduction. The municipal councils were as one in pointing to the admonition of the Appellate Division in *Bd. of Ed., Tp. of Deptford v. Mayor and Council, Tp. of Deptford*, 225 *N.J. Super.* 76 (App. Div. 1988) for consultation and cooperation between local board and local governing bodies, including a good faith oral exchange of views, in order to afford an opportunity to resolve differences. The case indeed held that failure of a municipality's governing body to file a statement of reasons with its certification of school budget reduction to the county board of taxation did not preclude the Commissioner of Education from reviewing reduction upon petition by a local school board where the governing body submitted a detailed written statement of reasons at the time it filed its answer to the petition. The court remanded for hearing a matter in which the entire budgetary amount had been restored for failure of the municipality to give an immediate concomitant statement of reasons in support of its budget at the time it acted, in order that an exploration of the full merits of the case be had in an administrative hearing on the line items in the budget in an individual educational analysis. *Id.* at 85-6.

Unquestionably, here there may be factual dispute as to the measure of cooperation between educational and municipal representatives. But the issue raised by the Regional District's motion for summary decision in its favor restoring the full amounts cut from the education budget does not draw in question necessarily the sufficiency of the reasons advanced by the municipalities in the cuts effected. To that extent, therefore, the countering arguments advanced miss the point. What is drawn in question by the Regional District's motion is the manner and methodology by which reductions were effected by the municipalities, rather than the reasons advanced therefor. In my view, this is not a *Deptford* case.

What is implicated more critically is propriety of reduction of the budget in 16 out of 17 line item accounts by means of a flat three-percent reduction factor across the board. Such across-the-board reductions, like lump sum reductions, without individualized

consideration of each line item affected[1], have been held arbitrary and invalid. Such factoring is radical surgery, mechanical and not fact-, issue- or line item-sensitive, and is thus the antithesis of the "individualized educational analysis" spoken of by the court in *Deptford*. *Id.* at 86. It suggests instead nonintuitive, automatic reaction to voter mandate rather than the independent, individualized analysis that the court in *East Brunswick* enjoined:

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

In *Bd. of Ed., Tp. of Old Bridge v. Mayor and Council, Tp. of Old Bridge*, 1985 *S.L.D.* _____ (Oct. 30, 1985), an administrative law judge said:

> In this case, the governing body purported to effectuate a lump sum reduction of one percent across the board. The resolution making the reduction does not indicate how or why the governing body determined that such a reduction could be made in each line item [emphasis added]. The resolution does contain a conclusive statement that the governing body has determined that each item of the current expense budget should be reduced by one percent and further that the governing body believes that the proposed budget, as reduced, will provide a thorough and efficient education system of the school and the district. . . . The action of the governing body is arbitrary, capricious and unreasonable under standards set forth in *Bd. of Ed. of Paterson v. City Council of Paterson*, 1982 *S.L.D.* _____ (Jan. 18, 1982); *Bd. of Ed. Tp. of Union v. Tp. Committee, Tp. of Union*, 1981 *S.L.D.* _____ (July 9, 1981); *Keansburg Bd. of Ed. v. Boro. of Keansburg*, 1982 *S.L.D.* _____ (Oct. 29, 1982). *Old Bridge, slip opinion*, at 9.

[1]Breadth of the reduction technique is more readily apparent with understanding that the "line items" affected are themselves only subtotals of numerous other specific line items. *See, Financial Accounting for NJ School Districts, Chart of Accounts*, published by the Department of Education, 1978, at p. 6. The 200 series of salary accounts for instruction, for example, covers teacher, principal, consultant or supervisor of instruction, guidance, and psychological personnel.

Motions for summary decision, under *N.J.A.C.* 1:1-12.5(b), may be rendered if the papers and discovery that have been filed together with affidavits show there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. I am satisfied that pleadings and pre-motion submissions, together with documented certifications and, in particular, the resolution of the Rockaway Municipal Council, whose result was adopted and ratified by the several other respondent municipal councils, demonstrate absence of any material dispute sufficiently to permit the Regional District's motion to proceed to judgment in its favor. I **CONCLUDE** that any factual dispute concerning lack or level of cooperation between it and the respective municipal councils is not presently material, that regardless of what reasons be advanced specifically for reductions, the manner and methodology chosen to effect the reductions was arbitrary and individually insensitive to particular line items because a three-percent factor was employed, and that the result achieved was improper reduction by lump sum amount. In short, no "specific reasons" could otherwise justify employment of across-the-board percentage reduction methodology.

CONCLUSION

Based on the foregoing and having considered pleadings, admissions, stipulations, and certifications, together with the respective memoranda of law of the parties, I **CONCLUDE** the Regional District's motion for summary decision in its favor on the petition of appeal granting full restoration of budgetary cuts affected by the respective municipal councils should be and is hereby **GRANTED**. It is **ORDERED** that the sum of $789,258 in current expense and capital outlay be **RESTORED** to the education budget of the Board of Education of the Morris Hills Regional District for 1988-89 and amounts *pro tanto* added to the tax levy by the Morris County Board of Taxation in addition to those amounts certified by respondent municipalities to the Board for school purposes on April 28, 1988.

Under the circumstances, I do not believe it necessary to address the Regional District's additional argument in support of its motion that the action of the four constituent municipal governing bodies was violative of *N.J.S.A.* 18A:13-19, for lack of unanimity among the four, absence of action by the Borough of Wharton having demonstrated that infirmity.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby file this initial decision with **SAUL COOPERMAN** for consideration.

January 27, 1989
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

2-1-89
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 1 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

md

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MUNICIPAL COUNCIL OF THE TOWNSHIP OF DENVILLE, MUNICIPAL COUNCIL OF THE TOWNSHIP OF ROCKAWAY, MUNICIPAL COUNCIL OF THE BOROUGH OF ROCKAWAY, AND MUNICIPAL COUNCIL OF THE BOROUGH OF WHARTON, MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with the ALJ's findings and conclusion and adopts them as the final decision in this matter for the reasons expressed in the initial decision.

Accordingly, it is determined that the current expense and capital outlay budgets be as indicated below:

	Current Expense	Capital Outlay
Original Tax Levy	$13,380,283	$395,777
Reduction	639,258	150,000
Tax Levy After Reduction	12,741,025	245,777
Restoration	639,258	150,000
Tax Levy After Restoration	13,380,283	395,777

Therefore, the Morris County Board of Taxation is hereby directed to make the necessary adjustment set forth above to reflect a total amount of $13,380,283 to be raised for the 1988-89 school year local tax levy for current expense purposes and $395,777 in capital outlay.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 15, 1989

LEONARD J. DI GIOVANNI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Russell J. Schumacher, Esq.

For the Respondent, Gaccione, Pomaco and Beck
(Frank Pomaco, Esq., of Counsel)

This matter is before the Commissioner by way of a Motion for Summary Decision submitted by petitioner pursuant to the powers granted him in N.J.A.C. 6:24-1.15. The Petition of Appeal filed in this matter was dismissed by the Commissioner on July 15, 1988 pursuant to N.J.A.C. 6:24-1.9 in all respects except for the issue which is the subject of this summary judgment.

Petitioner, a nontenured school business administrator, alleges that the Board violated the terms of his employment contract because it failed to give sixty days' notice of his termination. The following facts have been stipulated by the parties.

(1) On June 10, 1987, petitioner and respondent executed a contract to employ petitioner as School Board Secretary/Business Administrator, commencing on September 1, 1987 terminating on August 31, 1989.

(2) Under the terms and conditions of said contract, respondent and petitioner further agreed that petitioner would work in the district, prior to September 1, 1987, at a per diem rate equal to 1/240 of his base salary.

(3) Petitioner served as a per diem employee from July 15, 1987 through August 31, 1987.

(4) Petitioner's annual salary was set by the contract at $57,000.00 for the period of September 1, 1987 through August 31, 1988 and at $60,000.00 for the period of September 1, 1988 through August 31, 1989.

(5) The employment contract entered into between petitioner and respondent contained the following clause:

> If the Board wishes to terminate this contract during its term, it may do so upon a finding by the Board of unbecoming conduct or other just cause as these terms are defined in N.J.S.A. 18A:6-10, and the Board shall further be required to notify Dr. DiGiovanni of termination in writing no less than sixty (60) days prior to the date of termination.

(6) On February 5, 1988, petitioner was given a letter from Michael D. Nardiello, Superintendent of Schools, informing him that he was suspended.

(7) On February 8, 1988, petitioner and his counsel, Russell J. Schumacher, appeared before the respondent Board in private session to discuss his employment status.

(8) The Board did not take action in public session on February 8, 1988, regarding petitioner's suspension or termination. Petitioner continued on paid suspension following the February 8, 1988 meeting.

(9) Counsel for petitioner received a letter dated February 18, 1988, from Nathanya G. Simon, Esq., [former] counsel for respondent. The letter stated the following:

> Please be advised that formal public action concerning termination of employment of Dr. DiGiovanni, effective April 8, 1988, will take place at the meeting of the Belleville Board of Education on Monday evening, February 22, 1988.

(10) The respondent voted in public session, on February 22, 1988, to terminate petitioner's employment, effective April 8, 1988.

(11) Petitioner was not paid his salary or provided with his contractual benefits after April 8, 1988. (Stipulation of Facts, at pp. 1-3)

Petitioner argues that the sixty-day notice to terminate his employment became effective on the date of the Board's vote during its public session (February 22, 1988), not on the date of its executive/closed session (February 8, 1988). In support of this, he cites N.J.S.A. 18A:10-6 which requires that all Board meetings shall be public and that all of its actions must be voted

on in public session and N.J.S.A. 10:4-12 which prohibits a board from excluding the public from portions of meetings during which formal action is taken.

Petitioner further relies on Buff v. Board of Education of North Bergen, 1981 S.L.D. 340 as support for his position, a case wherein the petitioner whose teaching contract contained a sixty-day termination clause successfully argued that the board violated the contract provision when terminating her employment in a closed session. The Commissioner concluded that a violation of N.J.S.A. 10:4-12 and N.J.S.A. 18A:10-6 occurred because no public action was ever taken, thus the contract was never terminated.

The Board argues that the Open Public Meetings Act (OPMA) was not violated by its closed session decision to send notification of termination to petitioner. In support of this, it points to the OPMA's allowance for certain exceptions to the public session requirement, including discussion of any material pertaining to discharge of any individual. N.J.S.A. 10:4-12(b)(3)

As to the closed session, the Board avers it abided by the statutory requirements of N.J.S.A. 10:4-13 for a resolution at a public session prior to the closed one and the notice requirement articulated in Rice v. Union Cty. Reg. High School District, 143 N.J. Super. 64 (App. Div. 1977), cert. den'd 76 N.J. 238 (1978).

The Board further argues that the contract provision calls for written notification "no less than sixty (60) days prior to the date of termination." The date of termination agreed upon by the Board was April 8, 1988, which is sixty days subsequent to the date upon which petitioner was notified, albeit that due to the late hour of the meeting, written notice was sent on the morning of February 9, 1988. Moreover, it points to the fact that the contract does not state that the official vote to terminate petitioner's employment must be taken sixty days prior to the date of termination. It merely requires notification sixty days prior to termination.

The Board sees Buff, supra, as distinguishable from the instant matter because the board in that matter failed to notify the petitioner of the closed meeting and it failed to hold a public vote subsequent to the private decision. In contrast to this, petitioner herein was present with counsel and spoke at the closed session. A vote was held at the next public meeting. Further, in Buff the petitioner was terminated immediately; was given two month's pay; and she would have acquired tenure during the sixty-day period had she not been terminated.

Upon review of the record, the stipulation of facts which are adopted by the Commissioner and the arguments of the parties, the Commissioner determines that the effective date of the sixty days' notice occurred on February 22, 1988, not February 8, 1988 as averred by the Board. Notwithstanding the fact that a proper resolution for closed session was enacted by the Board that petitioner was duly noticed of and attended that closed session, the

date of the Board action to notice petitioner of his termination must by law be the date of the public action, not that of the closed session. Irrespective of the distinguishing factors in Buff, supra, the determination in that matter with respect to actions taken at closed sessions is indeed applicable in the instant matter.

As stated by the New Jersey Supreme Court in Cullum v. Bd. of Ed. of the Township of North Bergen, 15 N.J. 285 (1954), N.J.S.A. 18A:10-6 does not preclude closed meetings of a board during which there is free and full discussion in advance of public action on an issue. Nonetheless, such actions are tentative in nature only because as the court determined, N.J.S.A. 18A:10-6 "***does, however, justly preclude private final action***." (emphasis supplied) (at 294) Thus, while the Board in this matter was entitled to engage in a free and full discussion on the issue of noticing petitioner of his termination at the February 8, 1988 closed session, the tentative decision, by law, could not be final until action was taken at a public meeting.

Accordingly, it is determined that petitioner is entitled to two weeks' salary since the official action to notice his termination occurred on February 22, 1988. Hence, the sixty-day contract provision entitles him to compensation up to and including April 22, 1988.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 16, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3944-88
AGENCY DKT. NO. 100-4/88

ROBERT P. AND MARYLYN REPTAK,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL, MORRIS COUNTY, AND BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,
Respondents.

Robert P. Reptak and **Marylyn Reptak**, *pro se*

Ellen S. Bass, Esq., for respondent, Board of Education of the Township of Mine Hill (Rand, Algeier, Tosti, Woodruff & Frieze, attorneys)

Record Closed: December 20, 1988 Decided: February 2, 1989

BEFORE **ARNOLD SAMUELS**, ALJ:

Petitioners, Robert P. and Marylyn Reptak, are contesting a decision by the Mine Hill Township Board of Education denying their daughter's application for admission in the 1988-89 school year to Roxbury High School (one of two high schools that receives students from Mine Hill). Instead, Ms. Reptak was assigned to Dover High School (the second school in the sending/receiving relationship).

PROCEDURAL HISTORY

The petition was filed by Mr. and Mrs. Reptak with the Commissioner of Education on April 18, 1988, pursuant to *N.J.S.A.* 18A:6-9, which authorizes the Commissioner of Education to hear and determine controversies and disputes arising under the school laws. An amendment to the petition was filed on April 25, 1988.

Respondent, Board of Education of the Township of Mine Hill (Board), filed its answer to the petition and the amendment on April 27, 1988. No responsive pleading was filed by respondent Board of Education of the Town of Dover. However, the Dover Board of Education filed an appearance, through its attorney, Eugene M. Friedman, Esq., stating that it was not a proper party to the action and that it took no position with respect to the merits of the allegations of the petition. Nevertheless, counsel requested that the Dover Board of Education be kept advised of the status of the matter.

The Commissioner of Education transmitted the matter to the Office of Administrative Law on May 27, 1988, for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was held on August 9, 1988, and a prehearing order was entered, defining and limiting the issues to be decided, fixing a hearing date, providing for discovery and regulating other procedural aspects of the forthcoming hearing. The order also requested counsel for the Board of Education of the Town of Dover to signify its intentions regarding its future participation in the matter. Counsel replied and repeated that his client took no position, but asked to be kept advised of the continuing status of the case.

The hearing was held on November 10, 1988, at the Office of Administrative Law in Newark, New Jersey. Two witnesses were called by the petitioners: Joan M. Brennan, Board Secretary and Business Manager of the Mine Hill Board of Education, and Dr. David Ottaviano, the Mine Hill Superintendent of Schools. One witness testified for the Board, Monica C. Dodd, President of the Mine Hill Board of Education. Ms. Brennan was briefly recalled by the Board as a rebuttal witness. Fifty-six documentary exhibits were marked in evidence, as identified on the list attached to this decision. The parties filed posthearing briefs and memoranda, and the record closed on December 20, 1988.

ISSUES

The issues, as stated in the prehearing order, are as follows:

A. Whether petitioner's daughter is entitled to enrollment in Roxbury High School, as part of the sending/receiving relationship with the Mine Hill School District.

B. Whether the petition was filed out of time, pursuant to *N.J.A.C.* 6:24-1.2(b).

(No evidence was offered and no argument submitted on this issue. Therefore, the question will not be decided or dealt with further in this decision.)

DISCUSSION OF THE TESTIMONY AND EVIDENCE

The Mine Hill School District is small, limited to grades K to 6. Seventh and eighth grade students are sent to the public schools in the Town of Dover, pursuant to a single sending/receiving relationship between the two communities. Most of the Mine Hill High School students (approximately 96 percent) are also sent to Dover High School. The balance (approximately four percent) attend Roxbury High School.

Joan M. Brennan, Secretary and Business Manager of the Mine Hill Board of Education for the past 11 years, testified that she has always used the four percent limit for students sent to Roxbury High School, for as long as she has been employed in the district. According to Ms. Brennan, this has been observed consistently over the years, even though the Board policy was not adopted in written form until July 1986. *See,* Exhibit P-4. Furthermore, Ms. Brennan stated that the Reptak application for 1988-89 attendance at Roxbury by their daughter, Christie, was the first occasion on which the policy had to be applied, because of applications filed by more than four percent of the anticipated high school students from Mine Hill. The Reptak's older daughter, Suzanne, presently attends Roxbury High School, having been accepted for attendance there for the 1986-87 school year. Nevertheless, Ms. Brennan said that the office files, bills and other records showed that the four percent ceiling on Mine Hill High School attendance in Roxbury was always observed in the past, regardless of the fact that the policy was not put into written form until July 1986.

Ms. Brennan further testified that the four percent policy was based on the Board's adherence to the requirements of *N.J.S.A.* 18A:38-12, which provides that whenever a board of education designates two or more high schools outside of its district for the attendance of its pupils, it shall allocate and apportion its pupils

among the designated high schools in the same ratio that existed in the 1943-44 academic year, if no different or other allocation and apportionment had been made prior to 1943-44. According to Ms. Brennan, the Mine Hill District retained four percent as the allocation to Roxbury High School, in the absence of any other previous apportionment, because their best research determined that four percent of the eligible high school students were sent to Roxbury in 1943-44. Referring to the manner in which the question was researched, Ms. Brennan stated that although student records for 1943-44 no longer existed, the Board was able to use minutes showing 1943-44 tuition payments to Roxbury in that year. The number of students attending Roxbury in 1943-44 was computed by dividing the total dollar amount of tuition paid to Roxbury by $145, the per pupil cost that year. The foregoing calculation is illustrated in Exhibit R-6.

Ms. Brennan testified that she and the Board were aware of the fact that the Reptaks had a special reason for wanting their daughter to attend Roxbury, because their older child was a student there. However, Ms. Brennan pointed out that the policy was specifically designed to avoid giving preferences because of special reasons, primarily because a variety of special reasons would be likely to exist among the applicant families, and the Board did not want to be in the position of deciding that one special reason is more or less compelling than another. She acknowledged that some of the students admitted to Roxbury in the past, by request, stated that geographic proximity was the reason for the application. According to Ms. Brennan, that was an acceptable statement, but it did not matter to the Board because all requests were within the four percent limitation and were therefore granted regardless of the reason. Ms. Brennan further stated that the Board never advertised or advised people of the availability of the choice between Dover and Roxbury. Instead, they merely waited for written applications to be made, such as that submitted by the petitioners in August 1987, Exhibit P-2.

Ms. Brennan also identified the method used by the Board under the policy (No. 5119) to receive applications requesting assignment to Roxbury. The letters must be postmarked before the first day that mail is received after Labor Day. Later applications are also accepted, but requests received during the time stated above are given preference. In addition, applications are required to be made one year prior to the beginning of the year of admission to high school. In other words, an application for admission in September 1988 should have been submitted just prior

to September 1987. A lottery is held when there are more eligible applications than available places. That is what took place in the case of Christie Reptak. The foregoing procedures are explained in detail in the written policy, Exhibit P-4.

Ms. Brennan also explained why the Board did not feel it necessary to have the policy in written form in earlier years. The Board never had applications for admission to Roxbury that exceeded four percent of the entering high school students, and all requests that were received were granted. Ms. Brennan emphasized that the written policy only memorialized and continued the same policy that had been in effect for many years before. However, the Board predicted that, for the first time, more applications for Roxbury were expected than there were available places. Therefore, it became crucial for the policy to be spelled out in detail.

Ms. Brennan also went into considerable detail about the timing and the manner in which the number of available seats were calculated under the policy. Requests for attendance at Roxbury High School are due one year prior to the start of the school year for which attendance is requested. Therefore, estimated high school enrollment figures for one year prior to the year of enrollment are utilized. That necessarily means that student attendance figures at the time school closes in June must be used. Ms. Brennan explained that the projection made for enrollment in September a year later are therefore necessarily based on estimates, but it is always done the same way. The Board cannot wait until later in the immediately preceding school year because the receiving districts need to know the number of students expected and contracts must be entered into. Ms. Brennan presented a prepared exhibit, Exhibit R-7, to illustrate the manner in which the calculation is done. This exhibit illustrates the process that was used for calculating admission to Roxbury in September 1987, and then again a year later in September 1988, the year in dispute. The exhibit is self-explanatory, but it clearly shows how the result that permitted the admission of only one new student in September 1988 was arrived at .

There were two timely applications filed for admission to Roxbury in September 1988, one of which was for Christie Reptak. According to Ms. Brennan, this was the first time that requests were made that exceeded the four percent limitation, and the first time that Policy 5119 and the lottery had to be utilized. She also pointed out that the calculation showed a permissible 5.48 students for Roxbury

for the 1988-89 school year. This was adjusted to five students, because the fraction was under .50. If it would have been above .50, the adjustment would have been upwards, to six students.

Dr. David Ottaviano, Superintendent of Schools of the Mine Hill District, testified that he was contacted by the petitioners, who asked him for advice after the Board decision was made to accept the one student whose name was drawn in the lottery (not Christie Reptak). He advised the petitioners to consult the Board. As far as he was concerned, he did not feel that one student more or less in either high school was a serious objection, and he had no strong feeling one way or the other. However, he stated that he would support the ruling of his Board.

Monica C. Dodd, President of the Mine Hill Board of Education, testified that for as long as she had been a Board member, nine years, four percent was considered the maximum number of students that would be admitted to Roxbury High School. She observed that there was no great demand for admission to Roxbury in the past, and the four percent was not always filled. However, requests have been increasing in the past few years, which was the reason that the written policy was adopted. The Board predicted that there would soon be a demand for admission to Roxbury above the four percent limit, and they felt that the precise procedures for admission should be formalized. She repeated that requests had never exceeded four percent before the year in question and, therefore, no one who applied was subject to rejection.

When asked if she could discern a reason for the increasing demand by Mine Hill parents for admission of their children into Roxbury, rather than Dover, Ms. Dodd observed that the racial composition at Dover High School has been changing over the past several years, towards an increasing number of minority, black and Hispanic, students. However, Ms. Dodd stated that she had no firm evidence that the racial factor had any direct causation or relationship to the increased demand for the other school, Roxbury, and she did not choose to speculate on that subject.

Ms. Dodd outlined the procedures that were used in preparation for the written policy, No. 5119. A policy committee was first appointed to investigate and consider all of the necessary details before the draft was written. In discussing the matter, the Board felt that it wanted to be as equitable as possible when choices had to be made, and it was decided that, in order for the policy to be completely fair to

all applicants, it should be blind and deaf to any special circumstances, admitting all students on a first-come, first-serve basis or with the use of a lottery or drawing when it became necessary to decide among several applications that were filed on time. Ms. Dodd explained that special circumstances exist more often than not, and the Board did not want to be in a position where it would be compelled to choose among special circumstances. Such a subjective selection process could result in never-ending disputes.

When asked why there was very little, if any, publicity given to the Roxbury/Dover situation, Ms. Dodd stated that the Board did not want to give undue publicity to the availability of only a few spaces in Roxbury High School because it was such a small part of the sending/receiving arrangement, with Dover taking 96 percent of all high school students. She also felt that, because there were potential problems with some parents being disappointed at not being able to send a child to their school of choice, it was not wise to encourage these problems with publicity.

Ms. Dodd further testified about the research that was done into the use of *N.J.S.A.* 18A:38-12. The Board first sought help from the New Jersey School Boards Association, which led them to the statute and the necessity to use the 1943-44 school year percentage of attendance in Dover and Roxbury to fix the permanent apportionment.

Ms. Dodd repeated unequivocally that the Board had always observed and considered four percent of the entering high school students to be the maximum that would be sent to Roxbury, and the written policy, No. 5119, only formalized the practice. She stated that the Board had never exceeded the four percent in its history, although there were years when less students were sent because there were fewer applications.

When asked, on cross-examination, if the Board had ever shown favoritism or given special consideration to some applicants for Roxbury, Ms. Dodd denied it vehemently, saying that such a practice was never engaged in. (In papers related to the petition, the petitioners had alleged that favored treatment was previously given to the child of a local politician. However, it is observed that no proof was offered or attempted to be offered by the petitioners to support this claim.)

When asked about application of the policy to the petitioners' daughter, in the subject case, Ms. Dodd testified that the Board had engaged in a great deal of deliberation and met many times with Mr. and Mrs. Reptak about the problem. The Board recognized that Christie Reptak was the first student to be refused admission to Roxbury High School, by application of the policy. However, she predicted that it would be necessary to apply the policy and the lottery with increasing frequency in coming years.

Ms. Dodd also stated that present calculations show no new students will be granted admission to Roxbury High School in the coming school year, because enrollment has declined. The petitioners' daughter presently is first on the waiting list.

Board Secretary Joan Brennan was recalled by the Board in rebuttal to confirm the manner in which the arithmetic calculations were done when only one new student was admitted to Roxbury in September 1988 under the four-percent policy. She repeated that the fraction was dropped when the calculation showed that 5.48 Mine Hill students were in attendance at Roxbury. If the fraction had been .50 or higher, one would have been added. Ms. Brennan also testified about the open and apparently fair manner in which the lottery was conducted, which resulted in drawing the name of the student other than Christie Reptak. The method or fairness of the lottery was not contested by petitioners.

DISCUSSION OF THE EXHIBITS

The 56 exhibits marked in evidence provide a complete and thorough documentary record of the events involved in this dispute. There is a considerable amount of correspondence among the parties relating to this matter, including Roxbury High School's willing admission of Christie Reptak as a private tuition-paying student, in the absence of tuition paid by the Mine Hill Board of Education under the sending/receiving relationship. The exhibits also include all of the enrollment figures for the years surrounding this dispute. These were offered by petitioners to support their argument that the final enrollment figures often are not the same as those used a year earlier, when the Roxbury applications for admission are filed and selected. All of the Mine Hill Board minutes in 1943-44 are included, showing the only documentation that the Board possessed when it researched the

1943-44 figures in its attempt to comply with the statute. Other exhibits fully document the discussions surrounding this controversy and the consideration given to it by the Mine Hill Board.

POSITIONS AND ARGUMENTS OF THE PARTIES

The petitioners attack both the validity and application of Policy 5119, claiming that it was arbitrarily formulated and that it is arbitrarily applied.

In support of their argument that the policy was arbitrarily formulated, the Reptaks, while agreeing that the actual allocation and apportionment that existed in 1943-44 should prevail in the absence of a different contractual arrangement, allege that the figures and calculations used were questionable. Petitioners claim that the use of tuition bills in 1943-44 to establish the 4 percent/96 percent ratio was arbitrary and not indicative of actual student enrollment in that year.

Petitioners argue at much greater length about the Mine Hill Board's application of the policy, particularly insofar as it resulted in the rejection of their daughter for attendance at Roxbury high School. Their first allegation in support of an allegation of arbitrary application of the policy deals with the fact that until recent years less than four percent of the eligible high school students went to Roxbury, which necessarily meant that more than 96 percent went to Dover. This may be true, but the Board has stated that the reason for this was a lack of sufficient applicants for Roxbury. The Reptaks' position is that four percent should have been compelled to attend Roxbury, even if four percent did not make application.

The petitioners also allege that most of the students who attended Roxbury in earlier years did so because of geographical proximity, which was a special circumstance recognized by the Board. The Board counters this argument by saying that all applicants for Roxbury, which were less than four percent of those eligible coming from Mine Hill, were granted their requests to attend Roxbury, not because of any special circumstances, but because there was no reason to reject their applications.

Mr. and Mrs. Reptak state further that there was no evidence to indicate that more than three students ever applied for admission to Roxbury in one year, and on some occasions two or more were admitted. However, for the year in question only two applied, and only one was approved. Christie Reptak was the first person to have been refused acceptance. The Board here states that the standards of the policy were followed, which produced the result, after a lottery drawing. The Board further states that, because Christie Reptak was the first to be rejected because of applications over the four-percent limit, that fact does not invalidate the policy.

Petitioners also disagree with the deaf and blind attitude of the policy, ignoring the special circumstance where a family already has an older child in Roxbury. The Reptaks feel that the failure to give preference to siblings is arbitrary, without rational basis and is induced by improper motives. The Board here states that the petitioners are arguing for favoritism to be shown based on their special reason. Others may have their own special, but different, reasons and the policy wishes to avoid a situation whereby the Board or an administrator is responsible for giving preference to one special reason over another.

The Reptaks dwelt heavily on the fact that the estimated figures used at the time the selection is made do not remain the same when actual figures are available later in the year, thereby sometimes creating a deviation from the strict 4% enrollment sought. For example, six Mine Hill students were enrolled in Roxbury in 1987, instead of five that would have been a more accurate four percent, if viewed from the perspective of the actual enrollment that existed in September 1987. The Board here points out that the policy consistently utilizes the best available projected figures one year in advance, when the applications are received, and that this does not vary, but is self-adjusting from one year to the next. The Board further states that because enrollment usually decreases as the year progresses, fewer students would most often be admitted to Roxbury if later enrollment figures were used. If that had taken place in the year in question, Christie might have had even less of a chance of being selected. Of course, the Board does not remove a student once he or she is admitted and the enrollment figures drop later in the year. However, such a situation can and does affect admissions in the following year, usually causing a reduction.

The petitioners further argued that it was unreasonable for the Board, when confronted with the 5.48 fraction, not to have rounded the accepted enrollment up to six students, to include their daughter. Here, the petitioners repeat their argument for estimated figures to be used closer to the actual date that school begins, such as nine months instead of one year. The actual need for high school enrollment in January 1987 totaled 136 students, two less than the June 1986 number that was utilized in September 1986. Therefore, according to the petitioners, because the nine-month projection turned out to be more accurate, it rendered the 15-month estimated figure unreasonable and grossly inaccurate. The Board has pointed out that this argument is an attempt to adjust or change the policy for personal reasons, but even if such a change were made, fewer students would have been admitted because of the reduced enrollment, which again would have been less favorable for Christie's selection.

The position taken by the Board substantially repeated the reasoning, in support of the policy and its application, as testified to by the witnesses, Ms. Brennan and Ms. Dodd. In addition, the Board has submitted a single legal argument, supported by case law, that the petitioners have failed to meet their burden of proving that the Board's action, in enacting the policy in question and in applying it, was arbitrary, capricious or unreasonable, and that hence the petitioners should not prevail.

LEGAL DISCUSSION

Neither party contested the validity of the requirement to use *N.J.S.A.* 18A:38-12 to establish the allocation and apportionment of Mine Hill students to be sent to the two high schools, Dover and Roxbury, in the absence of any other allocation or apportionment prior to the 1943-44 school year. The petitioners have suggested instead that insufficient evidence existed to justify the Board's conclusion that the correct ratio in 1943-44 was 96% to 4%. However, they suggested no better alternative method to that used by the Board.

N.J.S.A. 18A:11-1 grants broad general powers to boards of education to make, amend and repeal rules for the government and management of the public schools, and the boards of education are further charged with the responsibility and duty to perform all acts and do all things consistent with law necessary for the lawful and proper conduct, equipment and maintenance of the public schools. Such

management responsibilities are the direct concern of local and State boards of education and are not subject to negotiation. *Galloway Tp. Board of Education, Atlantic County, v. Galloway Tp. Education Association*, 135 *N.J. Super.* 269 (Ch. Div. 1975), aff'd, 142 *N.J. Super.* 44 (App. Div. 1976).

It is true, as argued by respondent, that the exercise by boards of education of lawful management prerogatives will not be overturned, absent definitive showing that such actions are arbitrary, in bad faith, without rational basis or discriminatory. *Marcewicz v. Board of the Pascack Valley Regional High School District*, 1972 *S.L.D.* 619; *James McCabe v. Board of Education of the Township of Brick, Ocean County, 1974 S.L.D.* 299.

> . . . The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under the school laws, inquire into the reasonableness of the adoption of policies, resolutions or by-laws, or other acts of local boards of education in the exercise of their discretionary powers, but will not invalidate such acts unless unreasonableness clearly appears.
>
> *McCabe,* at pp. 307-308.

Absent a showing of abuse of the board's discretionary powers, the board's actions are entitled to a presumption of correctness. *See, Quinlan v. Board of Education of North Bergen Township*, 73 *N.J. Super.* 40 (App. Div. 1962).

However, a board may not act in ways that are arbitrary, unreasonable, capricious or otherwise improper. *See, Cullum v. North Bergen Board of Education*, 15 *N.J.* 285 (1954).

See also, Thomas v. Morris Township Board of Education, 89 *N.J. Super.* 327 (App. Div. 1965), aff'd, 46 *N.J.* 581 (1966); *Boult and Harris v. Passaic Board of Education*, 1939-49 *S.L.D.* 7, 13, aff'd, State Board of Education 15, aff'd, 135 *N.J.L.* 329 (S. Ct. 1947), 136 *N.J.L.* 521 (E.&A. 1948); *Hoffman v. Board of Ed. of the Township of Cherry Hill*, 1973 *S.L.D.* 406.

In furtherance of the foregoing standards, it is incumbent upon the petitioners to show that the Board's action in promulgating and utilizing Policy 5119, thereby eliminating their daughter from consideration for attendance at Roxbury High

School, was arbitrary, unreasonable, capricious or otherwise improper. The burden of proof rests with the petitioners. *Quinlan v. Board of Education of North Bergen*, 73 *N.J. Super.* 40, 49 (App. Div. 1962), and the petitioners must sustain that burden by a preponderance of the believable evidence. *In re Polk License Revocation*, 90 *N.J.* 550, 560, 562 (1982); *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962); *In re Kerlin*, 151 *N.J. Super.* 179, 184 (note 2) (App. Div. 1977).

CONCLUSIONS

Petitioners' desire for their daughter, Christie, to attend Roxbury High School is understandable, in light of the fact that their older daughter is presently enrolled there, and there is no showing that the petitioners were motivated by factors other than that circumstance. Nevertheless, they must satisfy the foregoing legal burdens in order to prevail.

First, it is **CONCLUDED** that Policy 5119 was carefully and validly promulgated in accordance with statutory requirements. There was nothing arbitrary about the manner in which the policy was formulated. Although the same policy had been in effect for many years, it was recognized that the need to utilize it to avoid problems was imminent. Itemized procedures needed to be spelled out. The matter was then investigated, considered and discussed by the Board, which made an intelligent, although possibly arguable, decision to deliberately avoid the vagaries and pressures that might accompany a need to decide on the supremacy or inferiority of special reasons on a case-by-case basis. The blind and deaf aspect of the policy was intentional, and it was not unreasonable or arbitrary because it established a standard that would be equally applicable to all, in an attempt to be even-handed, recognizing that insoluble disputes could arise when attempting to measure the equities of one special circumstance against another.

Secondly, it is **CONCLUDED** that the same comments apply equally to the very precise and detailed manner in which the Board Secretary performed her calculations in September 1987, in accordance with the policy, which is also very specific about the standardized manner in which applications must be filed.

It is within the reasonable prerogatives of the Board to have designed a policy that requires selections to be made one year in advance. This gives an adequate

opportunity for both the sending and receiving districts to plan for incoming students, draft contracts and provide for budgetary needs. It is also not unreasonable or arbitrary for the Board to use enrollment figures from the last day of school (the end of June) prior to the date on which the calculations are made (the beginning of September). These are the best available figures before school begins.

The petitioners' arguments were submitted in good faith. However, it is obvious that they made every possible attempt to turn the situation to a facet that might have provided more favored treatment for their daughter. Although perfection never could be attained in the application of the policy, the Board did everything it reasonably could to be fair, both in the content of the policy and in its implementation at the time in question. Even when the Reptaks attempted to argue a reworking or alternative use of the selection process, they did not succeed in showing that their daughter would have had any greater chance of selection; for example, if later enrollment figures were used. The closest they came to a successful attempt at varying the process in their favor was the argument that a .48 fraction should be rounded up one number, instead of dropped. However, the Board's point of view is the mathematically acceptable and proper method of dealing with a fraction when a whole number result is needed.

Therefore, the petitioners did not prove that there was no proper policy, or that it was unreasonable. They also did not prove that the policy or the manner in which it was implemented was arbitrary or unreasonable, either generally or with specific reference to their daughter. There was likewise no proof that the policy was previously unfairly applied or utilized in a manner to favor anyone with special personal or privileged reasons.

It is ultimately **CONCLUDED** that the Board's action was not unreasonable, arbitrary, capricious or otherwise improper. Furthermore, the Board acted within the scope of its discretionary authority and managerial prerogatives, and the presumption of the correctness of its action was not overcome by the petitioners. The petitioners have not shown that their daughter was entitled to enrollment in Roxbury High School, as part of the sending/receiving relationship with the Mine Hill School District.

ORDER

It is therefore **ORDERED** that respondent's action, declining to enroll the petitioners' daughter in Roxbury High School for the 1988-89 school year be **AFFIRMED** and the appeal **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10(c).

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

February 2, 1989
DATE

ARNOLD SAMUELS, ALJ

Agency Receipt:

2-6-89
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 7 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

ms/e

ROBERT P. AND MARYLYN REPTAK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL AND BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner Robert Reptak's exceptions and Respondent Mine Hill Board's answer thereto were timely filed pursuant to N.J.A.C.. 1:1-18.4.

Petitioner's exceptions specify a number of factual oversights which he believes are significant and in need of augmentation and/or correction. He urges that the Commissioner approve his daughter's attendance at Roxbury High School together with a refund of all tuition and transportation costs expended by him for her attendance at that school to date. In addition to his exceptions, petitioner also relies upon the brief submitted to the ALJ in support of his prayer for relief.

Upon review of the record in this matter including the exceptions, reply exceptions and the briefs submitted by the parties, the Commissioner is in full agreement with the ALJ's findings, conclusions and recommended decision dismissing the Petition of Appeal and adopts them as the final decision in this matter.

As correctly recognized by the ALJ, it is well established in law that the exercise of a board's lawful management prerogatives will not be overturned absent definitive showing that such action was arbitrary, taken in bad faith, without rational basis or discriminatory. The record quite simply does not demonstrate that petitioners have borne their burden of proof in this regard. The ALJ's thorough and considered analysis of the facts and legal issues is amply supported by the record.

Accordingly, the Petition of Appeal is dismissed for the reasons stated in the initial decision.
IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 20, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3845-88
AGENCY DKT. NO. 123-5/88

THE BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK,
Petitioner,
v.
THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF GREEN BROOK,
Respondent.

Kenneth S. Meyers, Esq., for the petitioner Board (Nichols, Thomson, Peek & Meyers, attorneys)

Harman R. Clark, Jr., Esq., for the respondent Committee

Record Closed: September 29, 1988 Decided: December 14, 1988

BEFORE **RICHARD MURPHY**, ALJ:

STATEMENT OF THE CASE

The Board of Education of the Township of Green Brook (petitioner) appeals from a reduction of its budget for the 1988-89 year in the amount of $38,000 made by the Township Committee of the Township of Green Brook (Committee) pursuant to N.J.S.A. 18A:22-37. The cuts are for roof repairs ($20,000) and conversion of a part-time administrative position to full-time ($18,000). The Board seeks restoration of the full amount on the grounds that it is necessary to provide a thorough and efficient system of education in the District. The Committee views the budget as unreasonably inflated and claims that it made a reasonable reduction in light of the Board's failure to properly budget for its needs over an extended period of time. This opinion recommends that the $20,000 item for roof repair be restored to the Board's budget.

PROCEDURAL HISTORY

The Board filed its Petition of Appeal on May 12, 1988 and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on May 24, where a prehearing was conducted on July 22. The matter was heard to completion in Green Brook on September 29, at which time the record closed for the purposes of decision. The period for submission of the initial in this matter was fully extended until December 14 for additional time for research and consideration as well as because of the backlog of other pending decisions.

FINDINGS OF FACT

The facts are not in dispute. The Board prepared and submitted to the voters a budget for the 1988-89 school year in the amount of $3,985,531, which the voters rejected on April 4, 1988. The Township Committee met on April 18, 1988 and adopted a resolution stating, in part, that:

> Whereas following receipt of the proposed 1988-89 school budget from the Board of Education of the Township Committee of the Township of Green Brook did meet and did consult with the Board of Education on April 18, 1988, considered the proposed 1988-89 school budget line item by line item, did make specific recommendations to the Board of Education of areas and amounts of reduction, with supporting reasons, and did determine an amount which in its judgment is necessary to provide a thorough and efficient schools in the district, which amount consists a reduction of $38,000 in the school budget. . . .

The Committee found that the current expenses of the schools were $3,947,531 and recommended that the amount of $3,952,011.50 be certified to the County Board of Taxation as the amount to be raised. No written reasons were provided by the Committee for rejection of the full budget at its April meeting, but a statement of supporting reasons, as well as line item reducations were subsequently provided on or about July 7, 1988, prior to the prehearing held in this matter. The Committee slashed $20,000 from a maintenance budget of $190,000.30 relating to roof repairs, and also reduced a request for $36,000 for a supervisor of instruction on a full-time basis to $18,000 to fund a part-time position.

As to the roof repair, the Committee noted that the increase in budget for maintenance of the plant between 1987-88 and 1988-89 was 50.162 percent (from $126,550 to $190,030) and stated that this "marked increase" in the new budget

was "judged to be overly burdensome to add to a single budget, and unnecessary for the maintenance of the buildings or for providing a thorough and efficient education. . ." (R-1). The Board further reasoned that the amount budgeted was in excess of the funds required for the roof repairs in light of bids received below estimate. Concerning the reduction of the position of supervisor of instruction to part-time, the Committee reasoned that the full-time position was not justified given the small size of the student body and declining enrollment (R-2).

The Board alleged in the second count of its petition that the Township Committee had neglected to specify in writing line items to be reduced and also had failed to provide detailed justification for the reductions. In light of the Committee's submission curing these defects on July 7, 1988, the parties agreed that this case would be limited to the issue of whether the reduced budget as approved provides sufficient funds for a thorough and efficient education. As indicated, the Committee concluded that the Board had failed to properly budget needs over a number of years and consequently had submitted an unreasonably inflated budget which it reduced. The Board contends that the Committee imposed a roughly one-percent reduction (in fact .008 percent) on a budget that was already well below cap. In essence, the Board accuses the Committee of arbitrarily selecting items for reduction in response to the voter's rejection without any real analysis or consideration of the underlying need for the items.

The superintendent of the Board, John Kolchin, who prepared the budget, testified that the submitted budget was $181,622 below the allowable cap for 1988-89 and that this was intended by the Board to give some relief to the taxpayers in light of the fact that prior budgets had been much closer to the cap. Because of this, no line budget surpluses were expected in the 1988-89 budget and it thus contained no real margin for contingencies. As to the roof repairs, Superintendent Kolchin stated that portions of the roof at both the elementary school and high school required immediate replacement, for which $100,000 was budgeted. After bids were submitted, a contract was awarded to Keating Roofing, Inc. for a total cost of $135,000. The $38,000 reduction will leave less than half of the funds necessary to complete the work. The Board also awarded a contract to J. Murphy Inc relation] Roofing and Sheet Metal to replace a portion of the elementary school roof at a cost of $65,746. The architectural fee for both projects is $16,060. As a result of water damage at the elementary school, there is also need to replace ceilings in the library and art room and to install new lightening at an estimated cost of $4,000 per room. Kolchin stated that half a high school roof had been repaired in the 1986-87 school

year, when there was no surplus and caps were at 4 5 percent The elementary school roof was reshingled for $30,000 in the 1987-88 school year, and the Board has spent several thousand dollars in an attempt to stop leaks in the elementary school. In Kolchin's opinion, the current roof repairs could not be postponed beyond the 1988-89 year and that, if necessary, the Board of Education intended to use the $172,000 surplus for this purpose. Kolchin conceded that no funds had been budgeted for roof repairs in prior years but maintained that the Board's philosophy was to keep the budget down. Both the repair work and architectural fees came in for less than the Board's estimates. For the 1988-89 year the costs for repair of the roofs of both the high school and elementary school will be in excess of $200,000 based on estimates of $65,746 for the reroofing of the elementary school and $135,000 for similar work at the Green Brook High School.

As to the reduced administrative position, Kolchin, who was testified as an expert in administration, stated that the position of supervisor of educational programs was created three years ago when the Board saw a need for such a position at the elementary and high school level to coordinate program and teacher evaluation and to report directly to the superintendent, as opposed to any involved principals (P-9). The position was modified to that of supervisor of instruction in 1985 and the job description was stated as that of assisting the superintendent in such tasks that pertained to the educational philosophy of the District (P-10). In addition to assisting the superintendent in general administrative operations, the supervisor of instruction is to observe and evaluate professional staff as assigned, assist teachers in methodology and management, supervise such personnel as assigned, and serve on committees and attend meetings as directed, among other duties (P-10). Superintendent Kolchin was of the opinion that this new full-time position, which performed functions previously handled by the superintendent and principals, was necessary to more efficiently monitor a thorough and efficient compliance, as well as to improve staff evaluation and observation, as well as new programs

The Board of Education also cited a number of unbudgeted items, including three new staff positions:

C-3 Projected Professional Staff 1988-89

A. One new Kindergarten teacher - increased enrollment - we will now have 3 full day sections The Board's policy is 20 students per section There are 45 students registered at this time. This was not

budgeted because we did not anticipate this increase in enrollment.

B. Increase the elementary school nurse from 77½ to full time. Not budgeted - Parents complained because students did not have coverage for the first 2 1/4 hours of school. Although the budget was defeated the Board honored this request for the Health, Safety, and Welfare of the students which coincides with a "thorough and efficient" education.

C. Increase the psychologist from 3 days per week to full time. We have a need to provide the students with crisis intervention, i.e. - drugs, alcohol, suicide, single parent families - not budgeted. However, when administrators and special services explained to the Board that there is a definite need after the budget was defeated the Board chose to honor the request to provide a "thorough and efficient education.

(P-1r).

As to the provision for a full-time psychologist, the Board claimed that Somerset had previously provided for counselling, which was no longer available In addition, after the budget was defeated there were three or four cases of 'potentional suicide," to use Superintendent Kolchin's phrase. Provision was also made by the Board for a fourth position consisting of a part-time custodian at 15 hours a week as needed for sanitation and health purposes. The breakdown of costs for the above four positions is as follows:

Nancy Grosso - $25,104			$25,104
Barbara Herting -	part time pay -	$18,370	
	full-time pay -	23,701	
	Difference of		5,331
Lisa Tomasini -	part-time pay -	$15,066	
	full-time pay -	25,610	
	Difference of		10,544
Kathy Schmalz - $8.46 per hour 15 hours per week 52 weeks per year			$ 6,599
			$47,578

The Board also submitted that the following amounts had to be spent but had not been budgeted for:

Automatic Temperature Control Services	$17,000 00
Carpet - Library	6,439.00
New ceiling in two rooms at I.E.F.	1,630.00
New ceilings in Library and Art Room at I.E F	4,225.00
Gorkin Glass Company	936.71
Hewson Tree Service	850 00
William Miller Paving	
Tennis courts, parking lots at elementary and H.S.	9,372 10
James McDougall & Sons, Inc.	3,550 00
Refractory repairs to high school boiler	
New Jersey Boiler Repair Co.	
New tubes and gasket, labor for high school boiler	4,491 00
Pasmore's Electrical Service - new lights	5,400 00
	$ 53,893.00
Accounts budgeted for but are short:	
Health Insurance	$ 33,026.40
Pick-Up Truck	14,725.00
	$ 47,751 40
GRAND TOTAL	$ 101,645.20

(P-11)

Superintendent Kolchin testified that the need for temperature control service was not known at the time of the budget because of the existing service was not then defective. Nor was the defective state of the new library carpet known Similarly, the need for new ceilings was based on an additional water damage after the budget. The paving expense also came to light later as a result of increasing deterioration of the existing tennis courts in the parking lot. The boiler expense was discovered when the boiler tubes were being cleaned last summer and the need for new tubes and a gasket was discovered. All of the above items are to be refunded out of surplus for 1988-89.

Given the roof repairs of over $200,000, as well as the above unbudgeted expenses of approximately $149,000, the Board intends to look to surplus as well as unanticipated investment income of an undetermined amount. No funds were taken from surplus in 1986-87 or 1987-88 budget years Thus after rejection of a proposed budget by the taxpayers and approval of a reduced budget which ultimately proved to be $219,622 under cap, the Board was forced by unanticipated

expenses to utilize approximately $171,000 in surplus which it had planned not to use.

There is no dispute as to the above facts and I so FIND.

ISSUE

The issue to be resolved is whether the action of the Township committee be in reducing the Board's budget by $38,000 arbitrarily and unreasonably deprives the Board of sufficient funds necessary to provide for a thorough and efficient education.

DISCUSSION AND CONCLUSIONS

Boards of Educationly II Districts not having having boards of school estimate are required, at the time of annual school elections, to submit their budgets to the voters for the ensuing school year. See, N.J.S.A. 18A:22-33. In the event that the voters reject any of the items submitted, the Board is then required to deliver the proposed school budget to the governing body of the municipality (in this case the Township Committee), which then is required to consult with the Board and by April 28

> determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such a budget, to provide a thorough and efficient of schools in the district, and certified to the County Board of Taxation the totals of the amount so determined to be necessary. . . . N.J.S.A. 18A:22-37.

In reviewing a rejected budget, the Township Committee is not limited to consideration of line items but can also reach and consider issues of increases and unanticipated interest income, as well as allocation of any unappropriated free balance in determining the amount required to be raised by taxation. See, Bd. of Ed., Branchburg Tp., Somerset Cty. v. Tp. Comm. of Branchburg Tp., 187 N.J. Super. 540 (App. Div 1983), cert. den. 94 N.J. 506 (1984). The Township Committee's action is subject to review by the State Commission of Education and the State Board of Education for procedural or substantive arbitrariness. Ibid.

Given that the Board, in this instance, orally communicated its line items reductions and supporting reasons at the time of consultation with the Board and later committed these matters to writing, there is no issue remaining as to

procedural arbitrariness. See, e.g., Bd. of Ed. of the Borough of Lakehurst v. Borough Council of the Borough of Lakehurst, Comm. of Education Decision October 31, 1986, OAL DKT. NO. EDU 4098-86 (failure of governing body to submit supporting reasons for line item reductions grounds for reversal); Bd. of Ed. of the Tp. of Old Bridge v. Mayor and Council of the Tp. of Old Bridge, Comm. of Education, S.L.D. October 28, 1985, OAL DKT. NO. EDU 4026-85 (entire reduction restored where Board reduced the current expense by one percent across all line items and failed to provide reasons for reduction). Here the Township Committee provided reasons and the question is whether those reasons are sufficient to support a conclusion that the reduced line items are not necessary to provide a thorough and efficient education. The decision of the Board as to reductions must be an independent one properly related to educational considerations and not based on voter reactions to the budget. See, Bd. of Ed., East Brunswick Tp. v. Tp. Council of East Brunswick, 48 N.J. 94 (105) 1966.

The Board maintains that the $38,000 reduction will prevent it from providing a thorough and efficient education because it will reduce roof repairs and limit the supervisor of instruction to a part-time position. It notes that the budget is some $219,000 below cap and emphasizes its desire to present the voters with the lowest possible budget. It accuses the Township Committee of making what amounts to a roughly one-percent reduction in the budget and then arbitrarily slashing random items without any real analysis. Petitioner maintains that the roof repairs were unavoidable in the 1988-89 school year.

The Township Committee defends the reduction. As reasonable and reflecting a majority of the voters wishes. It also stresses that the legislative cap is the maximum figure and not some sort of minimum that the Board is entitled to budget up to on each annual submission. Moreover, the Committee accuses the Board of failing to provide post-budget necessities in the budget and neglecting to adequately budget for repair work which was foreseeable. The respondent also attacked the Board's budget as misleading to the public because it did not clearly indicate that the surplus would be used and the budget thereby increased by some four to five percent.

As to the roof repairs at the high school and elementary school, the Township Committee does not question the necessity of this expense, but bases its reduction on the inadequacy of the amount allocated in prior budgets for what has been an ongoing problem of roof repair. It is true as a matter of fact that no funds were

adopted in the 1986-87 budget for district repairs and that only $50,000 was adopted in the 1987-88 school year (P-1m at 700-1). But despite this, the evidence submitted supports by a preponderance of the believable evidence that the roof repairs are necessary to provide a thorough and efficient education for public school students, especially in light of the proof that the interior of some areas of the school has been damaged or impaired by leaking water. Under these circumstances, I **CONCLUDE** that the $20,000 reduced from the plant maintenance budget by the Township Committee should be restored in its full amount.

The proofs submitted as to the reduction of the supervisor of instruction position from full-time to part-time are somewhat less compelling. Although the Board submitted credible evidence that this position is advisable and desirable, it failed to establish, in my opinion, that a full-time position is necessary to provide a thorough and efficient education for public school students residing in the school district. Although the superintendent may genuinely be in need of the assistance intended to be provided by the supervisor of instruction, there was a lack of evidence showing that the half-time position was inadequate for this purpose. On that basis, I **CONCLUDE** that the $18,000 cut by the Committee on this account is not necessary within the meaning of N.J.S.A. 18A:22-37 and should not be restored.

ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the $20,000 cut from the maintenance of plant account be restored by the Township Committee to the Board of Education's budget. The action of the Committee in reducing the administrative budget by $18,000 is **AFFIRMED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10(c).

OAL DKT NO EDU 3845-88

I hereby FILE this Initial Decision with **SAUL COOPERMAN** for consideration

Dec. 14, 1988
DATE

RICHARD MURPHY, ALJ

Agency Receipt

12/14/88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 19 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

jz

BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Both the Board and the Township filed timely primary exceptions pursuant to the provisions of N.J.A.C. 1:1-18.4. The Township also filed timely reply exceptions.

Petitioner posits five exceptions which are summarized, in pertinent part, below. As to the administrative position in question, the Board finds it "incomprehensible how a trial judge can encourage limitation of testimony at the time of the hearing and then state that there 'was a lack of evidence showing that the half-time position was inadequate for this purpose' (page 9 of the decision)." (Exceptions, at p. 2) Citing the transcript at pp. 91 and 92, the Board avers the ALJ erred in limiting such testimony because testimony regarding the duties of the position go to the very essence of deciding whether a full-time position was necessary to fulfill those duties.

Also relating to the administrative position, the Board avers the ALJ disregarded the expert testimony of Dr. John Kolchin concerning the need for a full-time position. It refers the Commissioner to pages 38-40 of the transcript in support of its contention that the full-time position is necessary for the provision of a thorough and efficient education in the district.

Moreover, at Exception No. 3, the Board argues that the ALJ disregarded the testimony of witness Katherine Fisher regarding the need in the district for a full-time position of Supervisor of Instruction. It refers the Commissioner to page 96 of the transcript of Ms. Fisher's testimony in response to the Township Committee's allegations that there were too many administrative positions for a district the size of Green Brook, averring that it was Ms. Fisher's belief that the district is operating on a minimum of administrators.

At Exception No. 4, the Board claims the ALJ failed to note that despite the Township Committee's position that there were too many administrative positions in the district, the Board reduced the number of administrators in the district from five to four in the 1988-89 school year, which is the budget year under scrutiny. To reduce another administrative position, the Board argues, in the same year, would have represented a total decrease of 30% of administrative staff. The Board charges that the duties of the Supervisor of Instruction, which position is also referred to as Supervisor of Education Programs, "were expanded specifically due to the reduction in administrative staff and the job description reflected the change." (emphasis omitted) (Exceptions, at p. 6) The Board cites Dr. Kolchin's testimony at pages 37-38 in support of this contention.

Finally, the Board contends that the ALJ failed to give appropriate weight to the fact that the Township Committee proffered no conflicting evidence concerning the need for a full-time position for Supervisor of Instruction. While the Board admits the burden of persuasion lies with it, it claims its exceptions demonstrate that the Board has met its burden. Without any conflicting evidence before him, the Board avers, the ALJ should have found for the Board and reinstated the amounts cut by the Township Committee for the administrative position of Supervisor of Instruction.

The Board contends that for the foregoing reasons, that portion of the ALJ's initial decision which denied restoration of $18,000 to be applied to a full-time administrative position in the Green Brook district should be reversed.

The Township Committee's exceptions are three. It first excepts to the ALJ's statement of uncontested facts at page 3 of the initial decision not because any of the facts are in question, but because it claims those facts are not "the facts in evidence." (Committee's Exceptions, at p. 1) The Committee argues that the ALJ ignored the fact that of the costs summarized at page 3, totaling $216,806, "all but $25,746.00 (or a total of $191,060) was paid from the 1987-1988 budget.*** Rather than leaving the Board with 'less than half the funds necessary to complete the work', the Board is left, even after the full $38,000 reduction, with a SURPLUS of $36,254 in the current roof repair account." (Id., at p. 2) (emphasis in original)

The Committee also challenges the ALJ's statement at the bottom of page 8 of the initial decision stating that only $50,000 was budgeted in 1987-88 for district repairs, and instead claims that "as admitted and asserted by the Board of Education at the hearing, the Board was utilizing $191,060 for roof repairs from the 1987-88 budget." (Id.) The Committee further claims that Judge Murphy also does not include the fact that the Board of Education, in reducing its budget by $38,000 chose to apply the entire $38,000 to reduce the $100,000 roof repair item, leaving the Supervisor of Instruction position intact. Thus, claims the Committee, "not only is it not necessary to restore the $20,000 to the roof repair account, but the Board has a surplus in the roof repair account of

some $36,254 which is more than adequate to take care of ceiling repairs and lighting as mentioned by Judge Murphy on the bottom of page 3." (Id., at pp. 2-3)

The Committee's second exception submits that the initial decision improperly considered the expenditures which the Board chose to add to its budget after rejection of the budget by the voters and reduction by the Township Committee. The Committee's position is that such items are irrelevant, should have been known prior to submission of the budget and should have been included in the budget which was submitted to the voters. It claims the Board was "pandering for affirmative votes" (id.) by giving in to relatively small groups seeking increases in the hours of the nurse, psychologist, etc. The Committee avers the Board has adequate surplus and that these special group additional expenditures are irrelevant in the consideration of a reduction of $38,000, "which, if not made, would have left the Board with a surplus of $74,254.00 rather than $36,254.00 in the roof repair account, after completion of the repairs." (Id., at pp. 3-4)

Finally, while admitting that it is not of significant import at this point in the matter, the Committee claims it did provide the Board written reasons or specifications as to where cuts were to be made in the budget at the time of its action in April. It avers that the Board probably did not transmit to its counsel the full package delivered by the Committee to the Board at the time of its April action.

By way of reply exceptions to the Board's primary exceptions, the Committee avows that in reducing the budget by $38,000, it had recommended that $18,000 be saved by reducing the Supervisor of Instruction from full-time to half-time, and that $20,000 be saved by reducing the appropriation for roof repairs from $100,000 to $80,000. The Board, the Committee reiterates, elected to make the entire $38,000 reduction to roof repairs.

The Committee states that because the Board elected to make the $38,000 reduction in roof repairs alone, it objected to the relevancy of testimony at hearing regarding the position of Supervisor of Instruction. It concurs with the ALJ's limiting the testimony on the duties of that position, but the Committee also agrees with petitioner's exception that it is beyond comprehension how the ALJ then made an opinion that proofs had been insufficient to sustain the position full time.

Rather than strengthening the Board's case, however, the Committee argues, "it further demonstrates that the Court also ignored the proofs that the Petitioner Board, even after deducting the full $38,000 from roof repairs, ended with a SURPLUS of some $36,254 in the roof repair account." (Committee's Reply Exceptions, at p. 2) (emphasis in original)

The Committee submits that the initial decision is so erroneous, factually and in its conclusions, that it should be ignored and an independent judgment be made by the Commissioner on the record below. The Committee avers that such independent

judgment will clearly result in sustaining the full cut of $38,000, less than 1% of the total budget.

Inasmuch as the initial decision in this matter was rendered in December 1988, well after an actual audit of free balance had been conducted during the preceding June, the Commissioner determined to take official notice pursuant to N.J.A.C. 1:1-15.2 (a), (b), and (c) of the actual audited free balance in the Township of Green Brook as of June 30, 1988, an amount shown as $285,580.54. By letter dated February 15, 1989, the Commissioner directed the parties to address themselves by way of legal memoranda to the issue of whether the amount restored to the 1988-89 school budget, as contained in the initial decision rendered by Administrative Law Judge Richard Murphy dated December 14, 1988, should be sustained in light of the actual audited free balance of June 1988.

Having done so and having considered the arguments of both parties, including that raised by the Board in its response dated March 7, 1989 to the Commissioner's directive dated February 15, 1989 wherein it claims:

> Since the June 1988 free balance amount reflects post-hearing events, your attention is drawn to additional post-hearing events which impact on the current proposed budget as well as the free balance. The proposed budget for the school year 1989-1990 reflects a loss of state aid in the amount of $55,920.00. The current expense budget is $5,082,994.00 which is $127,044.00 under cap. In order to provide this savings to the taxpayers of Green Brook, the Board appropriated $60,000 out of the free balance. Testimony at the time of the hearing indicated that it is generally recommended that a district maintain a free balance of between three and five percent of its current expenses to meet unforeseen requirements or emergencies. Four percent of the current expenses for the 1989-1990 school year is $203,319.76 which is approximately the balance left to the Board after the appropriation towards next year's budget. As a result, the free balance maintained by the Board of Education is appropriate and should not be used as a basis in rejecting the Board's position with regard to the budget appeal. (at p. 1)

the Commissioner finds no basis whatsoever to justify restoration of the $38,000 at issue in this matter. In so deciding, the Commissioner adopts the Township Committee's position as embodied in its response to the Commissioner's directive, dated February 22, 1989:

> The audited free balance of $285,580.54 is just another reason for sustaining the cut made by the Township Committee, and can stand alone as a basis for not sustaining the initial decision of Judge Murphy and for sustaining the full cut of $38,000.00 made by the governing body.
>
> As we pointed out in our Exceptions dated December 28, 1988, even with the cut, the Board was able to accomplish all the roof repairs and still create a surplus of $36,254 in the current roof repair account.
>
> At the hearing before Judge Murphy the Board testified that it had a free balance of $171,000.00, no part of which had been appropriated to its budget. It then argued that, by reason of other expenses they decided to made subsequent to the budget defeat (all of which were matters that, if legitimate, should have been in the budget), the Board would have to apply its free balance and use most of it to cover those items. (See Initial Decision, ante).
>
> It now appears that the poverty pleaded by the Board just is not the case. The Board's free balance increased from the $171,000 testified to at the hearing (which the Board pointed out was 3.525% of its budget), to the audited amount of*** $285,580.54 (which works out to 6.3% of its budget).
>
> As stated in prior papers, the Initial Decision of Judge Murphy should be ignored, and the $38,000.00 cut made by the Township Committee should be sustained in full. (at pp. 1-2)

Accordingly, because it is the Commissioner's opinion that there is adequate surplus to absorb the entire $38,000 reduction, the Commissioner rejects that part of the initial decision that restored $20,000 cut from the maintenance of plant account of the Board of Education's budget, but affirms that part of the initial decision that sustained the reduction of the administrative budget by $18,000, for the reasons cited by the ALJ. In sustaining the reduction of $18,000 it relates to the question of whether the Board met its burden of demonstrating the need for a full position as Supervisor of Instruction, the Commissioner makes no judgment and finds such point to be moot since the Board chose to fund such position from other sources.

Accordingly, the Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

March 21, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7221-88
AGENCY DKT. NO. 307-9/88

K.M., BY HIS GUARDIANS AD LITEM,
F.M. AND N.M., AND F.M. AND N.M.
INDIVIDUALLY,
Petitioners,
v.
LITTLE SILVER BOROUGH BOARD
OF EDUCATION, DOROTHY BALDWIN,
THOMAS GALLAGHER, LOUISE GORSENGER,
JOHN DOES AND JANE DOES
(FICTITIOUS NAMES REPRESENTING
INDIVIDUAL MEMBERS OF THE
LITTLE SILVER BOARD OF EDUCATION),
Respondents.

Alan Wasserman, Esq., for petitioners (Blaustein and Wasserman)

Robert E. Murray, Esq., for respondents (Murray & Murray)

Record Closed: January 4, 1989 Decided: February 7, 1989

BEFORE **DANIEL B. MC KEOWN**, ALJ:

PROCEDURAL HISTORY

Petitioners F.M. and N.M. are the parents of K. who during 1987-88 was enrolled in the second grade of Point Road elementary school operated by the Little Silver Borough Board of Education (Board). Petitioners sought, unsuccessfully, during September and October 1987 to have school authorities physically transfer their son from one second

grade classroom to another second grade classroom. Petitioners filed a complaint in lieu of prerogative writ with an order to show cause in New Jersey Superior Court, Law Division, Monmouth County, on November 12, 1987 by which they sought, among other things, to compel school authorities to immediately transfer K. from one classroom to another classroom. On November 18, 1987 Michael D. Farren, JSC, transferred the issue of placement of K. to the Commissioner for adjudication while retaining jurisdiction on other issues. Upon receipt of the remand from the Court, the Commissioner transferred that matter to the Office of Administrative Law for determination. The case was assigned Beatrice S. Tylutki, ALJ. Shortly thereafter, the parties settled the dispute when they agreed to have K.'s placement determined by an independent review team. That settlement was approved by the Commissioner on January 12, 1988. The Commissioner determined that the members of the review team were to be designated by Dr. Donald Clark from Rutgers, the New Jersey State University.[1]

The independent review team selected by Dr. Clark issued a confidential report on May 19, 1988 regarding its judgment on the placement of K. Shortly thereafter the Board moved to dismiss the remaining issues still pending before Judge Farren. Alternatively, the Board sought to have all remaining issues remanded to the Commissioner for disposition. On August 5, 1988 Judge Farren issued an Order as follows:

> The issue of whether K.M. has and is receiving a 'thorough and efficient' education is remanded to the Commissioner of Education for determination. The issue of damages shall remain in the Law Division and be stayed pending receipt of the Commissioner's decision. The reasons for this decision have been placed upon the record on August 5, 1988.

On September 30, 1988 the Commissioner transferred the matter as remanded to him again by Judge Farren to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. The Clerk of the Office of Administrative Law scheduled a telephone prehearing conference in the matter for November 22, 1988 and assigned this administrative law judge the case on October 31, 1988. A plenary hearing in the matter is scheduled to commence May 8, 1989. However, the Board moved for summary decision on the second remanded issue as a matter of law based on the facts as established by the record developed thus far. The record consists of

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1 The initial decision issued by Administrative Law Judge Tylutki regarding the settlement terms, and the Commissioner's final decision approving the settlement, are attached hereto.

the amended complaint filed by petitioners in New Jersey Superior Court, Law Division, Monmouth County and docketed as L-53620-87; Judge Farren's Order; letters to the Department of Education from counsel to the parties and letter the parties received from the Department of Education; a formal answer filed by the Board on September 27, 1988 with the Department of Education for which no initiating pleading exists other than a letter from petitioner on August 23, 1988 to the Department of Education regarding Judge Farren's Order; certifications in lieu of affidavit from respondents Dorothy Baldwin and Thomas Gallagher; petitioner N.M.'s affidavit in opposition to the motion; exhibits; and, briefs and letter memoranda of the parties in support of their respective positions on the Board's motion for summary decision. In the meantime, petitioner had filed a motion to compel discovery which is pending in light of the motion for summary decision filed by the Board.

This initial decision concludes that the Board's motion for summary decision must be granted as a matter of law on the facts established in this record as viewed most favorably for petitioner. K., while a pupil enrolled in the Point Road Elementary School operated by the Little Silver Borough Board of Education during 1987-88, was presented by the Board the opportunity of having received a thorough and efficient program of instruction as required by the New Jersey Constitution (1947), Article VIII, Section Four as defined by the Legislature in the Public School Education Act of 1975, L. 1975, c. 212, codified at N.J.S.A. 18A:7A-1 et seq., and as implemented by the State Board of Education at N.J.A.C. 6:8-1.1 et seq.

FACTS

For purposes of the motion for summary decision the relevant and material facts of the matter as established by the pleadings, exhibits, affadavits are these. During 1987-88 the Board's Point Road School had four second grade classes, each of which were under the general supervision of their own assigned teacher. Two of the classes were physically located in a traditional setting of regular closed rooms with four floor-to-ceiling walls and, presumably, a door and doorway for entrance and egress. The remaining two classes were physically located in what is referred to as "open space", or a space without four floor-to-ceiling walls. Rather, each of these two classes were separated from other classes by bookcases the Board says were 5 feet high, but which petitioners claim were 4 feet high. Regardless of this difference, petitioners conceded before Judge Farren on November 18, 1987 that it is of no significant difference whether the bookcases

are 4 or 5 feet high. (Exhibit 21, p. 4) Petitioners' son K. was assigned an open space second grade classroom during 1987-88 and it is that assignment, together with the refusal of school authorities to reassign K. upon petitioners' demand to a closed classroom, which is of significance in this dispute.

According to the first count of petitioners' Amended Complaint filed in Superior Court they allege K. is an easily distracted pupil who, they assert, must have a highly structured environment in order to succeed academically. Petitioners allege that during September 1987 the named respondent school principal, Dorothy Baldwin, refused their request to have K. transferred to a traditional closed classroom. Petitioners allege that the Board, on October 8, 1987, refused their request to transfer K. to a closed classroom unless K. first submit to tests designed to determine his "distractibility". Elsewhere in the Amended Complaint, petitioners allege that unidentified learning skills K. was to have acquired by way of private tutoring in the preceeding summer months began to falter in the open classroom, that K. became frustrated at his inability to grasp material presented and by his inability to pay attention, and that according to one standardized achievement test which it is noted is commercially prepared, K.'s academic progress during 1987-88 showed only a one-month gain.

Other facts alleged by petitioners upon which they resist the Board's motion for summary decision on the issue of whether K. received a thorough and efficient program of instruction during 1987-88 are found in the affidavit of K.'s mother, N.M. Those parts of the affidavit which allege relevant facts within the purported knowledge of N.M., but not her impressions, conclusions, nor her judgement are reproduced here:

> ***
>
> 3. In addition to being a parent who is concerned with the education and development of my son, I am an educator. I possess a master's degree in reading and I am a certified reading specialist. I have taught first grade for seven years and have been a substitute teacher in the Little Silver school system.
>
> ***
>
> 5. K.M. is a child with normal capabilities. However, he has certain developmental problems, problems with his learning skills and has historically demonstrated poor listening skills. He exhibits inconsistent concentration and has proven to be highly distractible. He is the type of child who must have a highly structured environment in order to succeed with his studies.

6. From the time K.M. was in kindergarten, it had been necessary to provide him with professional help in order to maximize his capabilities. I saw to it that K.M. had at his disposal the means to get the most of his education. At the beginning of the second grade, K.M. no longer needed any tutoring. Mrs. Gorsenger, K.M.'s second grade teacher, told me that K.M.'s academic level was average in some areas and above average in others for his class.

7. Early on in the 1987 school year, F.M., my husband, and I realized that the open classroom was inappropriate for K.M. At that time we made an appointment to see the principal of the Point Roads School, Dr. Dorothy Baldwin.

***

8. [D]uring the first week of school, K.M. brought home a paper which he had worked on with the following comments from his teacher, Mrs. Gorsenger: "K.M., you did not follow directions". During the second week of school, he brought home a composition book and did not know what he was supposed to do with it.***

9. In the third week of school, K.M. brought home a book which he had to do a book report on. However, the due date which he thought was required was almost a week earlier than his teacher had given him.***

10. In the beginning of September, K.M. came home complaining that he could not concentrate in school.

11. Once we were aware of the problem, we called the school and made an appointment with Dr. Baldwin. I spoke with Dr. Baldwin on September 28, 1987. At that time, she stated that if we could show her "what the problem was" that she would transfer K.M. to a closed classroom. We met with Dr. Baldwin on September 30, 1987, and explained the problem. We requested that K.M. be removed from the open classroom and transferred to a traditional, self-contained classroom.

12. At the meeting, Dr. Baldwin asked us what problems we had observed with K.M. and we stated the items as set forth above.***

13. At that meeting, we brought various documents and letters concerning K.M. for Dr. Baldwin to review. She virtually refused to look at them.

***

14. Dr. Baldwin never offered the services of a child study team or any information concerning same.

15. On or about October 1, 1987, I spoke with Mrs. Gorsenger, K.M.'s teacher. *** In my conversation with Mrs. Gorsenger on October 1, 1987, she acknowledged that K.M. was highly distractible and that the situation presented by the open classroom was highly distracting for K.M. [Emphasis in affidavit]

16. After I spoke with Dr. Baldwin, my husband, F.M., called the District Superintendent of Education, Thomas Gallagher.***

***

17. The request that K.M. be transferred was simply met with proposal after proposal after proposal for further evaluation and assessment. *** Instead of simply applying a little common sense and humanity, the defendants sought to negotiate, test, analyze and classify K.M.***

18. ***

[19]. In April of 1988, K.M. was evaluated by a child study team appointed by Judge Beatrice Tylutki. (The Court should note that the initial evaluation, which was to take place in February of 1988, was unilaterally cancelled by the respondents on the eve of the evaluation.) They *** made the recommendation that he be placed in a closed classroom for the 1988-89 school year. He was not removed from the open classroom in May of 1988 because the term was practically over and they believed that it would really serve no purpose to remove him at that time. The child study team specifically found that:

> In the opinion of the review team, the open classroom in which K. was placed this year does not offer an environment in which his problems in learning can be dealt with as well as they might be dealt with in a more traditional classroom. The team has reached this conclusion because K. manifested at the time of the visit (and according to what was learned at interviews prior to that time) behavioral response and learning situation characteristics which frequently can be handled better in the traditional or "closed" classroom situation than in the "open" classroom.
>
> * * *
>
> The review team recommends that Keith be placed in a "closed" classroom for 1988-1987 (sic.) school year. Other factors being equal (e.g. as described in the previous section), the view of the team is that K. would likely respond better to a traditional classroom. Specific problems which seem to characterize K. could, in the judgment of the team, be better dealt with in such a classroom environment. Therefore, the specific nature of the problems the team has identified as probable sources of educational difficulty for K. constitute risk factors for his learning and adjustment which might be dealt with at less risk in the traditional classroom setting.

It is noted that the term "child study team" is a term of art. Each board of education must separately or jointly with one or more boards of education provide for basic child study team services. The basic child study team shall consist of a school

psychologist, a learning disability teacher consultant and a school social worker, and for the purposes of evaluation and classification shall include pertinent information from certified school personnel making the referral. N.J.S.A. 18A:46-5.1. The documents in this case show K. was never evaluated by a "child study team". Petitioners refused to have K. evaluated by a child study team. Moreover, the documents in this case show that Dr. Clark designated the referenced review team which prepared the report subsequently quoted by N.M., not Administrative Law Judge Tylutki.

> [20]. K.M. underwent Iowa Tests of basic skills in April of 1988.*** [H] is composite grade equivalent score for the end of K.M.'s first year was 23.
>
> [21]. K.M. was tutored over the summer*** However, it was recommended by his summer school teacher at Raney [a private school in which K. was placed after petitioners removed him from the Board's school during June 1988] that he be placed in the average second grade class level.***
>
> [22]. *** The following facts which provide a sample of those which (sic) require the Court to proceed with an evidentiary hearing:
>
> a) K.M. was and is a distractible child.
>
> b) The school officials at the Point Roads School had at their disposal documentation which *** advised them of K.M.'s distractibility.
>
> c) The school officials had at their disposal all records of K.M.'s distractibility prior to the 1987-1988 school year.
>
> d) [T] he school officials saw fit to place K.M. in *** the open classroom.
>
> e) The school officials, notwithstanding the pleas of K.M.'s parents, refused to immediately remove him from the open classroom and conditioned his placement in a closed classroom upon an evaluation by a child study team***.
>
> f) At no time did either I or my husband seek to have special services given to K.M.
>
> g) K.M. was unable to finish his seat work. K.M. said a teacher had him do his seat work during other subjects, thereby precluding him from following and learning those subjects. Sometimes the papers were brought home but not noted as "homework". I made sure that he completed his seat work at home. His teacher would, however, correct it and put the assignments directly into his folder without any indication that the work was done at home.***

h) During the term, K.M. became quiet, depressed after school and frequently complained about having to go back to school. K.M. was seen, and is presently being seen, by a child psychologist because of the changes noted in his behavior and self concept.

[23]. These facts are set forth by way of example without limitation. There are certainly other facts which will be gleaned during the discovery process.

[24]. I do not seek to challenge the overall Point Roads School system or the open classroom system, and never have***

[25]. ***

The record shows that petitioners removed K. from enrollment in the Board's schools at the conclusion of the 1987-88 year and placed him at a private school. The record also shows that K. has been assigned by the private school to its second grade for 1988-89.

This concludes a recitation of the facts upon which, if true, petitioners claim K. was deprived of a thorough and efficient program of instruction. Accordingly, petitioners demand the Board's motion for summary decision be denied and that their motion to compel discovery be granted.

The Board, for purposes of this motion only, does not dispute petitioners' version of the facts. It does, however, point out additional facts established by the record and not disputed by petitioners. School principal Dorothy Baldwin certifies that she did meet with petitioners on September 30, 1987 regarding their request to transfer K. from an open to a closed classroom. Petitioners advised Baldwin that because of K.'s poor listening skills, his allergies, and his tendency to be easily distracted they were concerned that he would have a mid-year crisis if he was not immediately removed from the open classroom. Baldwin offered to have K. evaluated by the Board's child study team to determine the nature of K.'s presumed learning difficulties. K.'s father, according to the certification of principal Baldwin, responded that it would not do any good to have the Board's child study team test K. and he voiced his intent to get his lawyers involved if K. was not moved to a closed classroom by the following Monday. Principal Baldwin certifies that as the educational leader of the Point Road School, a review of K.'s records, and her observations of K. in the classroom, K. was continually receiving a thorough and efficient program of education while enrolled.

Superintendent Gallagher certifies that K. had been in an open-space classroom during his first grade year in 1986-87. The father of K., F.M., advised Gallagher on October 2, 1987 by way of a telephone call that he was a no-nonsense person and that his son must be in a self-contained classroom by the following Monday because he was assertedly "classified". It is noted here that the term "classified" is also a term of art which, in law, includes the classification of a particular handicap into one of several categories by a child study team. See, N.J.S.A. 18A:46-8. Gallagher certifies that a review of K.'s school records show that K. had never been tested by a child study team nor has he been "classified". When Gallagher inquired of K.'s father the nature of the difficulty K. was to have been experiencing, Gallagher was advised by the father that he would be contacted by his attorneys. (R-13)

The exhibits in this record reveal an exchange of communication between petitioners' attorney and the Board. These letters reveal that counsel for petitioners demanded of the Board that K. be immediately transferred from an open to a closed classroom on the basis that K. had a problem with "distractibility" and, therefore, K. was not receiving a thorough and efficient program of education in a open classroom. Petitioners' counsel also submitted to the Board letters prepared between September 29 through October 1, 1987 and include a letter from K.'s pediatrician, a private speech therapist, a reading specialist in a neighboring private school district, a person who identifies herself as an "early childhood special educator", and an occupational therapist.

The Board held a meeting October 8, 1987 for petitioners and petitioners' counsel to present the matter of their requested transfer of K. from an open to a closed classroom. One week later, the Board advised petitioners' counsel as follows:

> To avoid any confusion or misunderstanding with respect to the response of the Little Silver Board of Education to the above-captioned petition, it appeared appropriate to set forth the Board's proposal in writing.
>
> Preliminarily, it should be noted that all of the records of the Little Silver Board of Education indicate that the student has been properly placed in his current class and classroom with his teacher-Mrs. Gorsinger. It should also be noted that the classroom in question meets all State standards and has been approved by the appropriate State Education officials.
>
> The petition requesting the classroom transfer included a medical report from the student's physician. The Doctor cites certain hearing problems; the Board's records show no indication of

such problem. The Board proposes that the Board physician examine the student and correlate the test results with the environment of the two classrooms. If the Board physician recommends a transfer based on this examination, the student would be transferred.

If the Board physician is unacceptable to your client, the Board would propose that its physician and the student's physician agree on a third neutral physician who would conduct the examination and make a recommendation. If the recommendation called for a transfer, the student would be transferred.

Previously, the administrative staff of the Little Silver school system proposed to the parents that the district's Child Study Team evaluate the student. Such evaluation could include a recommendation for a classroom transfer. Your client has rejected this proposal. It is respectively urged that the parents reconsider this recommendation, particularly in view of some of the statements made by the professionals retained by the parents. As you are aware, the Child Study Team can be utilized in this case only if the parents consent.

If the parents do not have confidence in the district's Child Study Team, the Board proposes that a Child Study Team be retained from the Monmouth County Education Services Commission or a Child Study Team from any other Monmouth County School district.

If a Child Study Team recommends that the student be transferred, the student shall be transferred.

If the parents reject the services of a Child Study Team, the Board of Education proposes that the student be tested by the school district's Learning Disability Teacher/Consultant and the Speech Therapist. An appropriate series of tests could be utilized by these professionals. This program could be accomplished in a reasonably short period of time with a recommendation to be submitted not later than Friday, October 23, 1987. If the recommendation provided for a transfer of the student, the student shall be transferred.

In all of the proposed alternatives, the Board of Education would be responsible for the costs of the program and tests.

We urge careful consideration of the proposed alternatives or any combination of these proposals. In all cases, if the recommendation was for transfer, the student would be transferred immediately***
(R-16)

Petitioners' counsel advised in writing on October 21, 1987 that petitioners rejected the Board's recommendation that K. be evaluated by a Child Study Team.

Petitioners' counsel did propose that a learning disability teaching consultant, a speech therapist, and a child psychologist observe K. in the open classroom and his asserted distractibility and upon that basis determine that K. must be transferred to a closed classroom. The Board rejected petitioners' suggestion that a decision upon whether K. should be transferred could be made upon the basis of mere observation without testing. Petitioners rejected testing out-of-hand. Thereafter, petitioners filed the Complaint in lieu of prerogative writ in New Jersey Superior Court, Law Division, Mommouth County on November 12, 1987 which began this entire matter.

The exhibits in this record show that the school district operated by this Board was monitored by the Department of Education and received comprehensive approval of its program which resulted in the school district being certified as providing a thorough and efficient program of education which certification is valid until April 1990. There is no evidence in this record which would show the Board's schools, the Point Road School in particular, was or is in any way deficient regarding the obligation to provide its resident pupils a thorough and efficient program of education.

With respect to the review team selected by Dr. Clark of Rutgers, the confidential report it submitted regarding K. states in part as follows:

> ***
> In the opinion of the [Review] Team, K. should be referred to have a complete Child Study Team Psychoeducational Evaluation as described under New Jersey education law. There is evidence he may have some combination of physical, emotional, and developmental problems which are interfering with his school progress, happiness, and adjustment. Therefore, such evaluation should include thorough evaluation of K.'s psychological and emotional development, academic skills, his cognitive functioning and capacities, and his hearing and auditory processing***
>
> In the opinion of the Review Team, the open classroom in which K. was placed this year does not offer an environment in which his problems in learning can be dealt with as well as they might be dealt with in a more traditional classroom. The Team has reached this conclusion because K. manifested at the time of the visit (and according to what was learned in interviews prior to that time) behavioral response in learning situation characteristics which frequently can be handled better in the traditional or 'closed' classroom situation than in the 'open classroom.' This conclusion is not meant to suggest that the Team believes it can be sure of K.'s or of any child's response to a particular classroom structure at any given time. No single factor such as 'open vs. closed' can be assumed to account entirely or even in a major way for the

> progress, happiness, and classroom response of a child. Rather, factors of social relationships, teacher variables, classroom organization and routine, physical and psychological factors within the child, and home and family factors all interact and may change from year to year and within the year***
>
> In general, the Team views the school as an excellent educational environment for any child, including K. Each of the classrooms observed, the staff interviewed, and the school atmosphere all evidence quality educational practice.
>
> The Review Team recommends that K. be placed in a 'closed' classroom for the 1988-[89] school year. Other factors being equal***the view of the Team is that K. would likely respond better to a traditional classroom. [Emphasis in original]
>
> [M]oving K. to a traditional classroom***before the end of the school year is viewed by the Team as inappropriate and at great risk***
>
> Finally, the Team strongly recommends the full, in-depth, Child Study Team psychoeducational evaluation for K. discussed*** above. The Team has not provided such in-depth study of K. and, therefore, takes no position as to the extent or severity or specific problems identified and discussed***

This concludes a recitation of all relevant and material facts of the matter established by the record developed thus far for purposes of the Board's motion for summary decision.

ARGUMENTS, LEGAL ANALYSIS, CONCLUSION

I
ARGUMENTS

The Board contends that the facts show it provided K.M. with the opportunity for a thorough and efficient education which is its obligation under the New Jersey Constitution and, accordingly, the Board demands summary decision in its favor as a matter of law. The Board relies in this regard upon the fact the Department of Education has evaluated its total program and its facilities and declared that under N.J.S.A. 18A:78-1 et seq., as implemented at N.J.A.C. 6:8-1.1 et seq., its school district affords its pupils the opportunity for a thorough and efficient program of instruction. The Board's also points out in this regard that even the Review Team agreed to by petitioners found its Point Road School to be an excellent educational environment for pupils and,

furthermore, the Team agreed with school officials that K. must undergo an in-depth Child Study Team evaluation in order to determine whether a closed classroom would be a more suitable placement than an open classroom.

Petitioners contend that the issue of whether K. received a thorough and efficient program of education during 1987-88 can only be made after an evidentiary hearing examined against the backdrop of school officials keeping K. in a open classroom while knowing he was distractible. Petitioners contend that K.'s placement in an open classroom reveals asserted glaring defects in the Board's system of education because school officials were aware of K.'s distractibility, school officials had K.'s records which evidence his distractibility, school officials sought to have K. evaluated and classified prior to having him removed from the open classroom, school officials rejected a simple request to have K. placed in an asserted "better" environment, and K.'s teacher frequently gave him credit for work not performed properly by him. Petitioners point out that the thoroughness and efficiency of the school district itself is not an issue; rather, what is an issue is whether the system itself provided K. a thorough and efficient program of education.

II

LEGAL ANALYSIS

In Abbott v. Burke, 100 N.J. 269, 280-281 (1985), the New Jersey Supreme Court affirmed its earlier holding in Robinson v. Cahill, 62 N.J. 473, 515-19 (1973) in which it was held that "the constitutional guarantee of a thorough and efficient education requires 'equal educational opportunity' for all children*** which 'must be understood to embrace that educational opportunity which is needed in a contemporary setting to equip a child for his [or her] role as a citizen and as a competitor in the labor market'***. In order to reach the issue whether K. received a thorough and efficient education under the New Jersey Constitution within the Little Silver school district for the 1987-88 school year, one must examine whether the Little Silver school district provides its pupils with the opportunity of receiving a thorough and efficient program of education as that phrase is defined by the Legislature and as implemented by the State Board of Education.

The evidence in this case establishes that the Little Silver school district has been declared by the New Jersey Department of Education to provide its pupils with the opportunity for a thorough and efficient program of education. Whether K. would have

received a "better" education or a more effective education in a closed classroom, as opposed to an open classroom, is not the issue. Rather, the issue simply is whether K. was presented the opportunity of having received a thorough and efficient education. That issue must be resolved in the affirmative. All evidence points to the fact this Board operates a thorough and efficient program of instruction as is required under the New Jersey State Constitution and, as such, all pupils resident of Little Silver and others who may be enrolled in the Little Silver school district are presented the opportunity of receiving a thorough and efficient program of instruction.

School administrators and teachers in this case made a professional judgment that K., having been successful in first grade in an open classroom setting, continued him in that setting during the second grade. K.'s parents determined that K.'s asserted distractibility was significantly impairing his learning. Nevertheless, no child study team ever evaluated K. to determine if the asserted distractibility was such that it was presenting a handicap, in the law, with his learning. K.'s parents, in fact, refused the Board's recommendation and its school officials' recommendations that K. be evaluated by a child study team to determine what weaknesses, if any, he had with respect to learning. It is not beyond an accurate presumption that all pupils are distractible to one point or another. Common sense dictates that whether that distractibility alone impedes the learning process is not discernible from mere observation.

The Board did not unequivocally refuse petitioners' request to transfer K. from an open to a closed classroom. Rather, the Board prudently agreed with its school officials that K. should be evaluated by its Child Study Team in order to determine the extent, if any, K.'s distractibility handicapped his academic success. The refusal of petitioners, however, to have K. evaluated by the Board's Child Study Team does not result in K., or petitioners, suffering a constitutional or statutory deprivation. To the contrary, this Board of Education has done everything it is obligated to do in order to present its pupils the opportunity of a quality program of instruction as required by the Public School Education Act of 1975.

CONCLUSION

Summary decision must be granted the Board of Education in light of the undisputed facts in this matter. The Board of Education did provide K. with the opportunity to receive a thorough and efficient program of education during 1987-88. The

Board has met its constitutional and statutory obligation to K. in 1987-88 by presenting him the opportunity of receiving a thorough and efficient program of education. Petitioners' discovery motion is denied. The hearing scheduled for May 1989 is **CANCELLED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

February 7, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

2-7-89
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 10 1989
DATE

Jacque LaVecchia/KS
OFFICE OF ADMINISTRATIVE LAW

ij

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7642-87
AGENCY DKT. NO. 343-11/87

F.M. AND N.M., AS GUARDIANS
AD LITEM FOR THEIR SON, K.M.,
Petitioners,
v.
BOARD OF EDUCATION OF LITTLE SILVER;
DOROTHY BALDWIN, PRINCIPAL OF THE
POINT ROAD SCHOOL; THOMAS GALLAGHER,
SUPERINTENDENT OF EDUCATION FOR THE
LITTLE SILVER SCHOOL DISTRICT; AND
JOHN DOES AND JANE DOES, MEMBERS OF
THE BOARD OF EDUCATION OF LITTLE
SILVER,
Respondents.

Alan Wasserman, Esq., for the petitioners (Blaustein & Wasserman, attorneys)

Robert E. Murray, Esq., and Judith S. Miller, Esq., for the respondents (Murray & Murray, attorneys)

Record Closed: November 30, 1987 Decided: December 4, 1987

BEFORE BEATRICE S. TYLUTKI, ALJ:

This matter concerns the petition of F.M. and N.M. as guardians ad litem for their son, K.M., requesting the immediate transfer of K.M. from an "open" second grade classroom to a "closed" second grade classroom at the Point Road School.

This matter was initiated by the filing of an order to show cause for emergent relief in the New Jersey Superior Court. On November 18, 1987, the Honorable Michael D. Farren, SCJ, Monmouth County, heard the oral argument, and thereafter remanded the matter to the Commissioner of Education (Commissioner) for purposes of hearing the petitioners' motion for emergent relief and for a hearing on the merits of the charges filed against the respondents. Judge Farren retained jurisdiction as to the claims for damages filed by the petitioners.

The matter was filed with the Commissioner on November 19, 1987, and in their papers, the petitioners allege that K.M. is a distractable child who needs a more structured learning environment than that available in an "open" classroom and that the refusal of the respondents to transfer K.M. to a "closed" classroom without a child study team evaluation is arbitrary, capricious and contrary to school law. The petitioners allege that K.M. has been tested privately and that the results of these tests, which have been supplied to the respondents, justify the transfer of K.M. to a "closed" classroom. Further, the petitioners allege that the persons who have been privately treating and evaluating K.M. have stated that the further evaluation of K.M. would not be in the best interest of the child.

Also, in the papers filed with the Commissioner, the petitioners have asked for emergent relief, pursuant to N.J.A.C. 1:1-12.6, and have requested an expedited hearing. The matter was transferred to the Office of Administrative Law on November 20, 1987, for a determination 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.

As to the request for emergent relief, on November 24, 1987, the respondents filed a brief in opposition to the motion and argued that the petitioners had not shown any immediate or irreputable harm if K.M. remains in his current classroom until there is a decision in this matter. The oral argument regarding the request for emergent relief was scheduled to be heard before the undersigned on November 30, 1987, at the Office of Administrative Law in Trenton, New Jersey.

On November 30, 1987, the parties agreed to settle this matter and have set forth the following settlement terms on the record:

1. The Superintendent of Education for Monmouth County shall expeditiously select an evaluation team consisting of three members, with appropriate academic credentials, to determine whether K.M. is distractable and should be transferred from an "open" classroom to a "closed" classroom. None of the persons selected shall have had any personal or professional dealings with the Board of Education of Little Silver, Dorothy Baldwin, Thomas Gallagher, or F.M. and N.M.

2. The members of the team shall conduct an independent evaluation of K.M. and shall decide the criteria to be used to make the determination. The team will notify the petitioners as to when tests are to be given to K.M. The Board of Education of Little Silver may make suggestions to the team regarding what written tests should be given to K.M.; however, the team is not bound to follow these recommendations.

3. As part of its evaluation, the team shall conduct at least one personal observation of K.M. in the classroom.

4. The team may decide to require certain physical tests of K.M., and if it decides to have any audiological tests, the team shall consult with K.M.'s private physician.

5. The members of the team shall meet with N.M. so that N.M. shall have the opportunity to discuss her observations of K.M., including her observations in his classroom and at home, his reactions to school, the tests given to K.M. at school and at home and her comments regarding any of the other items presented to the Commissioner or the New Jersey Superior Court regarding this matter.

6. The team shall talk to Thomas Gallagher regarding the Board's position in this matter.

7. Any written tests given to K.M. shall be at a level appropriate to his grade and to the number of months he has been in said grade.

8. The team shall have access to all of K.M.'s records maintained by the respondents. A list of the items in said records shall be prepared by the respondents and a copy of this list shall be given to the team and the petitioners. The petitioners have the right to supplement the records by submitting to the team additional documents which should have been in J.M.'s school records.

9. The team shall interview the current and prior teachers of K.M. and may also interview the persons whose signed certifications were part of petitioners' submission to the New Jersey Superior Court or to the Commissioner.

10. Any costs involved with the evaluation by the team shall be paid by the Board of Education of Little Silver.

11. The team shall expeditiously prepare a written report setting forth its decision as to whether or not K.M. should be transferred from an "open" classroom to a "closed" classroom. This report shall include the reasons for the decision. The parties agree to be bound by this decision and the respondents agree to immediately implement the decision.

The attorneys for the parties recognize the need for a prompt determination in this matter and they shall contact the Commissioner's office to request an expedited final determination. If the settlement is approved, they will also contact the County Superintendent of Education and request that the members of the team be appointed promptly and be requested to make the determination as quickly as possible.

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

1. The parties have voluntarily agreed to the settlement on the record.

2. The settlement fully disposes of all issues in controversy as they pertain to that portion of the matter remanded to the Commissioner by Judge Farren. This initial decision does not address that portion of the case retained by Judge Farren.

3. The settlement is consistent with law.

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

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby FILE my Initial Decision with SAUL COOPERMAN for consideration.

December 4, 1987
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

DEC - 4 1987
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

DEC 9 1987
DATE

Mailed To Parties:
Ronald L. Parks/K.S.
OFFICE OF ADMINISTRATIVE LAW

ks/ee

K.M., by his guardians ad litem, F.M. AND N.M., AND F.M. AND N.M., individually,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LITTLE SILVER ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions and the Board's reply were timely filed pursuant to N.J.A.C. 1:1-18.4.

I. SUMMARY OF PETITIONERS' EXCEPTIONS

Petitioners object to the ALJ's decision averring that he decided an issue not remanded to the Commissioner by New Jersey Superior Court, Law Division but rather one he framed himself which had previously been denied on two occasions in Superior Court, thus violating the "law of the case" doctrine.

As to this, petitioners argue that the court's remand was to determine whether their son has received and is receiving a thorough and efficient education, not whether the Little Silver School District offered a thorough and efficient system of education. They further argue that instead of addressing or reaching the remanded issue, the ALJ merely suggests that since the Board had offered child study team services, it had therefore offered K.M. an opportunity for a thorough and efficient education, yet the word opportunity does not appear in the language of the court's remand.

Petitioners also contend that the ALJ has assumed that the offer for child study team services was a good faith, no strings attached offer, a factor which they maintain is highly disputed. They characterize the offer as negotiated, calculated and equivocal as it hinged on written tests and that it was made by a group of people they had just cause to distrust. Moreover, they argue that the Board coldly and calculatingly delayed the independent review team analysis so that it would be too late in the school year to remove their son from the open classroom setting.

Petitioners allege that the ALJ decided contested factual issues contrary to N.J.A.C. 1:1-12.5 by clearly displaying fact-finding which was favorable to the Board and displayed open hostility to petitioners' factual contentions. They also

strenuously object to his exclusion of N.M.'s impressions, conclusions and judgments when she is a reading specialist and mother of K.M. and in view of the fact that what was discarded goes squarely to the issues of the case. They also agree that the independent review team affirmed that K.M. was faring poorly in the open classroom and that the ALJ picked and chose facts in order to reach an improper result.

In addition to the above, petitioners contend that the ALJ made his decision without their having had the opportunity to secure discovery or to present expert testimony. They point to the fact that they had made a Motion to Compel Discovery which the ALJ never ruled out; thus, they were never afforded the opportunity to explore the decision making process that resulted in his being placed and kept in the open classroom. Nor were they afforded an opportunity to explore the striking disparities between the reports of the teacher and the facts set forth in N.M.'s certification or to present expert testimony of such individuals as Dr. Graden, an Associate Professor at the University of Cincinnati Graduate School of Education and Mr. Scharf, the former principal of the school K.M. attends.

Petitioners also argue, inter alia, that the ALJ had no authority to decide that their failure to consent to child study team services, where there was absolutely no duty or obligation to do so and where there were very good and valid reasons not to do so, constituted a waiver to the opportunity for a thorough and efficient education. Moreover, petitioners aver the ALJ relied on inapplicable rules of law by citing Abbott v. Burke, supra, and Robinson v. Cahill, supra, because, again, the ALJ has misstated the issue remanded by the court, i.e. whether K.M. was receiving a thorough and efficient education, not whether the Board was providing its pupils with the opportunity to receive a thorough and efficient program of education.

II. SUMMARY OF THE BOARD'S REPLY EXCEPTIONS

The Board argues first and foremost that the ALJ did clearly decide the issue remanded to him by Superior Court and that he decided the issue correctly. In support of this, the Board avers the ALJ correctly recognized the governing legal principle that the constitutional guarantee of a thorough and efficient education requires equal educational opportunity for all children, which is the educational opportunity needed to equip a child for his role as a citizen and competitor in the labor market.

The Board also argues the ALJ correctly recognized that in order to reach the issue of whether K.M. received a thorough and efficient education under the New Jersey Constitution, one must examine of it is providing its pupils with the opportunity of receiving such an education as that phrase is defined by the Legislature and as implemented by the State Board of Education. (Initial Decision, ante)

The Board argues as well that it was not the function of the ALJ to determine whether K.M. was provided with the best or optimum education, nor to require the Board to guarantee that K.M. develops to his full potential. Moreover, it refutes petitioners' assertion that the basis of the ALJ's decision has twice been denied by Superior Court, rather the issue was deferred to the Commissioner of Education.

Lastly, the Board argues that:

> The remainder of Petitioners' Exceptions contain a stream of rhetoric and merely continue their initial position. Petitioners' position has been specifically addressed and refuted by Respondents in their briefs in support of the instant motion, upon which Respondents continue to rely. Further, the arguments advanced by Petitioners have been correctly rejected by Judge McKeown. The Administrative Law Judge considered all material and relevant facts on the record in the light most favorable to Petitioners. There are no material facts in dispute, nor have there ever been. Moreover, Respondents are entitled to prevail as a matter of law. Judge McKeown applied the appropriate legal standard, and his decision is correct as a matter of law. Accordingly, Respondents respectfully request the Commissioner to affirm the Initial Decision and findings of the Administrative Law Judge in their entirety. (Board's Reply Exceptions, at p. 3)

III. COMMISSIONER'S DETERMINATION

Upon review of the record in this matter including the exceptions and reply exceptions submitted by the parties, the Commissioner agrees with and adopts the ALJ's recommended decision. Contrary to petitioners' arguments, the ALJ neither misstated the issue remanded by Superior Court Judge Farren nor did the ALJ frame an issue on his own.

In order to get to the issue of whether a pupil in a New Jersey public school is being provided a thorough and efficient education, it is first necessary to examine the threshold issue of what the constitutional mandate for a thorough and efficient education means. The landmark decisions rendered on the issue of thorough and efficient education by the New Jersey Supreme Court in Robinson v. Cahill, supra, and its more recent pronouncements on that issue articulated in Abbott v. Burke, supra, are certainly essential to consider before rendering any legal determination with respect to the issue in the instant matter. Thus, the ALJ did not err in looking to those two decisions for guidance in rendering his determination.

A review of those decisions and N.J.S.A. 18A:7A-1 et seq. and N.J.A.C. 6:8-1.1 et seq. makes it unequivocably clear that the

constitutional promise of a thorough and efficient education in New Jersey does not guarantee that all students will be provided the best or most effective education. Rather, the guarantee is that each student will be provided equal educational opportunity needed in a contemporary setting to equip a child for his or her role as a citizen and as a competitor in the labor market, as correctly noted by the ALJ on page 13 of the initial decision. Equal educational opportunity has also been defined by the Supreme Court as an opportunity which prepares a student to function politically, economically and socially in a democratic society. (Robinson v. Cahill, supra at 515)

In the instant matter, then, the issue is not whether K.M. was receiving the best or most effective education nor is the issue whether classroom A would offer him a better education than classroom B. The constitutional mandate does not guarantee that a child will achieve to the expectations of the parents or the school or the pupil, nor does it guarantee that there will be substantive gains on a standardized test from one year to the next. Rather, the guarantee is that there will be a thorough and efficient system of education provided to the public school pupils of the State.

Very importantly, however, there is a guarantee to the public school pupils of New Jersey, as defined by N.J.S.A. 18A:46-1 et seq. and N.J.A.C. 6:28-1.1 et seq., that all educationally handicapped pupils will have available to them an appropriate public education designed to meet their unique educational needs and learning problems. It has not been determined that K.M. is an educationally handicapped pupil. Thus, no entitlement existed for special educational programming or services.

The district did attempt to have child study team review of the learning problems alleged by the parents to be interfering with K.M.'s learning. That option was foreclosed by the parents notwithstanding the fact that child study team review does not automatically result in a classification as educationally handicapped. The role of the child study team is much broader than that. As defined by N.J.A.C. 6:28-3.1, its role is also to:

> ***
>
> 4. Provide preventive and support services to non-handicapped pupils;
>
> 5. Provide services to the general education staff regarding techniques, materials and programs for pupils experiencing difficulties in learning. Services include, but are not limited to, the following:
>
> i. Consultation with school staff and parents;

ii. The design, implementation and evaluation of techniques to prevent and/or remediate educational difficulties. (emphasis supplied)

Given the complaints of distractibility, hearing problems, and other learning difficulties alleged by the parents, it was imminently reasonable of the Board to premise its consent to change classrooms upon child study team review and recommendation. Exhibit R-16 shows the Board to be both reasonable and flexible in its desire to resolve the issue of placement for K.M. Contrary to the parents' perception that a review by the child study team would not do any good, information gained by the Board's child study team assessment of K.M.'s educational status would be essential to validating the allegations of the parents and to ascertain what program or placement modifications, if any, would be beneficial. As mandated by N.J.A.C. 6:28-3.5, even when a pupil is not determined to be educationally handicapped, a written summary signed by the child study team must be developed and provided the parent indicating all decisions and recommended course(s) of action.

The record makes it clear that from the beginning the parents in this matter cast aside and frustrated the Board's efforts to resolve the issue of K.M.'s placement by responding in confrontational and adversarial terms by threatening the principal on a Friday that if K.M. were not placed in a closed class by Monday, they would go to court. (Exhibits R-12 and R-13) Unfortunately, this set the tone for the remainder of the dealings between the school and parents to resolve the placement issue.

The Commissioner wishes to make it clear as well that the delay in finally receiving a report from the agreed upon independent review team does not rest with the Board exclusively. As was made clear in the Commissioner's decision of March 8, 1988, neither the parents nor the Board has a right to demand or to control what form of evaluation shall be conducted by a child study team to ascertain if learning difficulties are interfering with a pupil's education. That responsibility rests with the evaluation team. Moreover, a discrepancy did exist between the transcript and the ALJ's written settlement as to the inclusion of written tests. (Commissioner's Decision, at p. 5)

Determination of whether a child is experiencing learning problems rests upon many factors and a variety of assessment techniques must be employed, dependent upon the evaluation questions to be addressed. For example, the question is not merely whether distractibility is present. Rather, evaluation looks to ascertain under what condition is it or is it not present, to what degree does it appear to interfere with the child's educational functioning, what causative factors exist, etc.

Further, contrary to the parents' allegations, observation was not the only technique employed by the review team (see R-11, p. 2) and that very team itself discerned a need for K.M. to undergo a comprehensive child study team psychoeducational evaluation (R-11,

p. 3). For petitioners to claim the review team had no right to make such a recommendation is patently erroneous.

As appropriately recognized by the independent review team:

> ***No single factor such as "open vs. closed" can be assumed to account entirely or even in a major way for the progress, happiness, and classroom response of a child. Rather, factors of social relationships, teacher variables, classroom organization and routine, physical and psychological factors within the child, and home and family factors all interact and may change from year to year and within the year. For some children, development of a single bad social relationship or tensions created by a family event or a combination of seemingly insignificant events can completely change a child's response to instruction from success to failure--in any kind of classroom. Only through a very thorough study of a child can the educator hope to identify reliably the factors which are contributing to a change in school response in some children. (R-11, at pp. 3-4)

As to petitioners' exceptions regarding error having been made by the ALJ for accepting the matter for summary decision, the Commissioner finds no such error. N.J.A.C. 1:1-12.5(b) requires that 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 at an evidentiary proceeding.

Petitioners did in fact submit such an affidavit. Upon review of that affidavit in its entirety, the Commissioner fully concurs with the ALJ that what was eliminated in his findings of fact on pages 4-6 of the initial decision constitutes conclusions, impressions, or judgments on N.M.'s part. Upon careful review of the exceptions he likewise concurs that no genuine issue of material fact existed in light of the issue to be determined, namely, whether K.M. was and is being provided a thorough and efficient education as defined by law and as implemented by the State Board.

Testimony from the expert witnesses desired by petitioners was not necessary in order to reach a decision on whether the district failed to provide K.M. educational opportunity to prepare him for his role as a citizen and a competitor in the labor market. Robinson, supra Nor does the Commissioner believe that the ALJ's failure to rule out the discovery request until rendering his initial decision is fatal to the granting of summary decision because, again, it is emphasized that N.M.'s responding affidavit set forth no genuine issues of material fact which could only be determined at an evidentiary hearing.

Accordingly, it is determined that petitioners have failed in their burden to demonstrate that the Board denied K.M. the opportunity to a thorough and efficient education as defined in the State of New Jersey by law and as implemented by the State Board. That K.M. may have performed better in a closed classroom than in an open classroom does not constitute proof of the Board's failure to provide him the opportunity of a thorough and efficient education, nor does a failure to achieve to parental expectation or to gain "X" number of months on a standardized test from one year to the next. Such information may give rise to concern that a learning problem is interfering with a child's progress, in which event a Board may draw on the expertise of its child study team to assess the child's educational status and to recommend a course of action. This option was foreclosed by petitioners, however, until it was virtually too late in the school year to make any change in placement. Moreover, the preliminary review of the independent team recommends that a comprehensive psychoeducational assessment be conducted because it correctly recognized that the issue of K.M.'s progress is not one dimensional, i.e. strictly limited to the issue of a closed versus open classroom setting.

In no way has it been demonstrated in this matter that the Board failed in its responsibilities contained in N.J.S.A. 18A:7A-1 et seq. and N.J.A.C. 6:8-1.1 et seq., the requirements and components of a thorough and efficient system of education.

Therefore, as recommended by the ALJ, summary decision is granted to the Board for the reasons expressed in the initial decision and herein.

The matter shall be transferred back to Judge Farren, Superior Court, Law Division, Monmouth County.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 27, 1989

K.M., by his guardians ad litem, F.M. and N.M., AND F.M. and N.M., INDIVIDUALLY,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LITTLE SILVER ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Transferred by the New Jersey Superior Court,
November 18, 1987

Decided by the Commissioner of Education,
January 18, 1988

Transferred by the New Jersey Superior Court,
August 5, 1988

Decided by the Commissioner of Education,
March 27, 1989

Decision on motion by the Appellate Division,
May 1, 1989

For the Petitioners-Appellants, Blaustein & Wasserman
(Jonathan M. Kuller, Esq., of Counsel)

For the Respondent-Respondent, Murray & Murray
(Robert E. Murray, Esq., of Counsel)

In November 1987, the Petitioners filed a complaint against the Board of Education of the Borough of Little Silver ("Board") in Superior Court, Law Division, Monmouth County, seeking to compel the Board to transfer their son, K.M., from an open to a closed classroom setting. The Honorable Michael D. Farren, JSC transferred the issue of K.M.'s placement to the Commissioner of Education while retaining jurisdiction on other issues. On August 5, 1988, following the Commissioner's approval of a settlement whereby K.M.'s placement would be determined by an independent review team, Judge Farren transferred the issue of whether K.M. had been receiving a thorough and efficient education to the Commissioner for determination. He directed that the issue of damages remain in the Law Division pending receipt of the Commissioner's decision.

On March 27, 1989, the Commissioner granted summary judgment to the Board, concluding that Petitioners had failed in

their burden to demonstrate that the Board had denied K.M. the opportunity to a thorough and efficient education. On April 13, 1989, Petitioners filed with the Appellate Division a motion seeking leave to appeal the Commissioner's decision. On May 1, 1989, the Appellate Division denied Petitioners' motion, stating that the appeal from the Commissioner's decision did not constitute a final judgment, the State Board of Education being the ultimate administrative decisionmaker for controversies arising under the school laws. That decision was filed on May 4. The Appellate Division did not transfer or direct the appeal to the State Board.

On May 19, 1989, in a letter to Judge Farren, the Petitioners indicated that they would not be seeking to appeal the Commissioner's March 27 decision to the State Board. Nonetheless, on May 26, 1989, Petitioners filed a notice of appeal with the State Board. A notice of motion for leave to appeal was filed on May 30.

Petitioners contend that the 30-day period for the filing of appeals under N.J.S.A. 18A:6-28 should be deemed to run from the entry of the Appellate Division's order denying them leave to appeal, or, in the alternative, the filing requirements should be deemed to have been substantially complied with by virtue of the procedural complexity of the case and the novel issues involved.

Petitioners allege that they felt that the Commissioner's decision was interlocutory in that it concluded by remanding the matter back to Judge Farren, and that, while the Commissioner's decision was final with regard to the matter remanded to him, it did not constitute a final judgment that would have terminated the entire case. They alternatively argue that their notice of appeal should be viewed as timely under the equitable doctrine of substantial compliance, maintaining that their appeal was filed less than 30 days after the Appellate Division's denial of their appeal, the Board is aware of their claim, and the procedural status of the case at the time of the Commissioner's decision constitutes a reasonable explanation for their failure to comply with the statute.

We find no merit in these arguments. There can be no question but that the Commissioner rendered a final decision on the issue transferred to him by Judge Farren. As provided by N.J.A.C. 6:2-1.1(a), final decisions include:

> 1. Any determination of the Commissioner, including, as to those separable issues upon which the Commissioner has rendered a final decision, a decision remanding all or part of a controverted case.

N.J.S.A. 18A:6-28 requires that appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." No extensions may be granted to enlarge the time specified for appeal. N.J.A.C. 6:2-1.5. Given the jurisdictional nature of that statutory time limit, the State Board lacks the authority to extend it. E.g., B.W., a minor child by his parents, J.W. and B.W. v. Board of Education of the City of Brigantine and Safety Bus

Service, decided by the State Board, November 4, 1987. In the absence of directive by the court tolling the time limit or judicial guidance as to the proper standards under which a determination to toll the limit should be made, we decline to alter that view in assessing whether appeal to the State Board in this case is timely. Id.

In this case, the Commissioner's decision was rendered and mailed to the parties on March 27, 1989. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was filed on March 30, 1989. Thereafter, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3; N.J.A.C. 6:2-1.4, and computed under N.J.A.C. 6:2-1.4(b), Petitioners were required to file a notice of appeal by May 1, 1989. As noted, no appeal was filed with the State Board until May 26, 1989.

Petitioners were represented by legal counsel at all times, and the applicable statute and regulations are clear and specific concerning decisions appealable to the State Board and the time limitations for such appeals. Moreover, had Petitioners believed that the Commissioner's decision was interlocutory, motions for leave to appeal interlocutory decisions must be filed with the State Board within five days after service of the decision. N.J.A.C. 6:2-2.3. No such appeal, however, was filed.

Petitioners waited two months after the Commissioner's decision to file the instant appeal and motion for leave to appeal with the State Board, making no attempt to file such an appeal and motion until more than three weeks after the Appellate Division's denial of their appeal. We note further that just one week earlier, they had advised Judge Farren that they were not planning to appeal the Commissioner's decision to the State Board. Nor can we overlook the fact that this appeal was filed only after the Board, in response to Petitioners' May 19 letter to Judge Farren, advised the Judge that it was preparing a motion for summary judgment in the matter before him.

The Appellate Division, in dismissing Petitioners' appeal, did not transfer the matter to the State Board so as to toll the statutory time limit or otherwise alter the operation of the statute. In the absence of direction from the courts, we will not deem the time limitation of N.J.S.A. 18A:6-28 tolled, see Vogel Bus Company, Inc. et al. v. Board of Education of the Union County Regional High School District No. 1 et al., decided by the State Board, May 4, 1988, aff'd, Docket #A-4645-87T1 (App. Div. 1989), and under the circumstances, we find nothing to excuse the Petitioners' failure to comply with N.J.S.A. 18A:6-28.

Accordingly, we dismiss Petitioners' appeal in this matter and deny their motion for leave to appeal.

John T. Klagholz, concurring.

I note that, on the merits of this case, the Petitioner argued that the issue of whether K.M. received a thorough and efficient program of education could only be made after an evidentiary hearing that established the facts relevant to the claim which K.M. advanced.

In his recommended decision, the ALJ found that the fact that the Department of Education certified the respondent school district was dispositive of the sole issue in this case, i.e., whether K. M. was provided with an opportunity of having a thorough and efficient education.

The Commissioner determined that in order to reach the issue of whether a pupil in a New Jersey public school is provided a thorough and efficient education, it is first necessary to examine the threshold issue of what the constitutional mandate for a thorough and efficient education means. On the basis of this asserted standard, the Commissioner concurred with the ALJ that no genuine issue of material fact existed in light of the issue to be determined, namely, whether K.M. was and is being provided a thorough and efficient education as defined by law and as implemented by the State Board.

I cannot agree that the certification process is meant to, nor can it be construed to represent a conclusion that a particular child within a certified school district is receiving his constitutional and statutory due, without a finding, based on the specific facts, as to whether the statutes as applied to the complaining child warrant a remedy or a dismissal. I would therefore reject the dismissal of this matter on summary motion.

Nevertheless, I understand and acknowledge the Legal Committee's recommendation is that appeal in this matter has been filed out of time and the appeal should be dismissed for that reason.

Therefore, and absent latitude to relax in this case, I concur with the decision to dismiss for untimeliness, having first noted my objection to the decision below.

August 2, 1989

IN THE MATTER OF THE NEW JERSEY	:	
STATE INTERSCHOLASTIC ATHLETIC	:	COMMISSIONER OF EDUCATION
ASSOCIATION, THIRD REALIGNMENT	:	DECISION ON REMAND
OF LEAGUES AND CONFERENCES.	:	
	:	

For the Petitioner Immaculata High School, Robert J. Foley, Esq.

For the Respondent NJSIAA, Hannoch Weisman (Michael J. Herbert, Esq., of Counsel)

This matter was reopened before the Commissioner by way of a Petition of Appeal filed by counsel for Immaculata High School seeking reversal of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee's refusal for a second time to permit the aforesaid high school to withdraw from the Mountain Valley Conference (MVC) and join the Mid-State Conference (MSC). The reopening of this matter was authorized by the Commissioner in his decision of June 8, 1988 in the above-captioned matter. In his decision the Commissioner specifically noted "***that the reason advanced by the MVC for keeping Immaculata was diametrically opposed to one of the reasons given by the MSC for not admitting, namely the adequacy of the facilities available for athletic activity." (In re NJSIAA, Third Realignment, at p. 24)

The Commissioner noted that this particular discrepancy was never specifically addressed by the NJSIAA Executive Committee when rejecting Immaculata's appeal. In light of the failure to specifically address the aforesaid discrepancy, the Commissioner directed that NJSIAA take steps to reconsider Immaculata's appeal as it related to that apparent discrepancy. In so doing, the Commissioner retained jurisdiction for the purpose of hearing any further appeal which might arise from his remanding of this issue to the NJSIAA.

By way of background summary, the Executive Committee of NJSIAA held a meeting on September 14, 1988 at which time it considered anew the appeal of Immaculata to be permitted to withdraw from the MVC and enter the MSC. It should be noted for the record that the brief submitted by petitioner in this matter and the proceedings before the Executive Committee of NJSIAA did not limit the issues to be re-examined to the specific discrepancy noted above. Consequently, petitioner in this matter was granted a full rehearing and examination of all issues prior to the rendering of a decision. Upon the conclusion of the aforesaid rehearing of petitioner's arguments, the Executive Committee voted to again deny the application of Immaculata to withdraw from the MVC and join the

MSC and directed the development of a written decision. (See Respondent's Exhibit A.) The written decision was prepared and presented to counsel for petitioner with an opportunity being provided for comment and response. (See Respondent's Exhibit C.) On October 12, 1988 the Executive Committee formally adopted the written decision after consideration of the comments provided by petitioner.

While the Commissioner notes that the remand in this matter was limited to requiring the NJSIAA "***to reconsider the appeal of Immaculata specifically as it relates to the matters raised in this decision relative to the aforesaid discrepancies***" (In re NJSIAA, Third Realignment, at p. 25), he, as did NJSIAA, recognizes that the final determination must consider NJSIAA's response to the discrepancies within the total context of the reasons given for rejection of Immaculata's appeal.

Initially, therefore, the Commissioner will consider the response by NJSIAA to the alleged discrepancies between the reasons given by the MVC for seeking to retain Immaculata's membership and those provided by the MSC for rejecting the application for transfer to its conference. Immaculata argued that the reasons advanced by the MVC for opposing the release of Immaculata from its conference, namely the breadth of its program and the excellence of its facilities, was diametrically opposed to the reasons provided by the MSC for non-admission. The MSC rejected the application, argues Immaculata, because it deemed Immaculata's facilities as being inadequate. This inconsistency seemed to Immaculata to be proof that its application was not given serious consideration.

In addition to the alleged discrepancy of the reasons provided, Immaculata renews its argument set forth in the Commissioner's decision of June 8, 1988 that its membership in the MVC requires it to travel an average of 27.71 miles to away games at a considerable financial burden and, more importantly, considerable loss of school and study time for students who must be released from class early and arrive home both late and tired facing the added burden of homework. By way of contrast, Immaculata contends that it must pass several MSC schools to arrive at Ridge High School, its closest MVC opponent, and its average travel time as a member of the MSC would by only 9.32 miles.

Immaculata further presented argument to the effect that NJSIAA improperly applied the seventh criterion (adverse impact upon racial balance of the conference or conferences involved). Immaculata so holds because the report of the NJSIAA Special Committee which originally denied the request for conference transfer did so based upon the impact of such transfer on the "***balance of urban and suburban schools in that Conference. ***" (Petitioner's Brief, at p. 9 citing NJSIAA Special Committee Report at p. 39)

Immaculata holds that no such criterion as suburban/urban balance has been adopted by NJSIAA for making decisions on conference membership. However, if NJSIAA meant the impact of withdrawal on the racial balance of the conference, Immaculata

challenges said assertion on the grounds that no statistics on minority enrollment for nonpublic schools are provided to support such a contention. Nor can such minority statistics as are provided, contends petitioner, be relied upon since they reflect total school district enrollment rather than high school enrollment which is the significant statistic as it relates to interscholastic athletics. Further, Immaculata points out that the classification of minorities includes many racial and ethnic groups making it impossible to compare equally representative classification of minorities.

Additionally, Immaculata argues that the greatest weakness of the minority enrollment data as utilized by NJSIAA in reaching its conclusions is the fact that conference minority enrollment is arrived at without consideration of the enrollments of private schools since no racial or ethnic breakdown exists for nonpublic schools. Thus, contends Immaculata, its withdrawal will not impact upon the minority composition of the MVC.

Finally, Immaculata accuses NJSIAA of applying criterion seven in an unequal fashion since said criterion was utilized to deny withdrawal of Immaculata and Ridge High School from the MVC while being ignored by NJSIAA in originally denying admission of the heavily minority Newark City schools to the various suburban conferences.

Petitioner also contends that it was denied its right to due process when NJSIAA based its decision on facts not in the record. Petitioner contends that the facts on minority statistics utilized by the Special Committee of NJSIAA were not made available to petitioner. Petitioner argues further that the process utilized by NJSIAA in according a Special Committee the right to hear appeals violates Article XIII of the Bylaws of the New Jersey State Interscholastic Athletic Association, insofar as there was no access for petitioner to the Controversies Committee as provided for in the aforesaid article. While Article XIII, Sections 2 and 4 of the Bylaws provides opportunity for cross-examination, no such opportunity was afforded before the Special Committee. Petitioner further contends that neither the appeal hearing by the Executive Committee, nor the rehearing upon the Commissioner's remand, cured the defects of the earlier proceedings.

Immaculata's final exception contends that NJSIAA's rehearing continued to base its determination on facts not in the record in that the formal resolution denying transfer of Immaculata from the MVC to the MSC made reference to the second realignment of leagues and conferences. Additionally, Immaculata contends that the resolution indicates that the MVC denied transfer so as to preserve such balance. It is Immaculata's contention that neither the MVC letter to Immaculata nor to Ridge refers to racial balance as a reason for rejection. (See Petitioner's Exhibits A and D.)

In response to the foregoing arguments of Immaculata, NJSIAA argues that the appeal should be denied absent a showing by petitioner that compelling reasons exist for such reversal. NJSIAA urges the Commissioner to affirm its actions based upon a

presumption of correctness, absent a showing of arbitrary or capricious behavior or a failure to provide due process.

NJSIAA emphasizes the importance which the Commissioner has placed upon ensuring that schools with heavy minority populations are accorded opportunity to be integrated into the various suburban conferences. This emphasis, contends NJSIAA, has been a major focus of that organization's activities and that in each realignment of leagues and conferences it has acted to prevent predominantly white schools from withdrawing from conferences when such withdrawal would result in significantly increasing the minority representation in a league or conference. It is NJSIAA's contention that Immaculata's withdrawal from the MVC would have an adverse impact on racial balance in the conference since Immaculata is admittedly 95% white despite the fact that there are no official statistics available on nonpublic school minority enrollment. Notwithstanding the fact that no such reason was provided by the MVC for rejecting the application of withdrawal, NJSIAA contends that both the Special Committee and the Executive Committee cited such reason for rejection of Immaculata's appeal. Finally, in relation to the alleged adverse impact on the racial composition of the MVC, NJSIAA concludes that the Commissioner's reliance on the importance of criterion seven in requiring the admission of the Newark City schools into the suburban conferences and the subsequent admission of Newark Central High School makes the retention of Immaculata and Ridge High School even more significant both from the point of view of maintaining racial balance and maintaining opponents of comparable size.

As to its final reason for rejecting Immaculata's application for transfer from the MVC to the MSC, NJSIAA addressed the contradiction which resulted in the remand by the Commissioner in the following manner:

> 3. Contrary to the assertion of Immaculata, the reasons given by the MVC and the Mid-State Conference for opposing the transfer of Immaculata were not contradictory. As noted, the MVC praised the facilities of Ridge High School, which are far more extensive than Immaculata High School and then noted the expansion of programs at Immaculata. Both the MVC and the Report did note the need for the continuation of available facilities at both schools. Second, the MVC is a much smaller conference than the Mid-State Conference and therefore facilities that would be viewed as inadequate by a conference consisting predominately of Group III and IV schools, such as the Mid-State Conference, might be viewed as perfectly adequate by a conference comprised of Group I and II sized schools, such as the MVC. Third, the concern of the Mid-State Conference related to the fact that while Immaculata had adequate facilities available to it, at least the outdoor facilities were not under that school's

control, consisting of county park playing fields or Somerville High School facilities.
(Respondent's Exhibit A, at p. 7)

Further, the decision on remand emphasizes that even if there were inconsistencies between the reasons given by the two conferences, the Executive Committee of the NJSIAA was not bound by those reasons.

The Commissioner has carefully reviewed the arguments of the parties in this matter. Although the Commissioner's remand in this matter was originally limited to reviewing the inconsistencies between the reasons given by the MVC for retention of Immaculata and the reasons given by the MSC for rejecting the application for admission, the Commissioner recognizes that final determination in this matter cannot rest solely upon that isolated factor.

In rendering his determination in this matter the Commissioner deems it important to emphasize that he will not substitute his judgment for that of NJSIAA, provided the actions of that organization are consistent with its rules, regulations and bylaws and that its actions are not arbitrary or capricious. (See R.S.R. et al. v. NJSIAA, decided November 13, 1986 and Pascack Valley Regional High School District v. NJSIAA, decided August 19, 1987.)

With that in mind, the Commissioner concludes as he did in his original decision of June 8, 1988 that Immaculata's argument as to the distances which it must travel in order to fulfill its athletic obligations as a member of the MVC does not in and of itself constitute a sufficient basis for overriding the determination of NJSIAA's Special and Executive Committees.

On the other hand, the Commissioner does not find the explanation provided by the MSC relative to the alleged inadequacy of Immaculata's facilities to be particularly convincing. In the Commissioner's view, were the decision in this matter to hang on the facilities issue, Immaculata's claim relative to the fact that many of its facilities were already shared with other schools which are presently members of the MSC would carry considerable weight. In the final analysis, however, it is the issue of the impact of Immaculata's and Ridge's withdrawal from the MVC upon the racial composition of that conference which, in the Commissioner's view, is the most significant factor. In this regard, the Commissioner agrees with the position of NJSIAA that notwithstanding the reasons that may have been advanced by the MSC for not admitting Immaculata, both the Special Committee and the Executive Committee were well within their rights to apply a criterion which the Commissioner had deemed most significant.

In so concluding, the Commissioner is fully cognizant of the challenge raised by petitioner in this matter to the statistics used by NJSIAA. Notwithstanding the challenge, it is not disputed in the record that Immaculata is a school with a 95% white student body and therefore even though the Immaculata student body is not included in determining the percentage of minority students in the

MVC, the withdrawal of Immaculata coupled with the withdrawal of Ridge High School would have led to a MVC with a much higher minority pupil ratio. Although not a factor in the original determination rendered by the NJSIAA Special and Executive Committees, the addition of Newark Central High School by virtue of the Commissioner's directive in his decision of June 8, 1988 must likewise weigh heavily in the affirmance of NJSIAA's decision on remand.

Further, the Commissioner finds the assertion of Immaculata as to its being denied due process because of a failure to be allowed to appear before the Controversies Committee to be entirely without merit. He finds that NJSIAA acted entirely within its authority to create a Special Committee to initially hear appeals of the determinations of the various leagues and conferences relative to membership application and approval. Not only was Immaculata afforded opportunity to appear before the Special Committee, it was permitted to present its further appeal twice to both the Executive Committee and the Commissioner.

In rendering his decision in this matter as it pertains to the appropriateness of the actions of NJSIAA in considering the impact of withdrawal of Immaculata upon the racial composition of the MVC, the Commissioner imputes no ill motive to Immaculata in seeking withdrawal from the MVC and entrance into the MSC. In the Commissioner's view, such application was motivated entirely by the reasons set forth by Immaculata in its appeals and not by any desire to avoid athletic competition with minority schools.

In conclusion, the Commissioner affirms the action of NJSIAA and its committees in denying the application of Immaculata to withdraw from the MVC and enter the MSC for the reasons set forth above.

COMMISSIONER OF EDUCATION

MARCH 29, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4555-88
AGENCY DKT. NO. 181/6-88

LOOKING INTO EDUCATION,
MARILYN FONTES JOSE,
KATHY DECAVALCANTE
AND LYNN CORSI,
Petitioners,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF HAMILTON,
MERCER COUNTY,
Respondent.

Robert B. Rottkamp, Jr., Esq., for petitioner (Rottkamp and Flacks, attorneys)

Daniel J. Graziano, Jr., Esq., for respondent (Smithson and Graziano, attorneys)

Record Closed: December 19, 1989 Decided: February 17, 1989

BEFORE **RICHARD J. MURPHY**, ALJ:

Petitioner "Looking Into Education," an ad hoc group consisting of the concerned parents listed above, challenges the action of the respondent Hamilton Township Board of Education (Board) in adopting a redistricting plan on June 29, 1988, which substanially enlarged the "grandfathering" rights given to parents under an earlier plan for redistricting five elementary schools. The question presented is whether the Board's adoption of a redistricting plan (designated as plan C) on the June 29, 1988 was arbritrary, capricious, and without a reasonable basis in fact so as to be invalid as an abuse of the Board's discretion under N.J.S.A. 18A:11-1.

PROCEDURAL HISTORY

The petition in this matter was filed with the Commissioner of Education on June 17, 1988, and transmitted to the Office of Administrative Law on June 22, 1988 for hearing as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. On July 1, 1988, the petitioners moved for emergent relief to stay the proposed plan. The motion was argued on July 14, 1988, and denied on July 21, 1988, by ALJ Steven Reback. Judge Reback concluded that the petitioners had failed to demonstrate a probability of success on the merits in the plenary proceeding and also had failed to showa likelihood of immediate and irreparable harm. He further concluded that the inconvenience and burden of granting the stay would be onerous, in light of the impending school year. The parties subsequently that plan C would be implemented for the 1988-89 school year and that any changes would not be effective until the start of 1989-90 school year. A prehearing conference was held in this matter on August 16, 1988 to settle the issues, and hearing dates were set for September 22 and 23, 1988. Those dates were adjourned pending further discovery and the matter was heard to completion on December 19, 1988.[1]

FINDING OF FACTS

The material facts are not in dispute. The parties stipulated at the prehearing as to the contents and procedural propriety of resolutions passed by the respondent Board of Education concerning redistricting of elementary schools within the district on June 29, 1988 (the so called "plan C"), May 17, 1988 (plan B), and "plan A" which was passed on October 21, 1987. The basic difference between these plans is the extent to which they allow "grandfathering" of students or, in other words, the degree to which the plans permit parents to choose which school their children will attend. The parties also stipulated as to the statement of facts set forth in ALJ Reback's order of July 21, 1988, denying emergent relief and that statement is set forth in full below as it comprehensively and accurately depicts the various plans adopted:

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1 The deadline for submission of the initial decision was extended until February 17, 1989 due to illness and administrative problems.

For the past several years the Board of Education of the Township of Hamilton has had to wrestle with the problem of overcrowding in all of its 17 elementary schools, attended by pupils in kindergarten through 5th grade. Studies were undertaken, various meetings both of a formal and informal nature were conducted and several projections of student enrollments were made. By the fall of 1986, a report was submitted to the Board for its consideration and by mid-1987, it was the apparent judgment of the Board that the boundaries governing enrollment in 5 of 17 of the elementary schools in the district required change, in conjunction with the construction of additional facilities, in an effort to address the issue of overcrowding. For much of 1987 officials within the school system sought to establish boundary changes and, in addition, at a meeting conducted in April 1987, the Board voted to appropriate funds for the construction of additional buildings and facilities.

At its meeting of October 21, 1987, the Board formally adopted a resolution defining new boundaries for several of the elementary schools within the district. The plan, referred to as plan A, adjusted the boundaries for 5 of the 17 schools in the district. . . . In addition, and in an apparent effort not to fully disrupt the existing enrollments and status quo within these schools by displacement as a consequence of new boundaries, the Board at the same meeting conferred various options upon the parents of fourth graders who were in attendance at the schools at issue. The parents could send all of the children in one family to the same school or schools. In the alternative, they could keep their oldest child at one of several schools until the fifth grade. Finally, they could keep their oldest child at one of several designated schools for the 5th grade as well as any younger siblings in grades K through 4 at the same school for one year only before the entire family changes schools in the 1989-90 school year. These options, referred to in the boundary change memorandum . . . which presumably emanated from the Board meeting is termed "grandfathering". What it is clearly designed to do, in part at least, is to allow certain of the older pupils, if their families elect, to remain in the school which they attended prior to the boundary change. The Board, in what cannot be described as an unreasonable decision, elected to draw the line at which families would have various "grandfather options" at the fourth grade level, giving these children the opportunity to remain at the same school they had attended during their final year in elementary school. Those pupils below fourth grade level would have had to comply with the new boundaries.

On May 17, 1988, the Board adopted a resolution which significantly changed plan A. The new plan, B, implements the identical boundary changes as did plan A which, as will be recalled,

are applicable to only 5 elementary schools. But plan B significantly deviates from plan A by permitting parents of all pupils currently in attendance at those 5 schools to exercise grandfathering rights. As to those students who would currently be entering kindergarten or new students moving into the area, no grandfathering rights would be extended to them: they would be required to comply with the new boundary alignments. In addition, pursuant to paragraph 3 of plan B, the Board saw fit to restrict the foregoing rights based upon class size maximums. Under paragraph 3, once class size maximums are reached - those figures have been predetermined by the Board - any new child entering one of the 5 designated schools subject to boundary changes would be assigned to the nearest elementary school.

At its meeting of June 29, 1988, the Board (which was comprised of the same members as was the May Board) passed a motion adopting plan C as the elementary school redistricting plan for the school year 1988-89 "and beyond". This motion will supercede the adoption of the motion at the Board meeting of May 17, 1988 and will, thus, supercede both plans A and B.

Pursuant to plan C, as it will be implemented by the Board, the boundary changes will remain exactly as they were under previous plans A and B: they apply only to the 5 designated elementary schools previously named and to none of the other schools in the district. The primary difference between plans B and C is that under the latter, where class size exceeds administratively defined maximums, and where additional classroom space is unavailable, excess pupils will transfer to the next nearest elementary school where space is available. This prescription, which under plan B applied only to the 5 schools which were the subject of the resdricting plan, will under plan C, apply to all of the elementary schools in the Hamilton Township School System. The "grandfathering" provisions which were set forth at paragraphs 1 and 2 of plan B will presumably remain intact but only in respect to the 5 schools subject to the resdricting plan.

In broad terms, therefore, what plan C is designed to do is extend the policies in respect to maintaining class size below established maximums to the entire Hamilton Township School System and not, as did plan B, restrict it exclusively to the 5 schools subject to the redistricting plan. It was also, as indicated by the Assistant Superintendent for Instructional Services for the Township, a plan designed to implement the Board's expansion of grandfathering and to delay the boundary change effect. . . . . It was also apparent from oral argument that the Board perceives plan C to be a stopgap measure designed to be in place for approximately five years, during which time, presumably through grandfathering, there would be a significant reduction in potential disruption. Thereafter, plan A would be in place; the Board perceives that

> phasing in plan A through the use of plan C would ease the transition to the new boundary arrangements and mitigate the trauma on children of changing schools and be accomplished with no sacrifice to the quality of education in the affected schools.

The above section of Judge Reback's order accurately delineates the disputed features of the redistricting plans adopted by the changing membership of the Hamilton Township Board of Education between October of 1987 and June of 1988. (Four new members were elected to the Board in April of 1988, following the previous Board's adoption of plan A in October 1987.) ALJ Reback also concluded in his order that a stay of plan C should not be awarded because, among other things, the petitioners had not shown that they were likely to prevail on the merits of the matter in a plenary proceeding. As stated after denial of the motion for a stay, the parties agreed that plan C would stay in effect at least until the 1989-90 school year to avoid any mid-year disruption or chaos.

That plenary proceeding was conducted on December 19, 1988 and its purpose was to allow the petitioners and the Board an opportunity to fully present their cases, after an ample opportunity for discovery and accumulation of current enrollment data. At the hearing, the parties agreed to the admission of a number of documents including reports and affidavits, many of which had been presented previously to Judge Reback in support of or in opposition to the motion for a stay (P-1 through P-16; R-1 through R-4). New information was provided as to student enrollment, which is a key factor in the development of these redistricting plans, as they are intended to anticipate and provide for population growth in Hamilton Township and accompanying problems of overcrowding and unequal facilities. As of September 30, 1988, the Board of Education certified to the State Department of Education that total elementary enrollment was 4,962 students, with 900 at the kindergarten level and 736 in fifth grade (P-1). These figures, which are somewhat below previous projections (R-5 and R-6), indicate an increase in the elementary school population apparently reflecting a small scale "baby boom" in the population at large and rapid housing development in the Township. Enrollment figures submitted as of December 1, 1988, showed that the overall enrollment had increased to 5,008 and that the kindergarten and fifth grades had gone up to 908 and 746, respectively. The existing capacity of the 17 schools in the district is 4,630 students (R-6 at 35). The

current enrollment figures as to the five redistricted schools, as well as the impact of plans A and C on class size is set forth in the following chart. Class size is also shown for each school under the plans as of June of 1988 and is calculated by dividing enrollment by the number of classes (See R-2 - R-4).

School	Plan A	Plan C	As of 12/1/88
McGalliard	22 (287-13)	23 (302-13)	303
Mercerville	21 (274-13-14)	22 (286-13)	296
Morgan	20 (340-17-18)	20 (296-15)	320
Robinson	21 (297-14-16)	22 (294-14)	342
University Heights	21 (393-19)	22 (420-19)	419

Although class sizes in all of the schools comply, at this point, with the maximums set by the Board of 25 students for grades K through 3 and 28 students for grades 4 and 5, there is an increasing problem with crowding at the McGallaird and University Heights schools. The Morgan and Robinson schools have empty classrooms available, as a result of a plan by the Board to add space at those facilities. Under plan A, adopted in October 1987, the size of the student body at University Heights was expected to decrease by 50 - 75 students, who would be redistricted into the Morgan or Robinson schools. Although crowded, the University Heights school, having been built in 1977, is the newest of the five schools and contains some of the more modern features such as central air conditioning, as well as space for art rooms and resource centers. It lacks facilities for a computerliteracy center, which is available at the Morgan and Robinson schools, and is also somewhat smaller in size (P-7 at 3). The test scores of students attending the University Heights school are reported to be higher that those at the other facilities, and the Board does not dispute this claim, which was made by petitioner Marilyn Fontes-Jose. Under plan C, which keeps intact the full grandfathering rights accorded to parents under plan B, students currently enrolled at University Heights in any grade would be allowed to stay: new students would be subject to the redistricting lines drawn under plan A.

In order to assess the reasonablness of the Board's exercise of discretion in adopting plan C in place of plans A and B, it is necessary to examine the evidence available to the Board in reaching these determinations. Keep in mind that plans B and C were adopted by the reconstituted Board after April 1988, and share the feature that all

students in the five above named schools could be grandfathered in and not be required to transfer. Plan C, which was adopted a little over a month after plan B. did not alter this aspect or change the boundaries set by either plan A or B, but provided that pupils would transfer to the nearest elementary school where space was available in the event that class size exceeded the Board's maximum in any given school. This provision of plan C applied to all of the 17 elementary schools in the district, not merely to the five named above. The new Board thereby made a policy decision to favor the concept of neighborhood schools over reductions in class size.

At the hearing, petitioner's presented testimony by Dr. David E. Wieschadle, a professor of education at Montclair State College, who also served on the Citizen Advisory Committee to the Facilities Committee of the Hamilton Township Board of Education. Dr. Weischadle testified as an expert and set forth his role in the redistricting process as well as his position in favor of plan A, as a sound and responsible response to anticipated growth and need for space. As a member of the Citizen Advisory Committee, Dr. Weischadle assisted the Board in reviewing materials generated by a demographic team and a facilities consultant (the so-called "Humphries" report) as well as a master plan for the study of educational facilities in the Township (See, R-5-7). According to Weischadle, prior to October 1, 1987, (and there is no dispute on this point) the Board had available to it the major demography report (R-5), the master plan referred to (R-6) and the final report of the Hamilton Township Board of Education Facilities Committee (R-7). The demographic report was issued by consultants in March of 1986 and projected uneven growth within the Township of as much as 16 percent, with the largest growth at the elementary school level causing eight school to reach capacity and four to exceed it. The report also projected an increase of as many as 725 elementary students in the period between 1986 and 1990 (R-5 at 14 and 22). The Master Plan Study of Educational Facilities for Hamilton Township prepared in June 1986 by Kenneth W. Humphries, among others, saw a needed elementary school capacity for 5,400 students by 1990-91, over an existing capacity of 4,630 and suggested construction of two new schools, as well as additions to three older schools, including the Robinson and Morgan schools (R-7 at 32). The "Humphries" report also recommended redistricting of elementary attendance zones when these construction additions were completed to relieve overpopulated areas, including those served by the McGalliard and University Heights schools, which were

operating at or over capacity in September of 1985 (R-6 at 18-24; R-7 at 32). The final report of the Facilities Committee thus recommended what Dr. Weischadle accurately described as "modest construction" and "modest redrawing" of the district lines (Weischadle testimony). He estimated that the redistricting involved in plan A would result in the moving of some 120 to 125 students, most of whom he expected to weather the change well, although there would be "some trauma." He anticipated that plan A would involve close work with affected parents and students to alleviate any adjustment problems. Dr. Weischadle described plan A as "the best thought out possibility" which would make the best use of currently empty and available classroom space and also tend more to equalize class size. He views plan C as a "stop-gap effort, totally devoid of any semblance of long-range planning or appropriate policy development" (P-14 at 7, para. 13) and criticizes it as a quick and cursory reversal of plan A by a newly elected school board. On cross-examination, Dr. Weischadle conceded that the boundaries set under plan A were not changed by plan C, but that the issue was whether to move students right away under A or allow for gradual implementation of the new boundaries through plan C, which adopted the total grandfathering provided by plan B. Under plan C, new students moving into the area would be fully subject to the redistricting provided by plan A.

The petitioners also presented testimony from Anthony G. Cellentano, a member of the Board of Education since 1986, who was involved in the adoption of plans A, B and C, and reiterated that the Board's overall initial plan was to relieve overcrowding at McGallister and University Heights through additions at Morgan and Robinson. Celentano, who was re-elected in April 1988, testified that the Board as a whole did not meet until May 16, 1988, when the new Board adopted plan B. He claims that the new members received copies of the demographic reports and Facilities Committee Report but has no clear recollection of discussing the data with the new members before their vote to alter plan A by allowing "grandfathering" for all students in the five redistricted elementary schools. He stated that the subject of plan A was not on the agenda for the May 1988 meeting, but was brought up by new member Linda Dumple, who had two of her own children enrolled at University Heights. Dumple testified that she had been present at the Board's October 1987 meeting to consider plan A and reacted like a "crazy person" to the boundary changes because it involved playing "chinese checkers with kids." She felt it was particularly unfair and discriminatory to limit

grandfathering to the fifth graders, as provided by Plan A. She also reacted by going door-to-door in the neighborhood to drum up opposition against plan A, partly on the basis of what she perceived as the questionable accuracy of the population growth statistics on which plan A was, in part, based. Following her election to the Board of Education in April 1988, Dumple met with superintendent V. Gittelman and the school principals and the matter was discussed and adopted at the May meeting. After additional meetings with the staff and principals of some of the affected schools, plan C was developed and later presented at a public meeting on June 29, 1988. Dumple conceded that she was not a teacher, or an educational administrator, and had had no training or background in either area prior to being elected to the Board. The primary basis for her decision to seek a change to plan A, which effectively would delay its implementation, was her concern as a parent and conviction that there would be a decline in the Hamilton Township population and thus a reduction in the projected enrollment figures underlying plan A. As noted, total enrollment, as of December 1, 1988, was, in fact, up to the level of 5,008, which showed an increase of 42 students over the September 1988 figures.

Testimony was also given by the president of the Hamilton PTA, Marilyn Fontes-Jose, who is a teacher with 30 years experience and is familiar with the genesis of the redistricting plans. She generally provided her account of the development and relative wisdom of the redistricting plans in question. She agreed with Dr. Wieschadle that plan A was the best response for resolving overcrowding at University Heights and achieving effective utilization of additional space at Robinson and Morgan. Fontes-Jose also testified that the Board was given the full packet of redistricting data before voting in May of 1988, but that plan B was not the agenda of the May meeting and came up as a "surprise." She also agreed with new Board member Dumples account that plan C was on the agenda of the June 29 meeting and was the subject of considerable public comment, much of which expressed deep dissatisfaction with the changes and transfers required under plan A. She felt that the present class size at University Heights was "reasonable," but was not testifying as an expert on that or any other point. She also conceded that, under both plans A and C the same number of classrooms were planned to be utilized. The petitioners also presented testimony from the president of the University Heights PTA, Annete Marino, as to the overcrowding at University Heights and empty classrooms at Morgan, but neither Marino's testimony nor that of Kathleen Harts, the liaison for the

McGalliard school to the Board of Education, added much in the way of detail to the facts established by the documents and other testimony introduced and discussed above.

In response to the criticism of conditions at the University Heights school, respondent offered testimony by Ms. Leaf, the parent of a child enrolled at University Heights, who stated that she chose to keep her child in University Heights despite the overcrowding because the school offered certain classes not available at Morgan, such as accelerated reading and math, and also because of other matters peculiar to her daughter's needs. As cited above, although conditions at the University Heights school may be somewhat crowded, class size does not exceed the maximum established by the Board policy, which has not been challenged by the petitioners in this proceeding.

There is no dispute as to the facts set forth above and I so **FIND.**

ISSUE

The question presented is whether the Board's adoption of plan C: June 29 was without a reasonable basis in fact so as to be arbitrary, capricious and therefore invalid as an abuse of the Board's discretion to redistrict under N.J.S.A. 18A:11-1.

DISCUSSION AND CONCLUSIONS

Judge Reback's order denying emergent relief, contained the following accurate rendition of the petitioner's argument in this case.

> The petitioners allege that the plans superceding the initial plan A are arbitrary and capricious on several grounds. They allege that overcrowding will continue, class size in some instances, will actually exceed district policy limits, newly constructed classrooms in one elementary school will be left empty, the concept of grandfathering would result in busing of students outside of their neighboorhood, and the building expansion program, which was initially designed to address overcrowded conditions, would not be utilized for at least a period of five years, presumably while plan C remains in effect. While the petitioners acknowledge (see letter petition, June 16, 1988 at 2) that parents would have a serious concern about their children being transferred to an

> elementary school outside of their district, they assert that these parents had adequate notice since October 1987 to prepare for that. More importantly, they urge that as a consequence of the May 19, 1988 (and presumably the June 1988) decision reversing school assignments, timely notice was not given and would be more upsetting to the pupils. Petitioners also provided various documents emanating primarily from the Office of Superintendent of Hamilton Township Schools in support of the boundary changes manifested in plan A. . . . .
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> In respect to plan C, Mr. Rottkamp argues that the mere rapidity by which both plans B and C were adopted (a matter of two months) in and of itself suggests bad faith on the part of the Board. Moreover, the substance of the plan in his judgment would keep schools which are currently overcrowded in that same condition while buidings that had been enhanced would remain under-utilized. He also speculated that as a consequence of the grandfathering right of parents, there would be the possibilty that dual bus routes in the Township would be created. He suggested as well that plan C would diminish the rights of disabled pupils and that as a consequence of grandfathering, a negative impact upon the Hamilton Township real estate market could be created. . . . .
>
> Counsel for petitioners also suggests that the action of the Board was motivated by purported intimidation of some of its members. . . . . Mr. Rottkamp, in general terms, concluded his oral argument by asserting that there was no rational basis under which plan C should be implemented, that it was an arbitrary, unreasonable and capricious action by the Board, having no reasonable basis in fact, and inconsistent with the administrative recommendations which it had before it.

The respondent Board of Education defends its adoption of plan C as a lawful and reasonable exercise of its discretion with respect to matters of redistricting. The Board denies that the change in plans was coerced by intimidation of some of its members, or the product of some other ill motive or practice. The petitioners failed to produce any evidence at the hearing to support a finding of such intimidation or bad faith and the respondent's motion to dismiss that aspect of the case was granted. As to the reasonableness of plan C, the Board maintains that it properly exercised its discretion to minimize the disruption and transfers inherent plan A and did so in a manner that kept all class sizes with in acceptable limits and preserved to the extent possible the policy favoring neighborhood schools.

The burden of the petitioners in attacking the Board's decision to adopt plan C is to affirmatively show that this decision was arbitrary, capricious and without a reasonable basis in fact. See, Thomas v. Morris Township Bd. of Ed., 89 N.J. Super. 327, 328 (App. Div. 1965). Local boards of education are vested with management of public schools, including matters of redistricting, and a board's exercise of discretion in these matters will not be disturbed without a showing that this discretion has been abused by actions in violation of law, in bad faith, or without reasonable basis. As indicated, the Board's motion to dismiss was granted as to allegations and suggestions that it acted in violation of law or in bad faith. The question of the reasonableness of its action in adopting plan C remains. See, In Tolliver et al v. Metuchen Bd. of Ed. 1970 S.L.D 415, 421.

Several other Commissioner's decisions dealing with questions of redistricting are relevant to this case. In Baker et al v. Westfield Bd. of Ed., OAL DKT. EDU 1747-80 (June 11, 1980), adopted Comm'r of Ed. (July 28, 1980), the petitioners alleged that the local board acted improperly in its determination to redistrict the school system and close two elementary schools. The initial decision dismissed the contention, concluding that the board did not act arbitrarily, capriciously or unreasonably. The Commissioner affirmed the findings and determination. In his affirmance, the Commissioner stated:

> A wealth of detailed information was presented on what is admittedly a sensitive issue, the closing of schools which mayhap over the years have become community centers. The Commissioner is aware of the level of involvement herein demonstrated by citizens, Council members, professional educators and Board members.
>
> In these difficult times problems must be presented and discussed openly and in a forthright manner as was done here. This process must lead to discussions which, perforce, will not make each and every person involved in that process happy or content with the resultant decisions. Barring a decision which is patently arbitrary, capricious or unreasonable the Commissioner will not interject his judgment. [citation omitted]

More recently, the Commissioner adopted an ALJs opinion in the matter of Petrone v. Bd. of Ed. of the Township of Morrestown OAL Dkt. No. EDU 503-88, Agency Dkt. No. 170-6/88, finding that a Board of Education had acted properly before deciding to bus

kindergarten pupils until a permanent remedy to overcrowding could be devised. The Board in the Petrone case was found to have had carefully studied its space needs over an extended period with citizen input and had considered various options, including busing of kindergarten students. In concluding that the Board's decision to bus as a temporary expedient did not constitute a reversible abuse of discretion, the ALJ in Petrone cited a number of cases standing for the proposition that the Boards have discretion to determine pupil attendance areas and may legally transfer children from school to school in the absence of a showing of prejudice or discrimination (OAL Dkt. No. EDU 5033-88 at 6). The Commissioner of Education has also held that a board's study and answers to problems created by enrollment projections over a period of weeks prior to the time of its final action is not necessarily unreasonable. See Marcewicz v. Pascack Valley Reg'l. Dist. 1972 S.L.D. 619.

The issue in this case is not whether plan C is the best of all possible plans: the question presented is whether plan C is so patently and inherently unreasonable and arbitrary as to constitute an abuse of discretion, which the Commissioner of Education is empowered to invalidate. The Commissioner of Education is not authorized to veto a Board's redistricting plan because a more farsighted plan was abandoned or could have been adopted, so long as the plan chosen by the Board has a reasonable basis and is not otherwise invalid.

Petitioners assail plan C as a hasty and ill-considered scuttling of a superior long-range plan carefully designed to reduce overcrowding, control class size, and accomodate anticipated growth and enrollment. In the place of plan A, the petitioners depict a scenario under plan C where classes remain overcrowded, (particularly at the University Heights school), class sizes balloon beyond acceptable limits, new classroom space lies empty in schools such as Morgan and Robinson, and at least some children are bused out of their neighborhoods after moving within the district. Respondents concede that some overcrowding may continue and acknowledge that some space available may not be utilized, but point out that plan C does not eliminate plan A or disregard the anaylsis of data on which it is based but, rather, provides for a more gradual implementation of the plan in order to minimize its disruptive impact on students currently enrolled. The Board also contends that plan C will not exceed the maximum class sizes set by Board policy, and is a reasonable attempt to preserve, the greatest extent possible, to the concept of neighborhood schools.

The Board's modification of plan A in May and June of 1988 came after school elections had swept in four new members and was based in no small part on the urging of unhappy parents, including at least one new Board member, who wished to keep their children in University Heights, which they viewed as a superior facility. This fact, in and of itself, does not render plan C invalid: had plan A been continued in effect another set of disgruntled parents might well have risen to challenge it. The school board elections in April of 1988 gave the proponents of plan C the edge of power and they successfully pressed their case to modify the earlier plan. In doing so, the newly constitued Board had before it in May and June of 1988 all of the data which the prior Board had considered and relied upon in adopting plan A. After reviewing the options the Board devised plan C, which is admitted to be a "stop-gap" measure. Although plan C would slow the implementation of plan A and thereby result in some continued overcrowding and under utilization of available space, it retains the redrawn boundaries of plan A, and, based on current projections, stays within the class size requirements set by the Board. It is not a perfect solution to the problems of growth and space, but it is not required to attain perfection in order to withstand a challenge. Plan A, whatever its long-term merits, also would have had some disruptive short-term effects, which the new Board determined to prevent or ameliorate. While this decision may have some anomalous results on a temporary basis in the form of continued and possibly worsening crowding in the face of available space, these defects do not render plan C so inherently unreasonable as to require that it be invalidated by either the Commissioner of Education or the New Jersey Superior Court Appellate Division. Given the narrow scope of review permitted to the Commissioner, as well as to the Appellate Division, I **CONCLUDE** that the petitioners have failed to bear their burden of showing that the adoption of plan C was so unreasonable and arbitrary as to constitute an abuse of discretion.

ORDER

On the basis of the above findings of fact and conclusion of law it is **ORDERED** that the petition in this matter be **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

FEB. 17, 1989
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

Feb. 17, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 21 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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LOOKING INTO EDUCATION, MARILYN FONTES JOSE, KATHY DE CAVALCANTE AND LYNN CORSI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon examination of the record, the Commissioner agrees with the ALJ's findings and conclusions and adopts them as the final decision in this matter. Accordingly, the Petition of Appeal is dismissed for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

March 30, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5353-88
AGENCY DKT. NO. 224-7/88

SALVATORE T. PANETTIERI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,
Respondents.

Alfred F. Maurice, Esq., for petitioner

Louis M. Flora, Esq., for the respondent
(Giblin & Giblin, attorneys)

Record Closed: January 18, 1989 Decided: February 9, 1989

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

Salvatore T. Panettieri alleged he was employed by the Board of Education of the Borough of Emerson, Bergen County, as teacher of the handicapped and teacher of physical education commencing on or about September 1, 1983 until June 30, 1988, when his employment was terminated by the Board and the teaching position held was denied him and committed to other tenured and/or non-tenured staff members less senior than he. In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education on July 12, 1988, he alleged the termination was contrary to and in abridgement of his rights of tenure, which he alleged he had acquired together with concomitant seniority rights, under N.J.S.A. 18A:28-5(c) and N.J.S.A. 18A:6-10 et seq., the Tenure Employees Hearing Law. He sought judgment reinstating him to his teaching staff position for the 1988-89 school year, together with back pay and emoluments. The Board admitted

petitioner's employment generally, but denied he had service sufficient to entitle him to tenure under N.J.S.A. 18A:28-5, contending as well that any service in the 1984-85 school year was not creditable for tenure under N.J.S.A. 18A:16-1.1.

The petition was filed in the Bureau on July 21, 1988; the Board's answer was filed there July 19, 1988. Accordingly, the Commissioner transmitted the matter to the Office of Administrative Law on July 21, 1988 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on October 4, 1988 and an order was entered establishing, inter alia, a hearing date on January 12, 1989. The parties were directed to confer for the purpose of fashioning stipulations of all relevant and material propositions of fact, together with documentation as necessary, which thereafter were to be filed in the cause no later than ten days before hearing. Thereafter, unless there remained genuine material triable issues of fact, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision, in accordance with N.J.A.C. 1:1-12.5.

At issue in the matter generally, it was provided, are whether petitioner shall have established by a preponderance of the credible evidence his acquisition of tenure in a teaching staff position under N.J.S.A. 18A:28-5(c); whether any portion of petitioner's service in the 1984-85 school year was excludable from admeasurement of service for acquisition of tenure under N.J.S.A. 18A:16-1.1; and whether, if petitioner has acquired tenure, he shall be entitled to relief as demanded. Appropriate stipulations and documentation having been filed by the parties at hearing on January 12, 1989, and supplemented thereafter on January 18, 1989, the record closed then.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, with appropriate documentation, I make the following findings of fact:

1. Petitioner was first employed by the Board as a full-time aide to the handicapped on September 1, 1982.

2. He was continuously employed by the Board in various positions on a full-time basis until his termination on June 30, 1988.

3. From September 1, 1982, until April 30, 1985, petitioner was employed full-time by the Board as a teacher's aide in a secondary school special education program under a certified teacher.

4. Petitioner served in various capacities as assistant coach and coach of soccer and track and field from September 1982 to June, 1988.

5. Petitioner served as a physical education teacher for the district's summer program in 1986 and 1987.

6. Petitioner received a certificate from the State Board of Examiners as teacher of physical education in September, 1984. (Exhibit A)

7. Petitioner received a certificate from the State Board of Examiners as teacher of the handicapped on March, 1985. (Exhibit B)

8. The Board terminated petitioner at its Board meeting of April 25, 1988. (Exhibit C)

9. The Board hired non-tenured teacher Maureen Morrissey to teach the special education class formerly taught by petitioner on August 30, 1988 for the 1988-1989 school year. (Exhibit D)

10. The Board employs one S. deMarrais, a non-tenured teacher for the 1988-1989 school year in the resource room. He was appointed at the Board's June 13, 1988 meeting. The Board, likewise, employs M. Quirk and M. Sutherland, non-tenured special education teachers for the 1988-1989

school year. The Board employed J. Ramagli for her 4th year on September 1, 1988, as special education teacher. (Exhibit E)

11. Petitioner received an employment contract from the Board and an appointment as teacher of the handicapped on May 21, 1985. (Exhibit F) He served as such during May 1985 through the end of the academic year in June 1985, but continued to be paid at the rate of an education aide. (Exhibit Q; Exhibit R; Exhibit S; Exhibit T) He continued such service and was paid on the teachers salary guide through 1985-86, 1986-87, 1987-88 until terminated June 30, 1988. (Exhibit C) Petitioner replaced J. Ramagli as teacher of the handicapped; she left on approved maternity leave on May 17, 1985 until June 30, 1986. She returned on September 1, 1986. (Exhibits U, V, W, X, Y, Z)

12. Petitioner received an employment contract and was continued in employment as teacher of the handicapped for the period of September 1, 1986 to June 30, 1987. (Exhibit G; Exhibit T)

13. Petitioner received a contract from the Board and was continued in employment as a teacher of the handicapped from September 1, 1987, until June 30, 1988. (Exhibit H)

14. Petitioner was appointed assistant coach of the soccer team for the 1982-83 school year. (Exhibit I)

15. Petitioner was appointed assistant coach of the soccer team for the 1983-84 school year. (Exhibit J)

16. Petitioner was appointed head coach for the girls track team for the 1985-1986 school year. (Exhibit K)

17. Petitioner was appointed head coach for the girls track team for the 1986-1987 school year. (Exhibit L)

18. Petitioner was appointed head coach for the girls track team for the 1987-1988 school year. (Exhibit M)

19. Petitioner was appointed teachers aide for the special education-high school for the 1982-1983 school year. (Exhibit N)

20. Petitioner was appointed teachers aide for the special education class for the 1983-1984 school year. (Exhibit O)

21. Petitioner was appointed aide for the special education class for the 1984-1985 school year. (Exhibit P)

DISCUSSION

Did petitioner acquire tenure in the position of teacher of the handicapped? N.J.S.A. 18A:28-5 provides:

> The services of all teaching staff members . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the State Board of Examiners . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed . . . after employment in such district or by such board for . . .
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years. . . .

N.J.S.A. 18A:1-1 provides that the term "academic year" means the period between the time school opens in any school district after the general summer vacation until the next succeeding summer vacation.

In Spiewak v. Rutherford Board of Ed., 90 N.J. 63 (1982), the Supreme Court said:

> We hold that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1 [at 81].

The stipulated record above readily demonstrates that petitioner was a duly certificated teacher of the handicapped and that he served in that position for the three consecutive academic years, at least, of 1985-86, 1986-87 and 1987-88. The critical issue in admeasurement of his service on his claim for tenure, therefore, focuses on his service in the position of teacher of the handicapped from May 17, 1985 through June 30, 1985, service to which he was appointed to fill a vacancy left by an incumbent teacher of the handicapped who was granted a long-term maternity leave of absence beginning May 17, 1985 and designed to extend through the following academic year until June 30, 1986. Even after the incumbent returned at the beginning of the 1986-87 school year, however, petitioner's employment in a position of teacher of the handicapped continued concurrently with her renewed service until he was summarily terminated on June 30, 1988. Obviously, if all petitioner's service during 1985-88 in the position of teacher of the handicapped is creditable for tenure, he has acquired it under conditions in N.J.S.A. 18A:28-5(c).

The Board argued that petitioner's service in May and June 1985 is not creditable for tenure by force of N.J.S.A. 18A:16-1.1, which provides:

> The act of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting, but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting [emphasis added].

It is my view that petitioner's initial employment as teacher of the handicapped beginning on May 17, 1985 was not the appointment by the Board of a short-term substitute for a relatively brief time when the vacancy for maternity of another

teacher occurred during that school year. As early as March 19, 1985, the superintendent noted the regular teacher of the handicapped, Ramagli, expected to leave on May 17, 1985 on long-term disability/maternity leave through June of 1986. He recommended petitioner's appointment "for the remainder of [that] year and for the school year 1985-86." The recommendation, which apparently enjoyed administrative unanimity at the time, was because petitioner's performance as a teacher substitute and aide had been outstanding. Exhibit W. Again, the superintendent noted on May 9, 1985 that a substitute teacher aide for the special education class had been found as petitioner's replacement. Petitioner, it was said, would "be responsible to teach the class when [the regular teacher] was on medical leave." The appointment was recommended to be in force throughout the 1985-86 school year. Exhibit Y. When the Board concurred, it issued an employment contract to petitioner that was revealing of its intention to employ petitioner, not merely as a substitute, but on a longer term basis, fully-fledged. The contract employed petitioner as teacher to begin on the first day of September 1985 until the 30th day of June 1986 at a regular teacher's salary, first step four year level, but also, as provided in the contract, petitioner was immediately to "begin service on the first day of May 1985." Exhibit F. That the original evident intention was fulfilled becomes obvious when one notes that petitioner's 1985-86 employment contract was continued and duplicated as for a regular teaching staff member continuously through succeeding school years in 1986-87 and 1987-88. In short, I think the Board in May 1985 employed petitioner not only to replace a teacher on long-term leave of absence, but to instate and continue him in service in the position even after her return. I reject the Board's contention, therefore, that petitioner was merely installed in stopgap fashion as a short-term substitute for a relatively brief time during the school year 1984-85. In Sayreville Education Association v. Board of Ed., Borough of Sayreville, 193 N.J. Super. 424 (App. Div. 1984), the court said:

> We recognize that there may be special situations beyond those implicated in this case in which a Board may have a legitimate need to appoint a short-term substitute for a relatively brief time when a vacancy occurs during the school year. It may be, for example, that a Board may not be immediately prepared to fill a vacancy suddenly occurring for the balance of the school year. It would, therefore, require the flexibility of being able to appoint a short-term temporary substitute while it determined the best course to follow in permanently assigning the former teacher's duties for the balance of the year. We do, however, hold that if a relatively

substantial balance of the school year remains when the vacancy occurs and the Board is prepared, as here, to fill that vacancy until the end of the school year, it may not resort to the long-term substitute technique [under N.J.S.A. 18A:16-1.1] in doing so.

CONCLUSION

Based on the foregoing, I **CONCLUDE** that petitioner has satisfied the criteria for acquisition of tenure under N.J.S.A. 18A:28-5(c) by service as a properly certificated teacher of the handicapped from May 17, 1985 through June 30, 1985 and consecutively thereafter in the school years of 1985-86, 1986-87 and 1987-88. I **CONCLUDE** specifically that petitioner is not under the circumstances here disqualified from having credited to him for tenure the time of his service during May 17, 1985 until June 30, 1985, under N.J.S.A. 18A:16-1.1. Judgment is **ENTERED** in petitioner's favor so declaring; he is entitled to reinstatement to the position and appropriate back pay less mitigation for the period following his termination in 1988, together with emoluments. The Board's motion for summary dismissal of the petition of appeal is **DENIED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **Saul Cooperman** for consideration.

February 9, 1989
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

2-15-89
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 15 1989
DATE

Jaynee LaVecchia/K.S.
OFFICE OF ADMINISTRATIVE LAW

amr

SALVATORE T. PANETTIERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and the initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions to the initial decision pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioner filed timely reply exceptions thereto.

The Board excepts to the ALJ's finding that petitioner was employed to fill a vacancy when, it claims, the position he occupied was in substitution for a teacher who was out on disability and maternity leave from May 17, 1985 through the end of the academic year 1985-86. The Board notes she returned to her position as a teacher of the handicapped for the academic year 1986-87. Thus, the Board claims, petitioner served as a substitute teacher of the handicapped from May 17, 1985 through the end of the 1984-85 academic year and as a substitute for the same teacher, Ms. Ramagli, during the 1985-86 academic year.

While admitting that it cannot account for why Exhibit F, petitioner's contract, indicated a service date as commencing on May 1, 1985, it claims the May 1, 1985 date was never authorized by Board action or directive, and that this is an undisputed fact. The Board avows that the ALJ misconstrued petitioner's status as a substitute within the meaning of N.J.S.A. 18A:16-1.1 and cites Sayreville Education Association v. Bd. of Ed. of Borough of Sayreville, 193 N.J. Super. 424 (App. Div. 1984) as controlling the definition of a vacancy.

The Board submits "that without the specific finding that the Petitioner was improperly employed to fill a vacancy, the holding in Sayerville (sic), id., does not apply." (Exceptions, at p. 3) The Board relies on the following paragraph from Sayreville, supra, in support of the proposition that there was no vacancy when Teacher Ramagli was on leave and that, therefore, petitioner was a substitute:

> 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. We do not

> construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. This interpretation, in our view, accords with the plain meaning of the statutory provision. 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. If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is, moreover, in accord with the observation in Spiewak v. Rutherford Bd. of Ed., supra, 90 N.J. at 77, that the exception to the tenure statute which N.J.S.A. 18A:16-1.1 constitutes "is limited to employees hired to take the place of an absent teacher." Again the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent.
> (Exceptions, at pp. 3-4, quoting Sayreville, at 428)

Thus, the Board contends, "a substitute may be employed to fill in for the absence of another teacher, even if protracted, providing that said absence is not the result of a resignation or retirement; that is, the absent teacher will not be returning, which thereby creates a vacancy." (Exceptions, at p. 5) Accordingly, the Board claims no vacancy occurred as a result of Ms. Ramagli's disability and maternity leave and Sayreville, supra, is not controlling. Therefore, petitioner has not accumulated the service required under N.J.S.A. 18A:28-5(c) to obtain tenure as his service as a substitute should not be considered pursuant to N.J.S.A. 18A:16-1.1.

For these reasons, the Board requests that the Commissioner reject the initial decision and grant the Board's Motion for Dismissal.

By way of reply exceptions, petitioner cites Sayreville, supra, as follows:

> Clearly, a local board of education could not indefinitely fill a vacancy by the statutory substitute technique, no matter how financially advantageous it might be. Nor could it use that technique to fill a vacancy for a full academic

> year. Any such attempt would constitute an obvious effort to circumvent the school laws and would be condemned as such.
> (Reply Exceptions at p. 2, quoting Sayreville, at 428)

Petitioner relies on this passage from Sayreville, supra, for the proposition that from the outset of his initial contract with the Board, which ran from May 1985 through June 1986, the Board demonstrated its intention to employ petitioner as a teacher, not merely a substitute, since a substitute would not have been issued such a contract. Petitioner avers that the fact that he was initially hired for the balance of the 1984-85 school year and the entire 1985-86 school year does not in any way detract from his ability to have this time counted toward tenure.

Further, petitioner would ask the Commissioner to recognize that this matter proceeded on Cross-Motions for Summary Judgment based on his service as a special education teacher, and that petitioner's claims to tenure, based upon prior employment with respondent as a teacher of physical education from 1983 through 1985 was not considered.

Petitioner would have the initial decision affirmed.

Upon his careful and independent review of the record, the Commissioner reverses the initial decision substantially for the reasons set forth in the Board's exceptions.

Specifically, the Commissioner's review of the matter comports with the Board's, particularly in its reading of Sayreville, supra. In so interpreting the language of that decision, as noted by the Board, it is plain that so long as the position to be filled is not a vacancy, a substitute can be hired to assume the duties of the teacher whose intention it is to return. In this case, it is undisputed that the Board and petitioner alike knew full well that the position petitioner held from May 17, 1985 through the end of the next school year was as a temporary replacement for Ms. Ramagli, who left on approved maternity leave on May 17, 1985 until June 30, 1986. (See Finding of Fact No. 11, Initial Decision, ante) Hence, no vacancy existed in that position of teacher of the handicapped during the time that petitioner was assigned to assume Ms. Ramagli's duties. Consequently, because his service as a substitute in that position cannot be counted for tenure purposes, petitioner's argument that he is tenured in the Board's employ based on his service in that position fails. See N.J.S.A. 18A:28-5 and N.J.S.A. 18A:1-1; see also by way of contrast Donald D. Ujhely v. Board of Education of the City of Linden, decided by the Commissioner August 26, 1985. (Petitioner not acting in place of another pursuant to N.J.S.A. 18A:16-1.1 satisfied criteria for obtaining tenure.) Petitioner deftly and selectively chooses a portion of the Sayreville decision in arguing his position which deals with the fact that boards may not continue a person as a substitute indefinitely to fill a vacancy. In this matter it is clear that there was no vacancy as defined by the court in Sayreville wherein it stated:

> 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. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. This interpretation, in our view, accords with the plain meaning of the statutory provision. 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. If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is, moreover, in accord with the observation in Spiewak v. Rutherford Bd. of Ed., supra, 90 N.J. at 77, that the exception to the tenure statute which N.J.S.A. 18A:16-1.1 constitutes "is limited to employees hired to take the place of an absent teacher." Again, the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent. (emphasis supplied) (Sayreville at 428)

The Commissioner finds no merit in the argument that the May 1, 1985 date noted in his contract as the date that he was to commence employment as a salaried teaching staff member in the district similarly fails, since whether such employment commenced on May 1, 1985 or May 17, 1985, his service was at all times either in the capacity of an aide while he worked with Ms. Ramagli or as her substitute replacement. The Commissioner so finds.

Similarly, the Commissioner finds no merit in the argument raised by petitioner in his reply exceptions alluding to the fact that the matter before the Commissioner and the ALJ was decided upon his employment as a teacher of the handicapped, and did not take into account his service as a physical education teacher from 1983. First, the Commissioner notes that the record establishes that petitioner did not acquire physical education certification until September 1984. See Finding of Fact No. 6, Initial Decision ante; see also Exhibit A. Further, nowhere in the record is it

established that petitioner held a position as a teaching staff member in the field of physical education but rather indicates only that he was a coach. While a coaching position may require a teaching certificate, such coaching experience does not count toward the acquisition of tenure. See Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982); see also N.J.S.A. 18A:28-5 and In the Matter of Paul Furlong v. Board of Education of Kearny and its Members, 1980 S.L.D. 1420, aff'd State Board 1981 S.L.D. 1427.

Accordingly, the Commissioner rejects the initial decision finding that petitioner has "satisfied the criteria for acquisition of tenure under N.J.S.A. 18A:28-5(c) by service as a properly certificated teacher of the handicapped from May 17, 1985 through June 30, 1985 and consecutively thereafter in the school years of 1985-86, 1986-87 and 1987-88" (Initial Decision, ante) or as a physical education teacher. Rather, the Commissioner dismisses the instant Petition of Appeal for the reasons expressed above.

COMMISSIONER OF EDUCATION

March 30, 1989

SALVATORE T. PANETTIERI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EMERSON, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 30, 1989

For the Petitioner-Appellant, Alfred F. Maurice, Esq.

For the Respondent-Respondent, Giblin & Giblin
(Louis M. Flora, Esq., of Counsel)

For the reasons expressed therein, the State Board of Education affirms the decision of the Commissioner. In affirming that decision, the State Board rejects Appellant's assertion that he nonetheless is entitled to a remand on "the physical education issue." Brief and Appendix on Behalf of Petitioner, at 12-13. Even if Appellant could demonstrate that, as he now asserts,[1] his employment from September 1984 - May 1985 included teaching physical education to handicapped students so as to constitute service as a Teacher of Physical Education, Appellant's total employment creditable toward tenure would not have been for "the equivalent of more than three academic years within a period of four consecutive academic years." N.J.S.A. 18A:28-5(c).

August 2, 1989

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[1] We note that while Appellant generally asserted in his petition to the Commissioner that he had served as a physical education teacher, he did not specifically allege in his petition that he taught "classroom physical education" during the 1984-85 school year. See Brief and Appendix on Behalf of Petitioner, at 12. Nor do the stipulation of facts by the parties include any stipulation as to this factual allegation and the exhibits contain nothing to support the assertion. Further, Petitioner's Answers to Interrogatories, referred to in his brief to us and included in the appendix as Exhibit A, are not part of the record in this matter. See N.J.A.C. 6:2-1.14(b).

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - EXPEDITED
OAL DKT. NO. EDU 1928-89
AGENCY DKT. NO. 52-3/89

WILLIAM D. SOKOLOSKY,
Petitioner,
v.
HELEN CHELOC, ASSISTANT SECRETARY-DIRECTOR OF ADMINISTRATION, ELIZABETH BOARD OF EDUCATION, GUIDO ESPOSITO, PHILIP LaQUAGLIA, PHILIP G. GENTILE, JOHN H. DWYER, DONNA M. ESPOSITO, ALEXANDER SHARPE, JR., THOMAS CALLINAN, FREDRIC H. PEARSON, LUZ P. ROSARIO, JEAN CONNELLY-LAMMERDING, FRANK ALI, ALVARO CARDENAS, AND GREGORY L. JACKSON,
Respondents.

Mark Samuel Ross, Esq. for petitioner

Raymond O'Brien, Esq. for respondent **Helen Cheloc**

Guido Esposito, *pro se*

No appearance for **Philip LaQuaglia**

No appearance for **Philip G. Gentile**

John H. Dwyer, *pro se*

Donna M. Esposito, *pro se*

No appearance for **Alexander Sharpe, Jr.**

Thomas Callinan, *pro se*

Fredric H. Pearson, Esq., *pro se*

Michael J. Lapolla, Esq., for respondent **Luz P. Rosario**
(Durkin & Durkin, attorneys)

Jean Connelly-Lammerding, *pro se*

No appearance for **Frank Ali**

Alvaro Cardenas, *pro se*

No appearance for **Gregory L. Jackson**

Record Closed: March 21, 1989 Decided: March 23, 1989

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

Statement of the Case

This is an appeal brought pursuant to the general jurisdiction of the Commissioner of Education ("Commissioner") "to hear and determine all controversies and disputes arising under the school laws," *N.J.S.A.* 18A:6-9. Petitioner William D. Sokolosky ("Sokolosky"), a candidate for membership on the Elizabeth Board of Education ("Board") in the upcoming school election, challenges certain conduct of the school board secretary's office and the right of seven other

candidates to have their names appear on the ballot.[1] Basically, Sokolosky raises three issues: (1) denial of access to public records; (2) deficiencies in the nominating petitions of other candidates; and (3) conflicts of interest. While the Board takes a neutral stance on the adequacy of any particular candidate's nominating petition, it denies any impropriety by Board employees and questions the timeliness of Sokolosky's complaint under *N.J.S.A.* 18A:14-12. For the reasons set forth more fully below, Sokolosky's complaint was brought too late to permit other candidates to remedy curable defects in their nominating petitions and, therefore, his request to remove their names from the ballot must be denied. Similarly, he has failed to prove a conflict of interest which might disqualify other candidates from running for office. He has, however, shown a denial of his right of access to public records.

Procedural History

On Friday March 17, 1989, Sokolosky filed a verified complaint with the Commissioner in Trenton.[2] Due to the short time before the school election to be held on April 4th, the Commissioner promptly transmitted the matter to the Office of Administrative Law ("OAL") by fax machine. OAL stamped the file received as of 3:14 pm on March 17th and set the case down for hearing to commence on Monday March 20 at 1:30 pm at the Union County Board of Election in Elizabeth, New Jersey. The Clerk of the OAL instructed Sokolosky's attorney to arrange for service of notice

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[1] Originally Sokolosky sought to remove the names of thirteen candidates from the ballot. At the hearing, the Office of Administrative Law dismissed the action against Alexander Sharpe Jr. for lack of adequate notice. Sokolosky himself voluntarily dropped his suit against Gregory L. Jackson because that individual had withdrawn his candidacy and no longer appeared on the ballot. During the course of the hearing, Sokolosky agreed to dismiss his claims against candidates Frederic H. Pearson and Philip L. LaQuaglia when the evidence clearly established that their nominating petitions had a sufficient number of valid signatures. In addition, Sokolosky entered into settlement agreements with candidates Luz P. Rosario and Alvaro Cardenas. Under the terms of settlement, Sokolosky withdrew his opposition to their running for office, but reserved the right to reinstitute his complaint in the event that either of them won the election and continued to engage in activities alleged to create a conflict of interest. There remains for determination Sokolosky's complaint against assistant board secretary Helen Cheloc and candidates Guido Esposito, Philip G. Gentile, John H. Dwyer, Donna M. Esposito, Thomas Callinan, Jean Connelly-Lammerding and Frank Ali.

[2] Sokolosky's initial pleading will be called a "complaint" to distinguish it from the nominating "petitions" of prospective candidates for elective office.

on all interested parties. Hearings began on March 20th and continued to Tuesday March 21st. The record closed on March 21st at 5:00 pm.

Findings of Fact

(I) Denial of Access to Public Records

At the outset, it should be emphasized that Sokolosky does not allege fraud or intentional wrongdoing on the part of either Board officials or any of the candidates in this election. Rather, he contends that assistant board secretary Helen Cheloc and her staff delayed his examination of the nominating petitions on file in her office, making it impossible for him to comply with the statutory time requirements for challenging defective petitions. Once granted the opportunity to match the petitions against the voter registration list, Sokolosky found discrepancies which he says invalidate the nominations of several candidates.

Much of the background information is undisputed. Elizabeth was a Type I district with an appointed school board until November 1988, when the citizens voted to convert to a Type II district with an elective board. The school election on April 4th will be the first one under the new system. Currently the position of board secretary in the Elizabeth district is vacant. As assistant board secretary, Cheloc is in charge of the operation of the school election. She has no prior experience in supervising elections. To prepare herself for the task, Cheloc familiarized herself with the relevant provisions of Title 18A and consulted various authorities, including the Board's own attorney, the County Superintendent's Office, the County Clerk's Office and officials of the County Board of Election.

The statutory deadline for receipt of nominating petitions was the 54th day preceding the date of the election (February 9, 1989). By that date, Cheloc had received petitions from 28 different candidates. Of these 28 petitions, ten were only filed within the last two days. Cheloc reviewed all petitions "for form and sufficiency" but not for substance. In other words, she looked to see if each petition had at least 10 signatures, was verified by someone other than the candidate, and otherwise appeared valid on its face. She did not regard it as her responsibility to look beneath the facial validity to determine whether a signer was properly registered to vote in the City or whether the address given was correct. If a petition

appeared defective, she offered the candidate an opportunity to remedy the defect prior to the 49th day preceding the election (Tuesday, February 14th), provided that no new signatures were added.[3] As of the deadline for correcting deficiencies (February 14th), Cheloc had invalidated three petitions as defective and approved the petitions of the remaining 25 candidates. Ballots and voting machine slips reflecting the names of these 25 candidates have already been printed and placed in the voting machines. Sokolosky does not dispute these underlying facts, nor even the correctness of Cheloc's understanding of her limited role in reviewing nominating petitions. His point is that he should have been given earlier access to the petitions so that he could have mounted a timely challenge to their adequacy before the Commissioner.

On that issue, there is conflicting testimony. According to Sokolosky, he contacted the Board's offices twice by telephone on Friday February 10th, the day following the last date for submission of petitions. Sokolosky waited so long because he wanted to make sure all the petitions had come in and, admittedly, because he didn't want to give opposing candidates much time to correct any deficiencies. He recalled speaking to a staff person whom he knew only as "Irene," subsequently identified by Ms. Cheloc as Irene Hasalevris, one of the secretaries in her office. Sokolosky insists that he could not reach Cheloc personally and that "Irene" was unable to let him see the petitions without Cheloc's authorization. Cheloc had no personal knowledge of Sokolosky's efforts to obtain access on February 10th, and could not deny the truth of his assertion. After the filing of the petition, she spoke to Ms. Hasalevris, who told her she has no recollection of Sokolosky's inquiries on February 10th. Significantly, Cheloc confirmed that Hasalevris lacked authority to make any "managerial" decisions on her own, which, in Cheloc's view, would include allowing anyone to examine the original petitions.

Board offices were closed over the weekend and also on Monday, February 13th, for Lincoln's Birthday. Next, on Tuesday, February 14th, Sokolosky sought permission to review the petitions. Again, the testimony is somewhat in conflict.

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[3]One common type of error susceptible of easy correction was where a candidate improperly filled out the verification portion of his own petition, a practice expressly prohibited in school elections conducted under Title 18A, but permitted in general elections conducted under Title 19.

Sokolosky remembers that he talked to Cheloc over the telephone that morning and was told that she was too busy with preparations for the drawing of ballot positions. Cheloc denies any contact that morning, and produced documentation substantiating her version that she was out of the office attending to unrelated business.

Both witnesses agree that the drawing for ballot positions took place later that afternoon in the board offices; that Sokolosky and many other persons attended the drawing; that Sokolosky approached Cheloc shortly before closing time and asked to see the petitions; and that Cheloc demanded that he submit a written "letter of intent" before being allowed to see the petitions. At the hearing, Cheloc was unable to provide any statutory or regulatory authority for requiring such a "letter of intent" as a precondition for examination of public records in her possession and control. Sokolosky spent the next two days (Wednesday, February 15th and Thursday, February l6th) examining nominating petitions at the Board offices. On Friday, February 17th, he attempted to deliver written challenges to the Board. Upon advice of counsel, however, Cheloc refused to accept any challenge "received beyond the 49th day" prior to the school board election.

I FIND that Cheloc or other Board employees under her direction improperly deprived candidate Sokolosky of the right to examine the nominating petitions of other candidates on February 10th. Except for the hearsay statement of another Board employee who could have been called by the Board as a witness, there is nothing to counter Sokolosky's first-hand account of his unsuccessful efforts to review the petitions on February 10th. Cheloc's damaging admission that lower-level staff could not release the documents without higher-level authorization strongly supports Sokolosky's testimony that "Irene" was unwilling to allow him to see the petitions on that date. More importantly, it shows that the Board has erected obstacles to what should be a fairly routine procedure. Candidates or others who wish to examine these public records should be able to do so quickly, without unnecessary red tape or delay. Simple access procedures are especially crucial in election disputes, where time is always of the essence.

With respect to the events of February 14th, more likely than not Sokolosky renewed his request as soon as the Board office reopened in the morning, since he is undeniably zealous about challenging the petitions of other candidates. What is

absolutely certain is that by the end of the day on February 14th, when Sokolosky finally did confront Ms. Cheloc face-to-face, she put another obstacle in his path by demanding that he supply a written "letter of intent." Despite her awareness on February 14th that the time for challenging petitions was about to expire, Cheloc waited until February 17th before informing Sokolosky that he was out of time.

(2) Deficiencies in the Petitions

Generally, Sokolosky's attack on the validity of the nominating petitions follows the same pattern in each instance. Sokolosky merely compared the names and addresses on the petitions to the names and addresses on the voter registration lists, without purporting to conduct any independent investigation into voting qualifications. Essentially, then, the sole basis for Sokolosky's objections is that a person signing or verifying a petition was not a properly registered as voter in the City of Elizabeth ("City").

Sometimes the handwriting on a petition was difficult to decipher and Sokolosky understandably misread the correct spelling of a particular name. Administrator Arthur Wendland and his efficient staff at the Union County Board of Election, in whose offices the hearing was held, conducted computerized checks on possible variants of questionable names to see if a person by the same or similar name was registered at the given address or at any other address within the City. Alternatively, Wendland's computer system was able to retrieve the names of all persons registered at a particular address, so that difficult-to-read names could be cross-referenced against the address given on the petition. Through process of elimination, Wendland was able to confirm the actual registration of several suspect signatories and, in some cases, to satisfy Sokolosky that a challenged candidate had at least ten valid signatures on his petition.

Candidate Philip G. Gentile has at least ten valid signatures on his petition, but Sokolosky objected to the signature of one "Jerry Goldman," who verified the petition and also signed on line 7 as living at 996 Kipling Road. A computer check revealed that a "Gerson Goldman" and a "Grace Goldman" are registered at that address. Comparison of the handwriting on the petition with that on the voting registration record for "Gerson Goldman" shows striking similarities in the formation of certain letters, most notably the "G" and "m." Although a person

named "Jerry Goldman" was a candidate for City Council in the November 1988 election, Sokolosky is unwilling to concede that "Jerry" is probably a nickname for "Gerson."

The nature of Sokolosky's remaining objections is best illustrated by the petition of candidate Thomas Callinan. Since Callinan has just ten signatures on his petition, his candidacy is threatened if only one signature is found to be invalid. Sokolosky challenged two of the signatures on Callinan's petition. Election official Wendland was unable to verify the registration of either of the two, a "Nora Murphy" (whom Sokolosky had incorrectly transcribed as "Nora Muzsy") of 956½ DeHart Place or a "Dennis Shelly" of 420 Washington Avenue. Callinan took the stand to explain that he was personally acquainted with these two signatories, both of whom had lived in the City for more than 30 days. Insofar as he knows, neither of them had been adjudicated insane or an idiot, and neither had been convicted on any criminal offense. If Callinan's information is accurate, it would have been relatively easy for them to register to vote at any time prior to the 29th day preceding the school election (March 6, 1989). Wendland testified that a qualified adult person can register, re-register or file a change of address by mailing a convenient form to the County Board of Elections or by appearing in person. A similar state of affairs exists with respect to the petition of candidate Guido Esposito (four of twelve signatories could not be verified as registered to vote anywhere in the City) and the petition of candidate Donna M. Esposito (five of twelve signatories could not be verified as registered anywhere in the City).

An interesting twist occurred with the petition of candidate John H. Dwyer, in which the verification of twelve signatures was signed by one "Jaime Lopes" of 414 Elizabeth Avenue. Search of the records could not locate any registered voter by that exact name, but did turn up a "Jaime Lopez" of 909 Magnolia, who had been disenfranchised due to a conviction for an indictable offense.

I FIND that the Gentile petition is immune from successful challenge. "Jerry" is a nickname for "Gerson" Goldman, a properly registered voter who resides at the address given in the petition. But the Callinan and two Esposito petitions do not have at least ten signatures by properly registered voters and the Dwyer petition is

not verified by a properly registered voter. Had these specific objections been voiced earlier, it is conceivable that some or all of the defects could have been cured without adding any new names to the petitions. Moreover, the faulty verification on the Dwyer petition might have been remedied by substituting the signature of one of the eleven other signatories, whose validity has never been questioned.

(3) Conflict of Interest

All of the relevant facts concerning this issue are uncontested. I **FIND** that candidate Jean Connelly-Lammerding is a former Board employee with some 30 years experience, first as a teacher and then as a school administrator. Connelly-Lammerding retired from employment in January 1988 and no longer holds any position with the Board. She does receive a pension, administered by the Teachers' Pension & Annuity Fund and based in part on contributions she made while still working. Her pension amount is fixed by a formula which takes into consideration her years of service and last three years of salary. She also receives health insurance coverage which continues beyond the termination of her employment. Candidate Frank Ali, a former teacher in the district who retired after 25 years of service, is in a similar position. Ali also is not currently employed by the Board, but does receive a pension and health insurance benefits.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that all 25 candidates are eligible to run for a seat on the Elizabeth school board and that the previously printed ballot should not be altered in any respect.

Candidates for an elective school board must be "nominated directly by petition, signed by at least 10 persons, none of whom shall be the candidate himself." *N.J.S.A.* 18A:14-9. Contents of the petition must include a statement that the ten or more signers "are all qualified voters of the school district." Each petition "shall be verified by the oath of one or more of the signers thereof" *N.J.S.A.* 18A:14-11 Most significantly for our purposes, *N.J.S.A.* 18A:14-12 provides,

> If, on or before the 49th day preceding the date of the election the secretary of the board finds a nominating petition to be defective excepting as to the number of signatures, the secretary of the board shall forthwith notify the candidate of the defect and of the candidate's right to remedy the defect not later than the 49th day preceding the day amend the same in form or substance, but not to add signatures, so as to remedy the defect at any time prior to said date. *A nominating petition not so found to be defective shall be, as of the 48th day preceding the election, conclusively valid for the purpose of this chapter.* [Emphasis Added.]

By its literal terms, the statute appears to preclude any challenge to the adequacy of the petition subsequent to the 49th day preceding the election, since the petition then becomes "conclusively valid." *In re Leenhouts*, 1988 S.L.D. ____ (Comm'r of Ed., April 5, 1988) Notwithstanding such relatively clear and unambiguous statutory language, petitioner makes a convincing argument that the statute should not be strictly applied in the present context. Otherwise, a board secretary might defeat a candidate's rights "by delay and procrastination." Thus, petitioner urges that a literal reading of the statute would have the counterproductive effect of voiding the statutory scheme. But see, *Schulman v. O'Reilly-Lando,* 226 *N.J. Super.* 628, 629 (App. Div. 1988) ("If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the Legislature's intent.").

Assuming petitioner's analysis to be correct, he is not necessarily entitled to prevail in these circumstances. Even if petitioner should be protected against any worse treatment attributable to the board secretary's misconduct, he does not deserve any better treatment than he might normally have received. Under normal conditions, a candidate could expect no more time than the six-day interval between the last date for filing petitions (the 54th day) and the date the petitions become conclusively valid (the 48th day).[4] Here Sokolosky gained access to the nominating petitions on February 15th and consequently should have filed any objections within six days thereafter or no later than February 21st. Instead, he waited until March 17th, scarcely two weeks before the actual election itself.

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[4] Since he did not request access before the last date of filing, Sokolosky cannot now credibly claim that he should be given more than six days.

Petitioner maintains that any signatory to a petition must have been registered at the time of signing and that registration after the fact cannot retroactively cure the defect. *In re Ross Petition*, 116 *N.J. Super.* 178, 184 (App. Div. 1971) lends credence to the slightly different view that signatories to a nominating petition must be registered to vote "on or before the final day for filing a petition" Hence, *Ross* implies that signatories who were not registered by February 9th could not be counted as valid, even if they they were qualified to register on that date and later did so. Express mention in *N.J.S.A.* 18A: 14-12, however, that a candidate may amend a petition "in form or substance, but not to add signatures" is suggestive of a less hypertechnical legislative approach in school election law. If an eligible voter has neglected to register but wants to support a particular candidate's nomination, there is no demonstrable harm so long as registration occurs within the time allowed for remedying of defects in the petition. Allowing a signatory to cure the defect by registering "not later than the 49th day preceding the election" is consistent with the well-established principle that our election laws must be construed liberally in favor of the enfranchisement of voters. *Ross*, at 184. *Wene v. Meyner*, 13 *N.J.* 185, 187 (1953).

Adherence to a firm cutoff date does not rest exclusively on the theory that registration defects can be cured. Many policy reasons exist for enforcing finality in the bringing of challenges to nominating petitions, including the need for local districts to print ballots and make other election preparations, the willingness of candidates to invest time and money in their campaigns and the preference for allowing the electorate to make choices among a field of competing candidates.

Sokolosky fails to cite any reported case standing for the proposition that a former teacher or other Board employee is prohibited from running for election to the Board. A threshold issue is whether the question is even ripe for consideration. *N.J.S.A.* 18A:12-2 prohibits incumbent board members from having any interest "directly or indirectly in any contract with or claim against the board," but is silent as to whether anyone with such interest can run for office in the first place. Those cases in which conflict questions have arisen involve sitting board members, not candidates for public office who might disentangle themselves prior to assuming the duties of any new office.. In *Visotcky v. City Council of Garfield*, 113 *N.J. Super.* 264, 266 (App. Div. 197l), the Appellate Division held that simultaneous service as a school teacher and a member of the board of education in the same district is "patently

incompatible." On the other hand, the Appellate Division found nothing wrong with a teacher in one school district serving on the school board in a different district. *Jones v. Kolbeck*, 119 *N.J. Super.* 299 (App. Div. 1972). Our own case is much closer to *Jones* than to *Visotcky*. Connelly-Lammerding and Ali have completely severed their employment relationship with the Board. Fringe benefits to which either may be entitled are determined largely by factors existing at the time of their retirement or, in the case of pension benefits, by state standards beyond local control. In the speculative event that the Board may someday be called on to change benefits to retired employees, any appearance of conflict could be avoided if Board members refrain from any participation or vote on any matter in which they are interested. *Salerno v. Old Bridge Bd. of Ed.*, 6 *N.J.A.R.* 405 (Comm'r of Ed., April 23, 1984). Nor are Connelly-Lammerding and Ali disqualified from aspiring to public office simply because as Board members they may have to make decisions which could affect old friends or colleagues in the teaching profession. The law does not "contemplate a severance of all ties and associations with persons and organizations that may espouse a particular philosophy or position." *Jones*, at 301.

Attention must finally be given to what relief, if any, is necessary to prevent recurrence of problems relating to access to public records. In closing argument, petitioner left that matter largely to the discretion of the Commissioner, although in his pleadings he had requested the extreme remedy that the Commissioner assume direct responsibility for the conduct of the upcoming school election. Several extenuating circumstances make it unlikely that this problem will be repeated in the future. First, this is the first election after conversion to a Type II district and the Board will become more accustomed to election procedures as time goes on. Second, Ms. Cheloc is a capable and intelligent school administrator who will undoubtedly learn from her past mistakes. Third, the present vacancy in the office of Board secretary will one day be filled by someone with statutory responsibility to conduct school elections. Fourth, there are no proofs of fraud or intentional wrongdoing which might justify intervention by the Commissioner to preserve the integrity of the election. Fifth, the last minute confusion and litigation generated by this controversy will act as an automatic incentive for the Board to conduct a thorough review of its present policies regarding access to public records. Sixth, the publicity surrounding these proceedings will make the citizens of the City more aware of their right to inspect public records. Under the totality of these circumstances, no further relief from the Commissioner is needed or desirable.

Order

It is **ORDERED** that the relief requested by petitioner William D. Sokolosky is hereby denied.

And it is further **ORDERED** that any exceptions to this initial decision be filed with the Commissioner of Education no later than Monday, March 27, 1989.

This recommended decision may be adopted, modified or rejected by **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION,** who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN** does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN,** for consideration.

March 23, 1989
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt of Fax copy acknowledged by K. H Kim, Controversies & Disputes
1pm March 23, 1989
DATE
DEPARTMENT OF EDUCATION

Mailed to Parties:
March 23, 1989
DATE
FOR OFFICE OF ADMINISTRATIVE LAW
al

WILLIAM D. SOKOLOSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
HELEN CHELOC, ASSISTANT SECRETARY-DIRECTOR OF ADMINISTRATION, BOARD OF EDUCATION OF THE CITY OF ELIZABETH ET AL., UNION COUNTY,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered as an expedited matter by the Office of Administrative Law.

It is observed that Helen Cheloc, Assistant Board Secretary, has filed certain exceptions to the initial decision notwithstanding the fact that she concurs with the final conclusion of the ALJ which denies petitioner's request for relief herein.

In her exceptions Ms. Cheloc claims that in deciding this matter on an expedited basis, the ALJ committed reversible error because he failed to consider her testimony in which she contends that petitioner's reasons for filing this complaint may be attributed to the fact that she did not approve the employment of his wife as her private secretary.

Ms. Cheloc further excepts to that finding of the ALJ which holds that petitioner contacted her private secretary

(Irene Hasalevris) on February 10, 1989 requesting that he be given an opportunity to review the nominating petitions of the Board candidates. Ms. Cheloc maintains that the record of this matter establishes that at no time either on February 10 or February 14, 1989 had petitioner telephoned Ms. Hasalevris or herself requesting to review the nominating petitions. Instead, she asserts that the only time she was approached by petitioner requesting to review the nominating petitions was on the afternoon of February 14, 1989 just prior to closing time after the drawing of the ballots had taken place. According to Ms. Cheloc, after petitioner had filed the "letter of intent" he was then permitted on February 15, 1989 to review the nominating petitions. However, such review and challenge by petitioner was not made in the time prescribed by N.J.S.A. 18A:14-12 and therefore could not be considered. Moreover, Ms. Cheloc maintains that petitioner's challenge to the nominating petitions was not received until February 17, 1989, three days after the statutorily prescribed deadline set forth in N.J.S.A. 18A:14-12. Ms. Cheloc further rejects that finding of the ALJ which states that petitioner, having gained access to the nominating petitions on February 15, 1989, should have been allowed until February 21 (six days) to challenge these nominating petitions. Ms. Cheloc maintains that this conclusion of the ALJ is totally erroneous and violative of the provisions of N.J.S.A. 18A:14-12.

Finally, Ms. Cheloc maintains that the ALJ in conducting this hearing in an expedited fashion deprived her of her rights to due process by virtue of the fact that she was denied an opportunity to call and present witnesses who would have corroborated her testimony in refuting petitioner's allegations.

The Commissioner has carefully considered respondents' exceptions and in light of the evidence presented, he cannot agree that the ALJ improperly concluded that petitioner was deprived of the right to examine the nominating petitions on February 10 and February 14, 1989. Further, the Commissioner regards the motives ascribed by Ms. Cheloc to petitioner in this matter to be mere supposition and not verified by any factual evidence. As to Ms. Cheloc's defenses in regard to having merely acted in accordance with Board policy in requiring a "letter of intent" before granting permission to review the petitions and in claiming that petitioner could have obtained earlier access had he requested the permission of another administrator, the Commissioner finds such contention to be entirely self-serving. In the Commissioner's view, Ms. Cheloc and her subordinate were not open and accommodating to a legitimate request as their relative positions required. The Commissioner, however, concurs with Ms. Cheloc that the ALJ erred in concluding that petitioner was therefore entitled to six additional days beyond February 14, 1989 to challenge said nominating petitions.

However, the Commissioner does not concur with the ALJ that having found that petitioner was deprived of the right to examine the nominating petitions in a manner consistent with N.J.S.A. 18A:14-12, those nominating petitions of Candidates Thomas Callinan, John Dwyer, Guido Esposito and Donna M. Esposito, which the ALJ found to be defective, should be deemed valid. It is clear that the nominating petitions of these candidates have been successfully challenged by petitioner and are found to be defective for the reasons stated by the ALJ on pages 8 and 9 of the initial decision. Contrary to the ALJ's finding, however, none of the defects on these

four nominating petitions could have been cured without adding names which would thereby constitute a violation of the provisions of N.J.S.A. 18A:14-12.

Accordingly, the Commissioner finds and determines that the portion of the ALJ's decision which declares the defective nominating petitions of Thomas Callinan, John Dwyer, Guido Esposito and Donna M. Esposito valid is hereby set aside. This determination of the Commissioner is grounded upon the evidence presented in the record which establishes that petitioner was improperly and illegally deprived by the Assistant Board Secretary of his right to examine the nominating petitions of the candidates within the time prescribed by law. Accordingly, the Commissioner affirms in part and rejects in part the findings and conclusions in the initial decision for the reasons stated above.

The Commissioner, having found and determined that the formal nominating petitions of Thomas Callinan, John Dwyer, Guido Esposito and Donna M. Esposito are invalid, hereby directs the following measures to be taken:

1. The Elizabeth Board of Education shall immediately notify the Superintendent of Elections to lock the levers on lines or columns on the voting machines containing the names of these persons.
2. The Board shall place a written notice in each of the school polling places outside the area of the voting machines which informs the voters that the above-named persons have been disqualified as formal candidates for the Board. The voters shall also be notified that

votes may not be cast for the formal candidacy of the above-named persons.

3. The Union County Board of Elections is hereby directed not to count any of the votes cast by absentee ballots for Thomas Callinan, John Dwyer, Guido Esposito and Donna M. Esposito.

Finally, the Commissioner recognizes that the current school election is the Elizabeth Board's first such election as a Type II district. He therefore directs that the Board take such steps as are necessary to assure that responsible persons are fully instructed as to their roles and responsibilities in all future elections.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 31, 1989

DATE OF MAILING - MARCH 31, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7217-88
AGENCY DKT. NO. 291-9/88

MARIE DE STEFANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, Union County,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Irwin Weinberg, Esq., for respondent
(Weinberg & Kaplow, attorneys)

Record Closed: February 15, 1989 Decided: February 27, 1989

BEFORE: **WARD R. YOUNG, ALJ:**

Petitioner, a tenured assistant principal employed by the respondent Cranford Board of Education, alleged her tenure and seniority rights were violated when the Board terminated her employment as assistant principal and reemployed her as a teacher of social studies.

Respondent Board denies the allegation and avers that petitioner has less seniority as assistant principal (7.9 years) than her successor, Robert L. Lelli (10.5 years).

The matter was transmitted to the Office of Administrative Law as a contested case on September 30, 1988 and was preheard on November 30, 1988. It proceeded to

plenary hearing on January 25, 1989, and the record closed on February 15, 1989 with the filing of post-hearing submissions.

The following stipulated facts are adopted herein as **FINDINGS OF FACT:**

1. Robert Lelli was employed by the respondent as Athletic Director/Assistant High School Principal on October 16, 1979. See, J-1.

2. Petitioner Marie DeStefano was employed by the respondent on September 9, 1980 as Assistant High School Principal. See, J-2.

3. On October 19, 1981, petitioner's title was changed from Assistant High School Principal to High School Vice Principal. The purpose of said change was so that the title would conform to pension requirements. There was no change in the job duties. Petitioner continued to serve as High School Vice Principal until August 31, 1988. See, J-2.

4. On July 1, 1988, petitioner notified the Superintendent that she would accept the position of a social studies teacher. See, J-4.

5. Robert Lelli began his service with the respondent in the title of Athletic Director/Assistant High School Principal on October 16, 1979 and continued in the position until June 30, 1982. See, J-1.

6. On September 1, 1982, Lelli began service as Director of Athletics and continued in that position until June 30, 1988. See, J-1.

7. On September 1, 1988, Lelli was assigned to the position of High School Vice Principal/Director of Athletics. Said position was filed as an unrecognized title with the Union County Superintendent of Schools on August 17, 1988. See, J-5.

8. Petitioner was issued the certificate of Principal/Supervisor in September 1980. See, J-6.

9. Lelli was issued the certificate of Supervisor in July 1971. See, J-7.

10. The parties stipulate to the job description for the position of Director of Athletics (grades 7-12)/Assistant High School Principal. See, J-8.

11. The parties stipulate to the job description for the position of High School Vice Principal/Director of Athletics (grades 7-12). See, J-9.

12. The parties stipulate to the job description for the position of Assistant Principal-High School. See, J-10.

13. The parties stipulate to the job description for the position of Vice Principal-High School. See, J-11.

14. The parties stipulate to the August 21, 1979 minutes reflecting the appointment of Robert Lelli. See, J-12.

15. The parties stipulate to the minutes reflecting the appointment of petitioner to the position of Assistant High School Principal from September 9, 1980 to June 30, 1981. See, J-13.

16. Union County Superintendent Gagliardi approved the use of the unrecognized title of Vice Principal/Director of Athletics in a letter dated September 7, 1988. See, J-14.

17. The Board passed a resolution in April 1977 delegating authority to the Superintendent of Schools to develop and adopt all job descriptions. Succeeding Boards affirmed the policy annually.

TESTIMONIAL EVIDENCE

The high school principal since 1974, Robert C. Seyforth, testified that he supervised and annually evaluated the services of Lelli as Athletic Director/Assistant Principal from October 1979 through June 1982. Lelli was responsible for the supervision of the total athletic program. Lelli was also assigned the duties of evaluating 30 teachers and the discipline of 20 per cent of the student body. Two other assistant principals were assigned the evaluation duties of 70 teachers each and the discipline of the remaining 80 per cent of the student body.

Seyforth further testified that Lelli devoted 80 per cent of his time to the athletic program and 20 per cent to his duties as assistant principal. He also stated that Lelli was reassigned as a full time athletic director as of September 1982, and was relieved of all duties as assistant principal. See, P-1.

Seyforth also stated there were two assistant principal positions during the period from 1982-88, one of which was held by petitioner.

Lelli is currently devoting 80 per cent of his time to the duties of the assistant principal and the remaining 20 per cent as athletic director, the former consisting of duties previously performed by petitioner. Lelli continues to evaluate coaches as assistant athletic director Charles Ferrara is not certified as a supervisor. All other duties of the athletic director are performed by Ferrara.

Robert L. Lelli also testified and did not dispute the testimony of Seyforth. He stated he was not employed by the Board in any capacity during July and August of 1982.

Lelli stated that he devoted 75 to 80 per cent of his time as athletic director during the period from 1979-82, and currently is basically the overviewer of the athletic program. He also testified that Ferrara has assumed the bulk of the responsibilities formerly performed by Lelli when he was the full time athletic director.

ARGUMENTS OF COUNSEL

Respondent's principal argument is based on its seniority calculations of 10.85 years for Lelli and 7.47 years for DeStefano in the position of Vice Principal. The calculation for Lelli results from respondent's contention "that on October 20, 1982 when Mr. Lelli was serving as Director of Athletics, he obtained tenure as an Assistant or Vice Principal as provided in N.J.S.A. 18A:28-6. His seniority in the position of Assistant or Vice Principal is to be calculated from October 19, 1979." He argues that "In the event of transfer to a different position he begins to accrue seniority in the new position and continues to accrue seniority in the old one." See, Rb 11.

Respondent further contends that all tenurable services in the employ of a board of education count toward seniority and relies on Euell v. Princeton Regional Bd. of Ed., 78 S.L.D., 666 for the tacking on provision in calculating seniority.

Respondent relies further on N.J.S.A. 18A:28-6(c) in support of its contention that the statute "is clear and unambiguous and when Mr. Lelli was transferred back to the position of High School Vice Principal/Director of Athletics he had tenure and more seniority in the position of Vice Principal than did the petitioner." See, Rb 13.

Respondent cites Capodilupo v. Board of Educ. of West Orange Tp., 218 N.J. Super. 510 (App. Div. 1984), Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983), and Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987) at Rb 14, 15 for the proposition that "Seniority provides a mechanism for ranking all tenure teaching staff members so that reductions among the tenured force can be effected in an equitable fashion and in accord with sound educational policies."

Respondent finally argues at Rb 15 that "There is no question that the Board intended, as part of an administrative reorganization, to eliminate a Vice Principal and assign those duties to Mr. Lelli in addition to Athletic Director functions based upon seniority. The fact that more of Mr. Lelli's functions are spent doing Vice Principal duties is an irrelevancy."

Petitioner contends that Lelli did not acquire tenure as an assistnat principal during his services as Athletic Director/Assistant High School Principal from October 16, 1979 to June 30, 1982 as he did not serve the requisite time pursuant to N.J.S.A. 18A:28-5, and cites Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) and other case law at Pb 6. Petitioner presents other arguments in her Brief, which is incorporated herein by reference, and which I find no compelling reason to address.

DISCUSSION

As stated in Howley v. Ewing Bd. of Ed., 6 N.J.A.R. 509 at 512, "Misuse and abuse of the education vocabulary associated with the tenure law is so common that it has become the rule rather than the exception."

The certificates issued to Lelli and DeStefano incorporate the endorsements of Supervisor for the former and Principal/Supervisor for the latter.

N.J.A.C. 6:11-10.4 incorporates the following authorizations:

> (b) Principal: This endorsement is required for the positions of principal, vice-principal, and certain other administrative positions. Holders of this endorsement may supervise instruction.
>
> (c) Supervisors: This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing director and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction.

As also stated in Howley at 516:

> Tenure is a legislative status, not a contractual one, and in order to be protected by the status, a teaching staff member must have met the precise conditions articulated in the statute. In order to acquire tenure in any position in the public schools in any district, the teaching staff member must be a citizen of the United States (N.J.S.A. 18A:28-3), must hold an appropriate certificate for the position, issued by the State Board of Examiners, in full force and effect (N.J.S.A. 18A:28-4) and, pursuant to N.J.S.A. 18A:28-5, must hold employment in the district for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year, or
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years.

"Seniority is a concept which only applies to certain rights of tenured personnel and only has meaning when a reduction in the employment force is necessary." Howley at 521.

It is undisputed that tenure protects an employee in a particular position, and once tenure is acquired, that teaching staff member may not be "dismissed or reduced in compensation" except for cause in accordance with N.J.S.A. 18A:28-5 (for inefficiency, incapacity, unbecoming conduct, or other just cause), N.J.S.A. 18A:6-10 (after certification of charges and full due process hearing) or N.J.S.A. 18A:28-9 (as a result of a reduction in force). See, Howley at 519.

In the instant matter, the Board terminated petitioner as a result of its perceived administrative reorganization and reduction in force. It cannot be disputed that the acceptance of the social studies teaching position by petitioner was not a consensual transfer, but rather the choice she made between employment or unemployment resulting from her termination as assistant principal.

There was no reduction in force of the high school administrative staff. The termination of petitioner resulted from the reduction of the full time position of Athletic Director, and the gerrymandering of responsibilities related to the administrative and athletic staff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Robert Lelli did not acquire tenure in the position of assistant or vice principal.

2. Robert Lelli has not acquired any seniority in the position of assistant or vice principal.

3. Marie DeStefano is tenured in the position of assistant principal and acquired eight years of seniority in that category.

I **CONCLUDE**, therefore, that Marie DeStefano was illegally terminated from her position as assistant high school principal.

The Board is hereby **ORDERED** to reinstate DeStefano to her tenured position and compensate her for the salary differential of that position and what she received as a social studies teacher.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in 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.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

27 February 1989
DATE

WARD R. YOUNG, ALJ

1 March 1989
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAR 2 1989
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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MARIE DE STEFANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply were filed within the time prescribed by N.J.A.C. 1:1-18.4.

Initially, the Board excepts to the ALJ's determination in this matter because he failed to note that Lelli had both a supervisor and a principal certificate as evidenced by item nine of the joint stipulation of facts submitted by the parties but erroneously recited by the ALJ. This exception is not disputed by petitioner and is confirmed by joint stipulation. Thus, it is determined that the ALJ did in fact err in his disposition of this matter.

What remains to be determined then is whether Lelli acquired tenure in the position of vice principal pursuant to N.J.S.A. 18A:28-6 when reassigned by the Board from the position of vice principal/athletic director to simply that of athletic director.

N.J.S.A. 18A:28-6 reads:

> Tenure upon transfer or promotion
>
> Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for each purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

The Board's exceptions allege that there is no dispute Lelli consented to his transfer to the position of athletic director and at the time of transfer he was eligible to obtain tenure in the position of vice principal within the meaning of N.J.S.A. 18A:28-6. Consequently, the Board urges that the statute works to utilize his service as vice principal/athletic director in calculating his seniority as vice principal vis-a-vis the lesser seniority of petitioner.

Further, the Board also urges that the ALJ incorrectly ignored the undisputed fact that the Board legally implemented a reduction in force at the time of petitioner's termination.

Petitioner's reply exceptions do not rebut that a reorganization occurred. She does argue, however, that it is undisputed Lelli has not met the statutory time requirements to have acquired tenure as vice principal/athletic director and that even if he did serve the requisite period of time, he would not have acquired tenure as a vice principal in view of the fact that his primary duties (80%) were those of athletic director. In support of this, she cites case law which has held that the duties performed, not the title, determine the position in which a teaching staff member's tenure is to be applied.

Moreover, petitioner argues that even if the period in which Lelli served as vice principal/athletic director can be applied towards his claim of tenure as a vice principal, the subsequent period in which he served as athletic director may not be applied to that same claim because his assignment to the athletic director position may not be labelled either as a transfer or promotion within the meaning of N.J.S.A. 18A:28-6. In support of this, petitioner points to the fact that Lelli went from a position requiring a principal endorsement to one requiring only a supervisor endorsement which was therefore a lesser position.

Upon review of the record including the exceptions, reply exceptions and post-hearing briefs, the Commissioner determines that Mr. Lelli has not acquired tenure as vice principal under the provisions of N.J.S.A. 18A:28-6 because the position of athletic director is one of lesser rank in the hierarchy of school organization than a vice-principal position. Therefore, any assignment from a vice principal position to an athletic director position is deemed to be a demotion and not a transfer within the intendment of N.J.S.A. 18A:28-6, just as the reassignments of petitioners in Colella v. Elmwood Park Bd. of Ed., 1983 S.L.D. 149, aff'd State Board 172, aff'd N.J. Superior Court, Appellate Division 1984 S.L.D. 1921; Miscia v. East Hanover Bd. of Ed., 1983 S.L.D. 269, rev'd State Board October 26, 1983, reconsidered and aff'd State Board 1984 S.L.D. 1971; Forte v. Board of Education of Bellville, decided by the Commissioner May 25, 1988, aff'd State Board November 1, 1988 from positions of principal to vice principal were not deemed to constitute transfers. That Lelli purportedly consented to the demotion does not alter this determination. In so doing, Lelli acted at his own peril to any subsequent tenure acquisition as vice principal. N.J.S.A. 18A:28-6 cannot be construed to mean that when a nontenured teaching staff member is demoted, the time served in the position of lesser rank shall count toward tenure acquisition in the separately tenurable position of higher rank previously held, irrespective of any alleged consent to the demotion.

Accordingly, it is determined that petitioner was improperly terminated from her tenured position of vice principal. The Board is therefore ordered to reinstate her forthwith to such position together with all salary and emoluments owing to her, less mitigation.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 13, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7498-88
AGENCY DKT. NO. 280-8/88

ROBERT H. KULAK,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF
LAWRENCE, MERCER COUNTY,
Respondent.

Robert H. Kulak, petitioner, pro se

Dennis J. Helms, Esq., for respondent (Mathews, Woodbridge, Goebel, Pugh & Collins, attorneys)

Record Closed: January 17, 1989 Decided: March 1, 1989

BEFORE **RICHARD J. MURPHY**, ALJ:

STATEMENT OF THE CASE

Robert H. Kulak (petitioner) challenges a regulation and policy adopted by the respondent Board of Education on the grounds that it requires proof of a lease, deed or sales contract and unlawfully disregards other proof of residence. Mr. Kulak's son has been admitted to school by the Board, but the petitioner continues to seek the Commissioner's ruling on the legitimacy of the Board's policy and regulation. The respondent moves for summary decision, which is granted for the reasons set forth below.

PROCEDURAL HISTORY

Robert H. Kulak filed a petition in this matter on August 24, 1988, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on October 12, 1988. A prehearing conference was held on November 10, 1988, and it was determined that the respondent would seek summary decision. The record was closed on January 17, 1989, after receipt of the parties' briefs and memoranda and an opportunity for reply.

FINDINGS OF FACT

The facts are not in dispute. On or before August 8, 1988, the superintendent of schools for Lawrence Township, Dr. Gleim, approved the admission of Robert Kulak's son to the Slackwood Elementary School after reviewing the following documentation submitted by Mr. Kulak as proof of residency:

(1) 1988 Preliminary tax bill from the Township of Lawrence;

(2) Driver's License;

(3) Voter's Registration for Mercer County.
(C-1 - C-4)

As of August 8, 1988, these documents were accepted as sufficient proof of petitioner's residency in Lawrence Township (C-1).

Prior to that, the Superintendent of Schools declined to enroll Mr. Kulak's son because the petitioner had not submitted the proof of residency required by the Board of Education's regulation no. 5111, which provides that:

PROOF OF RESIDENCY

The following documents shall be the only ones accepted as proof of residency:

Lease (dated for current school year)

Deed
Sales contract stating approximate date of settlement

In exceptional circumstances the Superintendent may accept alternate proof of residency.

Documents such as the following are not valid for residency requirements and should not be accepted:

Tax Bills
Mortgage Book
Homestead Rebate Claim
Voter's Registration
Driver's License

Date: August 22, 1983
Amended: October 8, 1986

[C-4]

Petitioner also argues that evidence of residence in the form of a homeowner's rebate claim, tax returns and an affidavit of residence should be sufficient, but there is no evidence that this material was submitted to the Board or Superintendent.

The regulation for determining residence is based on N.J.A.C. 6:20-5.3; N.J.A.C. 6:20-5.4, as well as N.J.S.A. 18A:36-19a (C-6). The parties agree that these regulations do not provide any particular means of establishing residence. For reasons that are not indicated in the briefs (and not relevant to the petition in this matter), Mr. Kulak declined to submit a lease, deed or sales contract and argued that the Board's regulation requiring such information was arbitrary, capricious, that it equated proof of ownership with residence and that it was, in some unspecified way, "discriminatory." Apparently in consideration of the impending approach of the new school year, the Superintendent elected to grant admittance to Kulak's son without submission of a lease, deed or sales contract and regarded the petitioner's obstinance on this point as a sufficiently "exceptional" circumstance to allow for alternate proof of residency. In any event, the Superintendent was satisfied that the petitioner and his son resided in Lawrence Township and consequently allowed the boy to enroll in the Slackwood Elementary School.

ISSUE

The question presented is whether the respondent Board of Education is entitled to summary decision pursuant to N.J.A.C. 1:1-12.5.

DISCUSSION AND CONCLUSION

Summary decision in an administrative proceeding is appropriate where the papers and affidavits show no genuine issue of material fact and one party is entitled to prevail as a matter of law. See, N.J.A.C. 1:1-12.5. The burden of proof is on the party seeking summary decision and the moving papers and affidavits are to be considered most favorably for the party opposing. See, Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954); Friedman v. Friendly Ice Cream, 133 N.J. Super. 333, 337 (App. Div. 1975). Here, there is no dispute as to the facts and the issue is solely whether the respondent Board is entitled to prevail as a matter of law.

The Board argues that its regulation requiring proof of residence in the form of a lease, deed or contract of sale, except in exceptional circumstances, is a reasonable exercise of its discretion and in no way discriminates against the petitioner. The Board notes that no particular form of evidence of residence is required by statute or regulation. N.J.S.A. 18A:38-1; N.J.A.C. 6:20-5.3; N.J.A.C. 6:20-5.4. It also notes that the Board, in this instance, conducted its own investigation into the petitioner's claim of residency and determined that he resided within the district.

The petitioner, who no longer has any real controversy with the Board in light of his son's admission, maintains that the proof of residence required by the regulation is discriminatory and nonsensical in that evidence by way of deed, lease or contract of sale provides only proof of ownership and is, in fact, less trustworthy than such items as voter's registration, driver's license, tax returns and other forms of evidence offered.

The Boards of Education are empowered to promulgate rules concerning the government and management of public schools and those rules are presumed to be valid, unless they are shown to be arbitrary, capricious and without a reasonable basis in fact. See, N.J.S.A. 18A:11-1; Worthington v. Fauver, 88 N.J. 183, 197 (1982) (pertaining to administrative agencies generally); Paddock v. Demarest Bd. of Ed., 1974 S.L.D. 435 (as to

Board rules on class assignments). In the area of school attendance, the State Education Law provides that public schooling is to be provided free to persons domiciled within a school district. See, N.J.S.A. 18A:38-1. The statute does not provide any standards for determining domicile or temporary residence, but refers to submission of copies of leases where a person is kept in a home of another person who is domiciled within that school district and is supported by that other person is if he or she were that person's own child. See, N.J.S.A. 18A:38.1(b). The Assembly Education Committee Statement makes plain that the intent of the statute is to place on the parent the burden of proving that a child is eligible to attend school in a given district and to remove from the local board the burden of proving ineligibility. See, Assembly Education Committee Statement, Assembly No. 586 L. 1985, c. 6. The regulations promulgated by the Commissioner of Education also do not prescribe any specific method for determining residence or domicile. See, N.J.A.C. 6:20-5.3; N.J.A.C. 6:20-5.4. The Lawrence Township Board of Education has determined, except in exceptional cases, to require submission of deeds of ownership, leases or contracts of sale in order to satisfy its requirement of residence within the district. In so doing, it deemed insufficient such indicia of domicile as voter's registration, driver's license, homestead rebate claims, mortgage books and tax bills. The Board has made a determination that evidence in the form of a lease, deed or sales contract is an inherently more reliable indicator of actual residence and domicile than records of tax and mortgage payments, rebate claims or residence of record for the purposes of voting or driving. The petitioner argues, in essence, that proof in the form of a lease, deed or sales contract is not the best and most reliable evidence of residence. While that may be true, it cannot be said that the Board's insistence on receiving leases, deeds or sales contracts is inherently unreasonable and therefore invalid as an abuse of the Board's discretion. In the Board's eyes, the decision to demand documentation in the particular form of a lease, deed, or sales contract is reasonably related to the goal of ensuring that only persons actually residing in and domiciled in the district will be admitted free of charge. The fact that other evidence may also be used, as it was apparently used in this instance, to determine questions of residence and domicile does not preclude the Board from requiring those documents that show that a home has been purchased or leased within the district. While it is possible that some residents may not be able to provide leases, deeds or sales contracts (for example, those residing by adverse possession), the regulation adopted by the Board allows for alternative evidence in such exceptional circumstances. In this instance, the Board looked at such alternative proofs and admitted the petitioner's son.

While I appreciate the petitioner's point that residency may be better established by evidence other than that required by the Board of Education, it is not inherently unreasonable, arbitrary or capricious for the Board to demand documentation in the form of a lease dated for the current school year, a deed or a sales contract stating approximate date of settlement, because these documents provide or tend to provide the most tangible and fundamental evidence of residence. The regulation in question also leaves room for acceptance of alternative proof of residency in exceptional circumstances, as was allowed in this instance. As such, the regulation is a reasonable and valid exercise of the Board's discretion under N.J.S.A. 18A:11-1 et seq. and should not be disturbed by the Commissioner. It is also noted that the petitioner's son was admitted to a school within the district prior to transmittal of this matter to the Office of Administrative Law as a contested case and that the controversy was effectively rendered moot by that action. The Board here applied its policy in the "commendable spirit of accomodation and flexibility" recommended by the Commissioner in Saddle River Bd. of Ed. v. Tucker, decided March 25, 1988 (at 17).

ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that a summary decision be entered in favor of the respondent, Lawrence Township Board of Education, and that the petition be **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

MAR 1, 1989
DATE

RICHARD J. MURPHY, A.L.J.

Receipt Acknowledged:

March 2, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 6 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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ROBERT H. KULAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner's exceptions state that while he understands the decision as a matter of law, he takes umbrage to the fact that it is based on "forged or deliberately altered documents submitted by the attorney for the respondent." (Petitioner's Exceptions, at p. 1)

As to this, petitioner points to the fact that while the ALJ is under the impression that the superintendent approved the admission of his son on or before August 8, 1988, no action was taken by the Board, the superintendent, or anyone else until August 26, 1988 after the petition was filed in this matter.

Petitioner likewise asserts that the ALJ is incorrect in his belief that the Board applied its policy in a "commendable spirit of accommodation and flexibility" as recommended by the Commissioner in Saddle River, supra, since his decision is based on fraudulent documents as indicated above. (Id.)

Petitioner also asserts among other things that the Board's meaning of "exceptional circumstances" as contained in its policy is to wait for someone to file a petition with the Commissioner. Further, petitioner maintains that he has no objection to the acceptance of a deed as proof of residency but when the Board demands it as the sole proof of residency then its meaning is not proof of residency but rather proof of ownership. As such, he avers that when the Board refuses to take any action whatsoever until proof of ownership of real property in Lawrence Township is presented, then that in petitioner's opinion is unreasonable, unaccommodating and inflexible.

The Board's reply to petitioner's exceptions object to his characterization that the ALJ's decision was based on forged or deliberately altered documents submitted by its attorney. It does acknowledge, however, that the ALJ refers to a draft of a letter dated August 8, 1988 which was inadvertently submitted and which is

virtually identical to that sent to petitioner on August 26, 1988. Also the Board points to the fact that petitioner was informed of the error in September 1988 together with the Board's apology. Moreover, the Board alleges it was beyond its control that the ALJ did not receive a copy of its letter to correct the record.

The Board contends that the ALJ's decision is correct as a matter of law irrespective of the use of a misdated letter since the decision is based upon the substance of the letter not the date of its receipt. As to the letter, the Board avers that it demonstrates its willingness to go beyond the strict terms of its policy to ensure that petitioner's son could start school on time. Moreover, the Board contends:

> The long and short of this, is that Judge Murphy's decision is correct as a matter of law. The use of a misdated letter does not detract from the fact that the Board had a right to make and follow the policy it did. That Mr. Kulak personally did not like the policy has lead to a protracted and pointless dispute which wastes the time of everyone. Had he tried to follow the Board's policy in the first place (i.e., by submitting his deed) or even explained why he could not (e.g., by saying it was lost or destroyed), all of this might well have been avoided. In the end, the Board bent to serve the student's best interest. Mr. Kulak bends to no one. (Reply Exceptions, at p. 2)

Upon review of the record in this matter, the Commissioner does not agree with the conclusion reached by the ALJ that the Board's policy is a reasonable exercise of its discretionary power. It is the Commissioner's determination that the policy herein which limits proof of residency to a lease, a deed, or a sales contract and prohibits other bona fide documentation of residency such as voter's registration and driver's license is, in fact, a rigid and inflexible policy. Consequently, it is determined that such a policy is an unreasonable exercise of the Board's discretionary authority. This determination is reached notwithstanding the policy's provision that the superintendent may under "exceptional circumstances" accept alternate proofs of residency given that there are any number of circumstances which are not "exceptional" in nature where an individual(s) may reside, either permanently or on a temporary basis, within a given school district and neither lease, nor own, nor have a sales contract for purchase of a residence.

To have delayed the registration of petitioner's son for weeks on end in the face of documentation of residency being submitted in the form of a voter registration card, a valid driver's license, and a current tax bill is unreasonable and arbitrary irrespective of the fact that school was not in session.

Accordingly, the Commissioner directs that the Board review and revise its policy to assure that the policy accommodates a more

flexible range of bona fide documentation of residency so that pupil registration/enrollment may be promptly and expeditiously accomplished. Where bona fide documentation of residency cannot be produced then further review by the superintendent is appropriate as currently stated in the existing policy.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 17, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5545-88
AGENCY DKT. NO. 248-7/88

EDUCATION ASSOCIATION
OF VINELAND,
Petitioner,
v.
BOARD OF EDUCATION OF
THE CITY OF VINELAND,
Respondent.

Steven S. Goldenberg, Esq., for petitioner (Saiber, Schlesinger, Satz & Goldstein, attorneys)

Robert A. DeSanto, Esq., for respondent (Gruccio, Pepper, Giovinazzi & DeSanto, attorneys)

Record Closed: January 17, 1989 Decided: March 3, 1989

BEFORE JEFF S. MASIN, ALJ:

Education Association of Vineland ("Association"), a collective bargaining unit for teachers employed by the Vineland Board of Education, filed a Superior Court action against the Board on December 21, 1987, alleging entitlement to interest earned on summer payment plan deductions made by the Board from the salary of employees pursuant to the provisions of N.J.S.A. 18A:29-3. This statute, which was amended by L. 1970, c. 238, effective October 28, 1970, permits school boards to deposit up to ten percent of the salary of employees in an interest bearing accounts. Specifically, the statute provides that:

> Such deductions may be deposited by the Board of Education in an interest bearing account in any financial institution having its principle office in the State of New Jersey. (Emphais added.)

The Association claimed that the Board had failed to pay interest to the employees since 1970. The Board denied any obligation to pay interest and contended that the interest earned on the monies deducted and deposited on behalf of the employees under the Plan was the Board's money to use at it saw fit.

After motions for summary judgment were filed in Superior Court, the Honorable Paul R. Porreca, J.S.C., issued an Order dated July 7, 1988, transferring the matter to the Commissioner of Education. The case was then sent to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held with counsel on October 31 and November 16, 1988, and a Prehearing Order was issued on December 1, 1988. The Association then filed a motion for summary decision on December 23, 1988, pursuant to N.J.A.C. 1:1-12.5. Respondent filed a cross-motion for summary decision on January 5, 1989. The Association filed a reply brief on January 17, 1989. The record on the motions closed as of that date.

For reasons expressed below, I **CONCLUDE** that summary decision in favor of the respondent is appropriate.

PETITIONER'S LEGAL POSITION

Petitioner asserts that the Board of Education, acting pursuant to the summer pay statute, N.J.S.A. 18A:29-3 serves in a fiduciary capacity with respect to the monies deducted and the interest earned thereon after its deposit in an interest bearing account pursuant to the statutory authorization. As such, under concepts of common law trust, as well as taxation principles and fiduciary obligations, the Board's refusal to distribute accrued interest earned on the participant's deposited funds is illegal.

RESPONDENT'S LEGAL POSITION

Respondent asserts that the Association's action must fail under a number of legal theories. Initially, the Association contends that under the equitable doctrine of laches, the Association, which made no claim for any entitlement to the interest in question until 1984 or 1985 and did not file suit until December 1987, is barred from recovery. Secondly, the Board asserts that the question of entitlement to interest on

summer payment plan deductions is a negotiable issue which the parties must resolve through the collective bargaining process. Therefore, any claim of a grievance concerning the interest must be handled pursuant to grievance procedures in the contract. Thus, any action on the part of the Association is limited in remedy to the thirty (30) time bar contained in the collective bargaining agreement.

In addition to the aforementioned responses, the Board contends that the New Jersey Contractual Liability Act, which provides for requirements for notice and a two-year statute of limitations, bars the Association's action. Finally, the Board denies any trust relationship to the interest and thus any breach of fudiciary obligations with respect thereto.

THE STATUTE

N.J.A.C. 18A:29-3 provides:

> Whenever persons employed for an academic year by a board of education shall indicate in writing their desire to participate in a summer payment plan, and such board of education approves such participation, then, and there upon, the proper disbursing officer of the board of education, under such rules as may be promulgated by the commissioner with the approval of the State board, is hereby empowered and directed to deduct and withhold an amount equal to 10% of each semi-monthly or monthly salary installment, from the payments of the salaries made to such employees as shall participate in such plan and the accumulated deductions for any academic year shall be paid to the employee or his estate under such rules as may be established by the board of education in one of the following ways:
>
> (1) At the end of the academic year;
>
> (2) In one or more installments after the end of the academic year but prior to September 1;
>
> (3) Upon death or termination of employment if earlier. Such deductions may be deposited by the board of education in an interest bearing account in any financial institution having its principle office in the State of New Jersey.
>
> ....

FACTUAL BACKGROUND TO THE DISPUTE

The agreement between the Board and the Association entered into for the period of July 1, 1970 to June 30, 1971, contained a provision in Article VIII B1 providing for the ten percent deduction from monthly salary to be paid to the teacher according to a "schedule of payment throughout the summer as agreed upon by the Board of the Association." The statutory amendment providing that school boards might deposit deductions in interest bearing accounts became effective October 28, 1970. The July 1, 1971 to June 30, 1973 contract, Exhibit 2, contained identical language to the previous 1970-71 contract with respect to the summer pay deductions. No provision was made as to the disbursement of interest.

Subsequent to the 1971-73 contract, eight further agreement have been negotiated between the parties. The most recent covers the period July 1, 1986 to June 30, 1989. That contract contains a provision in Article XI B2 which exactly reflects the language of the original 1970-71 contract. There is still no provision with respect to the disbursement of interest from the deposited funds.

According to an affidavit filed by Thomas Thayer, Secretary of Business and Assistant Superintendent for Business Administration for the Board who has held the position since 1979, the Board has never paid any interest from the summer payment plan monies to the teaching staff. According to Thayer, in 1984 the Association contacted the Board through its representative and demanded that interest be paid on the monies held by the Board under the summer payment plan. A conference was then scheduled between representatives of the Board and the then Board solicitor and representatives of the Association and their attorney. According to the affidavit, as a result of this conference a letter was issued by Carl W. Cavagnaro, Esq., then solicitor for the Board, advising that the Board was unwilling to resolve the matter for several reasons:

1. The fact that the VEA on several occasions has attempted to negotiate this check-off into the contact and as of this date has been unsuccessful.

2. The fact that from all indications, it does not appear that the claim of the VEA for interest on the monies held by the Board of Education for the Summer Payment Plan is viable, and that most likely, the application will not be successful.

3. The fact that any member of the VEA may voluntarily elect to open up an account with the credit union and forward directly to that account payments for the pay period.

4. The fact that if a check-off is agreed upon, the Board of Education, by law, must also provide the alternative summer payment plan.

5. The fact that this will cause additional expense and work to the Board of Education without the Board receiving anything in return.

In late 1987, the president of the Association forwarded to the Board solicitor a letter of September 15, 1987, arguing that interest on the summer pay program funds belong to the employees and demanding an accounting of all interest earned by the Board "on funds which the Board has held as trustee for employees who participated in a Summer Pay Plan."

On November 17, 1987, the then Board solicitor wrote to Association advising that the Board, in reliance upon the Commissioner of Education decision of July 8, 1976, Dunwoody v. Board of Education of Moorestown, 1976 S.L.D. 671, believed that interest obtained from the summer payment plan was the property of the Board of Education and would not honor the "informal request made by the Association for payment of interest to individual teaching staff members derived from the participation in the Summer Payment Plan."

On November 25, 1987, counsel for the Association wrote to the Board Secretary, again asserting that the Board, acting as trustee, had to account for earnings and adding "Upon completion of the accounting, we will require that you immediately draw checks to each of the participants for the interest earned on their monies . . . ."

On September 15, 1987, Mr. Cavagnaro for the Board advised Mr. Seid, counsel for the union, that the Board of Education has taken the position and will continue to maintain the position that any interest earned on funds voluntarily deducted from employees' salaries are in fact monies which can and will be retained by the Board of Education.

In his affidavit, Mr. Thayer proceeds to explain that during negotiations the Association "on several occasions" has requested that the contract provide for deductions from employees' paychecks and payments to various financial institutions, savings accounts and tax annuities. The Board has objected to this request and did not agree to it until the 1986-89 contract. Thayer proceeds:

> It is important to note that during the period of negotiations leading up to this change in basic contractual language, that VEA alleged in support of said application that it was unfair for them to have money taken out of their pay through the summer payment program and not receive interest. By permitting them the alternative to have the money placed in other accounts, they would be able to choose their investment and obtain interest on it, without necessitating the Board of Education to forward them checks during the summer.

PRIOR CASES REGARDING THE INTEREST ISSUE

In their briefs the parties have called to my attention two prior determinations in this state with respect to the interest issue. The first of these Dunwoody v. Board of Education of the Township of Moorestown, 1976 S.L.D. 671, is a decision of the Commissioner of Education. In Dunwoody, the petitioners complained that the Board had improperly withheld interest monies due the Moorestown Education Association which interest resulted from deposits made by the Board on behalf of the petitioners under the summer payment plan. According to the decision, the application for participation in the summer payment plan provided that interest accruing on the monthly deposits would be paid to the Moorestown Education Association for a scholarship fund. Apparently, this practice had been followed pursuant to an unwritten policy since 1968. However, the Board was advised by its auditors in the 1973-74 audit report that "interest earned on a summer payment payroll account is to be credited to the current fund of the Board of Education. The Board acted consistent with this advice and as of 1974-75 refused to pay interest to the Association. The Commissioner concluded that the issue was

> whether a board of education that elects to establish a summer payment plan pursuant to N.J.S.A. 18A:29-3 has authority to pay interest earned on deposits made as a result of salary earnings from those who participate to any one or any entity other than its own current fund.

The Commissioner held that:

> . . . There is no authority pursuant to N.J.S.A. 18A:29-3 for a board to pay interest earned on plan deductions to the employee or his/her designated recipient.

He concluded that the legislature had provided the Board's authority to place the deposits in interest.bearing accounts "so that the boards would secure the interest earned thereof." "Interest earned on summer payment plan deposits made by a board of education accrues to that board of education. As such, the monies become part of the public purse which the board of education must protect."

On November 3, 1976, the State Board of Education issued a one-paragraph reversal of the Commissioner's decision. It read

> The decision of the Commissioner of Education is reversed. The State Board of Education determines that the Moorestown Board of Education is free to make the decision to disburse the accumulated interest funds resulting from its summer payment plan deposits.

The second decision cited is Wildwood Education Association v. Board of Education of the City of Wildwood, Dkt. No. C-7868-87 (decided November 9, 1988), a decision of Honorable John Callinan, sitting in the Chancery Division in Superior Court, Cape May County. This case raises the exact issue present in the case before this judge. The contract between the parties in Wildwood contained the option for payment over a 10 or 12-month period pursuant to N.J.S.A. 18A:29-3. There had been a series of ongoing "correspondence and bickering" between the Association and the Board since at least 1979 resulting in litigation filed by the Association on October 27, 1987. By Letter Opinion of May 27, 1988, the Court held

> . . . that the right, title and interest to the funds during the time that they are held in escrow by the Wildwood Board of Education is vested in the individual employee and that the Wildwood Board of Eduation actually holds those funds in trust.

Following Judge Callinan's Letter Opinion, the parties filed cross-motions for summary judgment to determine who is entitled to the interest on the funds and the extent of the reach of such a claim. The Association sought a refund by the Board of all interest

monies earned under both the present contract, as well as all previous contracts entered into containing the same provision as to summer pay.

Judge Callinan considered the parties' arguments concerning the legislative intent, the affect of the Dunwoody case, various statute of limitation defenses raised by the Board and the laches defense. The Court concluded that the equitable defense of laches barred the Association's claim. In addition, it determined that the issue of who should receive the interest on the deposited funds was a matter which was properly the subject of negotiation between the parties and therefore was, pursuant to N.J.S.A. 34:13A-5.3, a proper subject for a grievance under the terms of the grievance article of the agreement between the parties.

In considering the legislative intent, with respect to the interest, Judge Callinan noted that the statute did not provide for the disposition of interest. In fact, the Senate Education Committee report concerning Senate Bill 418 on January 20, 1970 states:

> This bill would permit boards of education to deposit, in an interest-bearing account, funds held for summer payment to 10-month employees. Clarification of the present statute is needed. Some boards are desirous of using interest-bearing accounts or awaiting legislation before taking such action.
>
> Other boards are presently placing these funds at interest and this bill is needed to validate such practices.
>
> This bill has been referred for further study since it doesn't clarify what is to be done with the interest earned.

Apparently no further study was done, or at least the legislation does not include any reference to a determination of who the interest belongs to.

Judge Callinan also considered the effect of the Dunwoody case. He concluded that it was of little precedential value. Although the Commissioner had taken the position that the interest became part of the public purse which the Board could then use as it saw fit, the State Board had reversed the Commissioner and, in its rather limited decision, had held that the Board was free to disburse the accumulated interest funds. No appeal was taken from that State Board decision. The judge referred to Dunwoody's value "as support for the proposition that the Board is entitled to keep the interest monies generated from summer pay programs" as "debatable."

Initially, respondent argues that it does not hold the summer payment plan interest in trust. Although the brief appears to argue in part that the deductions themselves are not held in trust, the scope of the discussion as to why no trust exists is really aimed at the interest rather than the deductions themselves. The Board argues that "there can be little question but that there was no intention on the part of the Vineland Board of Education to pay interest to any member of the Vineland Education Association through the summer pay plan." "It is also clear that the Legislature did not intend to create a trust relating to the attained summer payment plan deductions." However, the next reference by counsel for the Board is to the Education Committee comments on the lack of clarity as to what was to be done with the interest, and not as to any comments concerning the deductions themselves. The Board then relies on Dunwoody. Dunwoody, of course, focuses on the interest issue, not on the underlying deductions. Thus, it appears that the Board is not actually arguing that the deductions themselves are not held in trust, but in fact that the interest is not held in trust since it is not, under the Dunwoody rational, money which belongs to the employees, but is instead money which belongs to the Board. However, in referring to the Dunwoody opinion, counsel fails to note that the Commissioner was overruled by the State Board. Of course, the problem is that the State Board's decision does not spell out the reasons for its reversal of the Commissioner. One reading the case could conclude that the State Board was only saying that since there was an agreement at one time between the parties for disbursal of the interest to the Association's scholarship fund that there was no legal bar to the Board disbursing the accumulated funds in accordance with that agreement even though the accumulated interest belonged to the Board. However, the State Board did not spell out its reasoning in quite such detail. The phrasing of the decision, which indicates that the "Moorestown Board of Education is free to make the decision to disburse the accumulated interest funds . . .," might imply that the money was in fact the Board's and it can do as it pleases with it, including disbursing the money in accordance with the prior agreement. Possibly the State Board was not disagreeing with the Commissioner's underlying conclusion that the interest belonged to the Board. The reversal may have only been aimed at the Commissioner's finding that:

> That portion of the Board's application (P-1) for participation in its summer payment plan by which it is to pay interest earned to the Association is ultra vires and is hereby set aside.

As Judge Callinan concluded, Dunwoody is of limited and questionable aid in deciding the ownership of the interest funds because of the uncertainty as to the exact meaning of the State Board reversal of the Commissioner's position.

If Dunwoody, as decided by the Commissioner, is an accurate reflection of the law, then clearly interest, held to belong to the Board, could not be considered monies held in trust by the local board. On the other hand, if the Commissioner was wrong, and the interest does not belong to the Board but instead to the employees, then there can be little doubt but that a trust does exist for those funds, as well as for the underlying deposits.

The underlying deposits themselves are clearly held in trust for the employees. Pursuant to the terms of the statute, the summer payment plans permits the deduction of up to 10 percent of an employee's salary for deposit in a designated account and payout to the employee according to his scheduled to an agreement between the parties. This deposit of funds with a financial institution, with the funds to be held for delivery to the employees in accordance with a certain schedule, clearly constitutes the establishment of an escrow account and creates a fiduciary relationship.

The Restatement of Trusts, (2nd), Section 12, Comment (j) provides:

> Deduction from employees' wages. Where an agreement is made between employer and employees under which the employer is to deduct certain sums from the wages of the employees and to apply the amount so deducted for a purpose beneficial to them, a trust arises when, and only when, the amount deducted is set aside or paid over to another for the employee's purposes.

In the present matter, pursuant to the statutory authorization, the Board of Education has deducted from the wages of its employees so choosing monies which are transferred to an interest bearing account in a financial institution. These monies are eventually to be paid to the employee, thus clearly serving the employee's purposes in that the monies paid over during the summer under the agreement will aid the budgeting process for the employees. Thus, the relationship created by the deduction deposit and the purpose therefor is a relationship of trust under the provisions of the Restatement.

State v. U.S. Steel Co., 12 N.J. 51 (1953), involved a situation where the employer had deducted from employees' compensation monies which were to be used to purchase Liberty Bonds. The monies were not segregated from the general funds of the employer and no interest provision was provided. The State was attempting to escheat the funds. The respondent attempted to raise statute of limitations defense. According to the Court, the monies were recognized as being the employee's property from the time of withholding until they were applied for the purpose of purchasing the bonds. In such a situation, the Court held:

> Here the wages had been earned by the employees and were due to them at the time the withholding occurred. In effect, they were, on each pay day, giving back to the company the stipulated amount of the deduction as trustee to conserve the funds and, when sufficient had accumulated, to use them for the declared purpose of the agreement, to wit, the purchase of bonds for the use and benefit of the employees. Legal title to the funds was in the company, but not the equitable title. Whatever bookkeeping or other convenience may have been served by the mingling of the employee's funds with its general funds, such unilateral action will not, standing alone, defeat the true intent of the parties. To so hold would do violence to the essence of the fiduciary relationship. (Id. at 58-59)

I **CONCLUDE** that a fiduciary relationship was created between the employees and the Board with respect to the monies deducted pursuant to the Plan.

The common law rule provides that profits realized from assets held in trust accrue to the beneficiary of the trust and the trustee is accountable for such profit. Restatement 2d trusts, Section 203 (1959). Under the common law rule, the interest generated by the funds deducted pursuant to summer payment plan would belong to the employees for whom the deductions were held in trust and the Board, as trustee, with a fiduciary relationship, would be required to account for the profit. However, if the legislature, in the course of enacting the amendment to the statute, made it plain that it intended to change the common law rule so as to provide that the interest generated would be a Board's then surely the legislature could so act. However, a review of the legislative history and the final wording of the amendment does not indicate clearly that the legislature did in fact enact a provision that was intended to be in derogation of the common law principle. Although the issue was raised at the committee level as to who the interest belonged to, apparently no resolution of that question was ever made, at least

none is clearly stated. The only enacted language as to the interest is the permission to the Board to deposit the monies in an interest bearing account. Nothing is said whatsoever as to who those monies belong to. Under such circumstances, where the legislation does not "clearly and plainly" demonstrate an intention to change the common law as to the ownership of these funds, then the common law principle must apply. Although Judge Callinan noted this in his decision, it does not appear that he actually ruled as to who owned the interest, concluding instead that the matter was subject to negotiation and grievance procedures. With deference to his opinion, it appears to this judge that if the common principles apply, as it seems he felt they did, then just as the issue of the ownership of the underlying funds was a matter of law not subject to negotiation then the issue of the ownership of the interest is a matter of law, similarly not subject to negotiation. While certainly the Board of Education would be entitled to some recompense for expenses involved in the program, for the cost of banking services, etc., and this money could be a deduction from the profit generated, that is, the interest, and while the question of how much of a deduction for expenses was to be permitted would certainly be a matter subject to negotiation, the ultimate ownership of the interest is decided by the common law. There is nothing in the legislation which appears to indicate that such a subject was to be a term and condition of employment subject to negotiation. While the parties could clearly negotiate as to whether or not the Board would exercise its discretion to place the funds into an interest bearing account, and while a determination not to do so might not subject the Board to any claims of breach of fiduciary obligations since the legislature appeared to give the Board the right to decide affirmatively or negatively on placement of the funds in such accounts, the fact that such discretion was provided does not mean that the legislature intended to suggest that if the Board exercised its discretion and deposited the funds in an interest bearing account, that the Board would retain ownership of the interest.

I **CONCLUDE** that the interest produced as profit on the trust funds consisting of the deductions for the summer payment program held in interest bearing accounts pursuant to the statutory authorization are owned by the employees for whom the deductions were made. As such, unless an equitable or legal defense exists barring the beneficiary from asserting his claim for an accounting, the petitioner must prevail.

STATUTE OF LIMITATIONS DEFENSES

Respondent argues that whatever claims the petitioner might have would be barred from prosecution because of the provisions of the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq. This Act provides for a waiver of the state's sovereign immunity with regard to claims regarding express or implied contracts. Limitations are established on this waiver in the form of requirements for 90 days notice from the accrual of the claim, which notice must be filed with the contracting agency. After the expiration of the 90 days from the date the notice is received by the contracting agency, the claimant is permitted to file suit in a court of competent jurisdiction. Failure to file the notice within 90 days of accrual of the claim is generally a bar to recovery, as is failure to file suit within two years of the accrual of the claims or one year after completion of the contract given rise to the paid claim, whichever is later. N.J.S.A. 59:13-5.

Petitioner denies that its claim is barred by the Contractual Liability Act. Although respondent argues that the definition of "State" contained in the Act includes a board of education and therefore the Board is protected by the notice requirement and the Act's statute of limitations, petitioner points out that the definition of "State" reads:

> the state and any office, department, division, bureau, board, commission or agency of the State, but shall not include any entity which is statutorily authorized to sue or be sued. N.J.S.A. 59:13-2.

Since N.J.S.A. 18A:11-2(a) provides that boards of education "may sue or be sued," petitioner does not believe that they fall within the coverage of the Contractual Liability Act.

Petitioner also argues that the dispute here arises under the trust relationship between the parties as to the interest funds and therefore no statute of limitations bar would exist regardless of the definitional questions concerning the Contractual Liability Act. Support for this argument is gathered from the holding of the New Jersey Supreme Court in the U.S. Steel Co. case, supra, where the court held that the relationship between the parties was one of trust and therefore the statute of limitations did not apply, U.S. Steel Co., supra, at 59-60. Additional support for this argument arises in the

case of Williams v. McKay, 40 N.J. Eq. 189 (E & A 1885) where the court considered the relationship between the managers of a savings bank and the depositors. The managers raised a statute of limitations argument as a bar against a charge of mismanagement. The court however concluded that a trust relationship existed between the parties. In discussing the question of whether the statute of limitations applied, Chief Justice Beasley referenced a decision from England. It seems worthwhile to quote the Chief Justice's discussion. While it deals with the applicability of the statute of limitations to the trust relationship, which is equitable in nature, it also points to the relationship of the lapse of time from the accural of a cause of action and its relationship to defenses raised by trustees against claims arising from the trust relationship. In light of the laches defense raised herein, the discussion is quite pertinent:

> "And looking upon the present controversy as growing out of a trusteeship, it seems to me incompatible with such a conclusion to hold that the statute in question will begin to run upon the vacation of his office by the manager, because such act has changed the essential nature of the transaction, for the right of the depositor remains, as before, a purely equitable one, which he cannot enforce any court of common law. And it is the accrual of the right of action at law which calls the statute, by force of its own terms, into play. Lapse of time, therefore, is not an absolute bar to an equity of this nature, but lapse of time is often a strong, and sometimes a conclusive, circumstance in the administration of the law of equity. Sir John Romilly, sitting as master of the rolls, in the case of Williams v. Page, 24 Beav. 654, 661, in which a bill had been filed in behalf of shareholders against the managers of a railway company, places this subject in what I deem its true light. He says: 'The managing committee of a projected railway company are, as well as the directors of the company after its formation, not the mere agents of the stockholders, but their trustees, and liable to account as such. The trust, no doubt, is a peculiar one, but such as it is they have undertaken to discharge the duties of it, and they must be responsible for the due performance of them. In my opinion all principle and all authority point one way on this subject, and I should consider myself wasting public time by enunciating and enforcing elementary principals, which are familiar to everyone cognizant of legal matters, if I were to enlarge upon this subject. Still, the nature of the trust is such that I should consider time, although not a bar by statute, a very material ingredient in such a transaction, and having regard to the discretion which courts of equity have always exercised on this subject, and which, in part, forms an important branch of equity itself, I should think a court of equity would refuse relief to stockholders, and decline to decrease such general account against persons so

> situated, who had, three or four years before, rendered their accounts, divided the money in their hands, and this without meeting with any comment or remonstrance on the part of the shareholders.' It will be observed, from this extract, that the distinguished Master of the Rolls treats, as a matter entirely settled, of the relationship of the directors to the shareholders as constituting the former a trustee, and declares that to the equities arising between them the statute of limitations is not applicable as a bar." (Emphasis in the original.) Williams, supra, at 198-199.

In view of the conclusion that the parties stand in a trust relationship as to the interest accumulating from the deposited funds, I **CONCLUDE** that the statute of limitations does not stand as a bar between them. However, this does not preclude the possibility that the equitable defense of laches, which of course is related to the lapse of time between the accrual of an action and the pursuit of such, may stand as a defense to the petitioner's claims.

LACHES

Laches has been described as

> The neglect for an unreasonable and unexplained length of time, under the circumstances permitting diligence, to what in law should have been done. More specifically, it is an inexcusable delay in asserting a right . . .
>
> The length of delay, reasons for delay and changing conditions in either or both parties during the delay are the important factors that a Court considers and weighs. Atlantic City v. Civil Service Commission, 3 N.J. Super. 57, 60 (App. Div. 1949).

In this case the statutory amendment providing boards of education with the authority to deposit deducted monies into interest bearing accounts became effective in 1971. The first indication of the Association's claim for payment of interest occurred in 1984 and the first written demand was made on March 5, 1985. Thus, a period of approximately 13 years passed between the time of the adoption of the amendment and the initial Association claim. No evidence has been supplied in connection with these motions as to the reason for delay in asserting this claim. Thus, the delay is unexplained. It is obvious that each and every contract since the adoption of the amendment up to 1984 contained a provision allowing for deductions under the summer payment program. There

is no evidence, and could be no suggestion, that the Association was not aware of the existence of these deductions; indeed, they must have been since they agreed to the provision in the contracts and no doubt sought the inclusion of this provision sometime prior to the 1970 contract, the initial contract placed in evidence which contained such a provision, and the deductions have been occurring ever since. The Association was charged with knowledge of the statutory provision providing for an interest bearing account. Under these circumstances, there appears no reason why the Association could not have asserted its claim against the Board, either formally or informally, at some point during the 13 years between 1971 and 1984. However, this delay remains without explanation.

The Board contends that laches should apply because it has been prejudiced by the inexcusable delay of the Association in asserting its purported right to the funds. The asserted prejudice results from the fact that the Board has used the interest over the course of these many years and the money does not presently exist in a segregated fashion payable out to the Association's members upon a determination that they are entitled to the same. As such, the Board believes that it would be required to raise the monies due by the imposition of taxes on the public, thus threatening to upset the budgetary and tax schemes in existence. In addition, the Board contends that by failing to assert the claim over the years and entering into contracts with the Board through the collective bargaining process, the Association has (1) given the impression that it was not concerned with interest payments and not asserting a claim for them and (2) was permitting the Board to enter into negotiations and agreements based on financial considerations not including the payment of interest thus allowing the Board to believe that it had an undisputed right to the interest funds which it could use as it saw fit in meeting its needs. Further, the Board contends that it relied on Dunwoody and assumed that the interest funds were its own as held by the Commissioner and that therefore since the issue was never contested by the Association from 1971 to 1984, and indeed up to the time of the filing of a law suit in 1987, the Association has taken no action to correct any misimpression on the part of the Board that Dunwoody gave it clear title to the funds.

Similar arguments were raised by the Wildwood Board in its dispute with the Wildwood Education Association. Judge Callinan held:

> By not asserting the right sooner, either by institution of an action or the filing of a grievance, the plaintiff's have compromised the budgeting process of the Board. Collective Bargaining Agreements have been negotiated, one after another, over a period of years without addressing the issue of disposition of interest income. Given the fact that no serious claim has been made by the employees to interest generated on these invested funds, the Board has utilized the money in meeting their financial responsibilities and in planning their fiscal requirements. The court is not unmindful to the fact that similar situations may exist throughout the state. Boards of Education have reasonably relied upon the commissioner's ruling in Dunwoody . . . We hold . . . that the Association (inferentially the individual claimants) is guilty of laches. (Opinion at p. 16, 17.)

The circumstances of this case also require a finding that the Vineland Association has been similarly guilty of laches. Therefore, it is barred from recovering any interest for the period prior to the filing of the lawsuit.

CONCLUSION

On this matter summary decision is appropriate as the affidavits and legal arguments do not identify any disputes of material fact relevant to the determination of the legal and equitable principles necessary to resolve the matter, Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954); N.J.A.C. 1:1-12.5. As such, I **CONCLUDE** that the Association is barred from recovery of the interest up to the time of the filing of its lawsuit in December 1987, when the matter was brought to a head. From that time on, there is no equitable basis for invoking laches. In view of the legal conclusion stated above, I **CONCLUDE** that the Association has a legitimate and enforceable claim for the interest arising from the deductions made beginning with the deductions for December 1987. The Board is **ORDERED** to provide an accounting of the interest accumulated from that date, which shall be paid to the employees. The timing of such payments, as well as the amount of the interest which the Board may deduct for expenses of its trusteeship over the funds, are proper subjects for negotiation within the labor-management negotiating framework. Therefore, the parties are **ORDERED** to enter into negotiations to resolve these matters. Such negotiations shall commence within 30 days of the issuance of the final decision of the State Board of Education.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

2-23-89
DATE

JEFF S. MASIN, ALJ

March 3, 1989
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAR 8 1989
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

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VINELAND EDUCATION ASSOCIATION, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Association filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The Association's exception addresses the ALJ's conclusion that the Association was barred by laches from recovering any interest for the period prior to the filing of the lawsuit. It claims the ALJ erred in ruling that it is barred by laches from recovering any interest for the period prior to the filing of the lawsuit and cites, inter alia, Auciello et al. v. Stauffer, 58 N.J. Super. 522 (App. Div. 1959) for the proposition that "[a]ny prejudice sustained by the Board subsequent to its having received notice of the claim was occasioned by its own misconduct and was therefore at its own risk" (emphasis in text) in continuing "to misappropriate the interest earned on the summer pay account while it had full notice of plaintiff's claim." (Exceptions, at p. 3) Therefore, the Association avers, it should not be barred from recovering interest after defendant had notice, as early as 1984, of the Association's claim.

Further, the Board counters the contention that granting retrospective interest to 1984 is burdensome and relies on Gowdy v. Board of Education of the City of Paterson, 89 N.J.L. 137, 138 (Sup. Ct. 1916) and Emerick v. Teaneck Board of Education, 221 N.J. Super. 456, 464-65 (App. Div. 1987) for the proposition that "any 'burden' imposed on the taxpayers of Vineland in compensating the participants could be taken into account in the fashioning of an appropriate Order which would require the Board to pay the judgment on a periodic basis so as to 'obviate the public inconvenience'." (Exceptions, at p. 4, quoting Gowdy), .

According to the Association, then, the ALJ erred in finding that its claim for interest "prior to the filing of the lawsuit was barred by laches because the Board's prejudice resulted from its own actions in misappropriating interest earned after 1984 and because an appropriate remedy can be fashioned to militate against any further prejudice to the Board." (Exceptions, at p. 5)

Upon his careful and independent review of the record, the Commissioner adopts in part and rejects in part the initial decision for the reasons which follow.

The Commissioner notes his approval of the ALJ's discussion of the common law pertaining to the fiduciary relationship extant between the Board and the Association members who choose to participate in the summer payment plan. (See Initial Decision, ante.) However, the Commissioner rejects the ALJ's conclusion that absent language in N.J.S.A. 18A:29-3 abrogating ownership of the interest produced from the corpus of the summer payments, such monies are owned by the employees for whom the deductions were made. In so finding, the Commissioner acknowledges that when a statute specifically establishes a right or entitlement, such language preempts common law principles or questions as to negotiability. However, N.J.S.A. 18A:29-3 is silent as to who owns the interest. Since any claim such interest which may be made by petitioners can only arise under the common law and, since there is an apparent dispute between the parties as to whether the interest derived from the corpus was subjected to collective negotiations and bargained away (see Board's Motion for Summary Decision and in Opposition to Plaintiff's Cross Motion dated January 4, 1989 at p. 13; see also Plaintiff's Response to Defendant's Motion and Brief in Opposition to Plaintiff's Cross Motion dated January 17, 1989 at p. 3), the issue of whether the interest deriving from the corpus of the summer payments belongs to the individual teachers, therefore, is a matter which may well be subject to the negotiation process as contended by the Board. Since the issue of negotiability is beyond the purview of the Commissioner, the matter would properly be within the jurisdiction of the Public Employment Relations Commission (PERC). See Bd. of Ed. of Tp. of Bernards v. Bernards Tp. Ed. Assoc. and Amer. Arbit. Assoc. et al., 79 N.J. 311, 316 (1979) (PERC has been designated by the Legislature as the forum for initial determination of scope of negotiations matter because of its special expertise in this area.) See also Woodstown-Pilesgrove Regional Bd. of Ed. v. Woodstown-Pilesgrove Regional Education Association, 81 N.J. 582, 587 (1980) and City of Hackensack v. Winner 82 N.J. 1 (1980). The Commissioner must therefore decline resolution of the question of negotiability and dismisses the petition without prejudice to the parties to refer the issue of negotiability to PERC for resolution.

The Commissioner finds that this disposition of the matter is consistent with both Mrs. James Dunwoody et al. v. Board of Education of the Township of Moorestown, 1976 S.L.D. 667, State Board rev'd 671 and Wildwood Education Association v. Board of Education of the City of Wildwood, Dkt. No. C-7868-87, N.J. Superior Court, Chancery Division, November 9, 1988. Contrary to the ALJ's conclusion the State Board's decision in Dunwoody does not definitively stand for the proposition that interest derived from the corpus of funds held by a board for employees who are part of a summer payment plan is not the board's. Rather, the State Board decision in Dunwoody stands for the proposition that a board is free to disburse such funds or to made an agreement with the employees as to how the funds earned on the corpus shall be directed. From this

case one might well infer that the State Board did not dispute the Commissioner's finding that such interest belongs to the Board, but merely affirmed the right of the Board to disburse said funds according to its agreement. See Attorney General's Letter Memorandum dated July 9, 1976 which found the interest from summer payment plans belongs to the board.

Similarly, Judge Callinan determined in Wildwood, supra, that the issue of to whom the interest belonged was a matter for negotiation. "We find that until the Legislature speaks to the issue, the claim of the Association [that it is entitled to interest on the funds held by the Board for a summer pay plan] is governed by the grievance procedure and we direct the matter to be negotiated.***" (Slip Opinion, at p. 18) While Wildwood II dated November 9, 1988, would seem to suggest that such issue is negotiable, the Commissioner may not make such determination.

In the event that the parties seek a scope of negotiation determination and PERC finds the matter of the interest is not subject to the negotiation process, the parties are free to petition the Commissioner of Education to reopen the matter for resolution of any remaining issues. In the event that PERC finds the issue to be negotiable, the parties are left to their remedies under the collective bargaining agreement, and the Commissioner does not retain jurisdiction.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 17, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5255-88
AGENCY DKT. NO. 186-6/88

VONITA SMITH,
Petitioner,
v.
BOARD OF EDUCATION OF THE
CITY OF TRENTON,
Respondent.

Arnold M. Mellk, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

Gregory G. Johnson, Esq., for respondent (Lemuel H. Blackburn, Jr., P.C.)

Record Closed: January 19, 1989 Decided: March 6, 1989

BEFORE JOSEPH LAVERY, ALJ:

Vonita Smith (petitioner) appeals from the decision by the Trenton Board of Education (Board) to withhold petitioner's salary or adjustment increment, or both, for the 1988-1989 school year.

The Trenton Board of Education (respondent) answers that its action was an exercise of lawful discretion.

PROCEDURAL HISTORY

This matter was initiated by timely petition, filed with the Commissioner of Education on June 22, 1988. Following an answer submitted July 14, 1988, the Commissioner declared this a contested case, pursuant to N.J.S.A. 52:14B-9 and 10, and filed it with the Office of Administrative Law (OAL) on July 18, 1988.

Prehearing conference convened before the Honorable Bruce R. Campbell, ALJ on September 29, 1988. The case was at that time scheduled for plenary hearing before this administrative law judge to convene on December 14, 15 and 16 in the Trenton hearing rooms of the Office of Administrative Law. On December 14, 1988, at hearing, the parties determined to submit a stipulation of facts and to bring motions and cross-motions for summary decision accompanied by briefs. The stipulation of facts was prepared on that date, and briefs followed, the last of which was filed on January 19, 1989. On that date the record closed.

ISSUES

The issues are set forth in the Prehearing Order, dated September 29, 1988:

1. Was the withholding a proper exercise of Board authority under the circumstances of this case?
2. If not, did the withholding violate the New Jersey Law Against Discrimination or the Federal Rehabilitation Act of 1973 or both?
3. If the withholding was improper on any grounds, to what relief is the petitioner entitled?

Burden of proof:

The burden of proof in this case falls on petitioner, who must carry it by a preponderance of the credible evidence.

Undisputed facts:

The parties have grounded their motion and cross-motion on facts which are part of a stipulation reduced to writing, as well as 40 exhibits (J-1 through J-40) jointly submitted. That stipulation is as follows:

1. Petitioner Vonita Smith is a tenured teaching staff member in respondent's employ and at all relevant times herein has been assigned to the Jefferson Elementary School.
2. At a meeting held May 26, 1988, respondent "approved the Superintendent's recommendation to withhold [petitioner's] entire increment for the 1988-89 school year only."

3. The foregoing action by respondent was based upon the recommendation of Ernest J. Hilton, Principal, Jefferson Elementary School, due to petitioner's "unsatisfactory attendance record" for 1985-86, 1986-87, 1987-88 school years.

4. Petitioner's absences were due to and caused by Crohn's disease, which was first diagnosed in September, 1984. Because of that disease, petitioner was on leave of absence from January 3, 1985 through June 30, 1985. The Board had written notice of the underlying reason for that leave. The Board considered petitioner's disease at the May 26, 1988 meeting.

5. The attached exhibits, J-1 through J-40, are proffered jointly, both as to substance and form, and incorporated herein by reference.

ARGUMENTS OF THE PARTIES

The parties sought summary decision pursuant to *N.J.A.C.* 1:1-12.5, for the following reasons:

Petitioner's argument:

Petitioner argues generally that the Board's action was arbitrary, capricious, and unreasonable in its application of *N.J.S.A.* 18A:29-14. Under that section, in petitioner's view, the Board has good cause to withhold an increment only under certain preconditions. It must first find that petitioner's absences have had an adverse impact on her performance, through diminished or discontinuous instruction, which can be shown to have created a negative impact on students' developmental growth. Particular circumstances must be considered, and legitimate use of leave time would not fall under that rubric.

The Board must limit its action to the information before it, and consider the particular circumstances for impact on pupils' education. Petitioner contends that in this case, the Board did neither. Further, it imposed a penalty for legitimate use of statutory or contractual sick and personal leave through mechanistic application of a policy which is invalid. Beyond failing to adhere to state law, the Board also violated §504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and at the same time acted in violation of N.J.S.A. 10:5-4.1 of the New Jersey Law Against Discrimination.

Respondent Board's argument:

In support of its cross-motion, the Board contends that the burden here lies on petitioner to prove that her absences were not excessive, and did not disrupt the educational process. Its decision was an exercise of managerial prerogative, delegated by the Legislature. The decision may not to be upset unless patently arbitrary, without rational basis, or induced by improper motive. The record discloses a pattern of excessive absenteeism, the cumulative affect of which the Board was entitled to examine. Notwithstanding petitioner's Crohn's disease, legitimate medical reasons do not prohibit a board from finding excessive absenteeism to deny a salary increment, absent arbitrary or unreasonable motivation.

Since petitioner has offered no evidence, the Board may assume that a negative impact on the learning process occurred. The Board's policy does not violate the law, and petitioner was given ample notice of her principal's concern over excessive absenteeism. The Board considered petitioner's illness on May 26, 1988, when it made its decision based on the policy. It acted on a fair and reasonable incidental absentee rate standard.

As to the charge of discrimination, presuming for the sake of argument that Crohn's disease is a handicap, N.J.S.A. 10:5-4.1 prohibits discrimination based on handicap "unless the nature and extent of the handicap reasonably precludes the performance of the particular employment." While the Board does not contest the legitimacy of the medical excuses, it is petitioner's burden throughout any charge of discrimination to establish a prima facie case. Should that test be met here, the burden merely shifts to rebut the presumption by producing evidence, and the Board has done so. In the three school years extending from 1985 through 1988, petitioner has established a pattern of excessive absenteeism through the accumulation of 64 days of absence (Exhs. J-29 through J-31). With the prima facie case rebutted, petitioner must show that the articulated reason was a mere pretext for discrimination. No such proof exists.

With respect to the Rehabilitation Act of 1973, accommodation need be provided only if it would not impose an undue hardship on the operation of a program. Here, petitioner has not shown herself to be an employee of a federally-funded program directly benefited by that financial assistance. In addition, that Act does not excuse unsatisfactory performance as evidence by poor attendance and, in

fact, the Board asserts that any proposed accommodation to that handicap, to the extent that this record discloses, would be "an undue hardship," 29 C.F.R. §1613.704.

For all the foregoing reasons, in the Board's view, its action was neither unreasonable nor arbitrary, and petitioner has not shown that the withholding of her increment violated either the New Jersey Law Against Discrimination or the Federal Rehabilitation Act.

ANALYSIS

Summary decision:

This matter is ripe for summary decision, pursuant to N.J.A.C. 1:1-12.5. There are no disputes of material fact, and the issues may be resolved as questions of law, Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). Both parties agree that the record provided through stipulation comprises all that was considered by the Board in its decision.

The burden of proof:

As in virtually all administrative hearings, the overall evidentiary standard is "preponderance of the credible evidence", *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962). By that preponderance, petitioner must demonstrate that the Board: (1) acted on underlying facts which were the same as those claimed to justify withholding of an increment, and (2) acted unreasonably, as a result. Neither this tribunal nor the Commissioner may substitute their judgment, and the burden of proving unreasonableness falls on appellant. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 289, 296-297 (App. Div. 1960).

The issues:

Whether the Board's withholding of petitioner's increment for the 1988-89 school year was a proper exercise of it's authority, pursuant *N.J.S.A.* 18A:29-14.

The stipulated facts and exhibits leave beyond argument the fact that the Board's withholding of petitioner's increment derives from the recommendation of her building principal, Ernest J. Hilton. The principal did so on the grounds of an

asserted unsatisfactory attendance record during the 1985-86, and 1986-87 school years (Exh. J-23). Equally true, on the other hand, is petitioner's excuse that these absences (Exhs. J-10 through J-12) were all caused by a continuing, chronic illness: Crohn's disease (Exhs. J-24 through J-36). The Board "considered" this excuse (Stipulation of Fact #4, and accepted it as the cause for petitioner's absences, all of which were authorized at the time by statute or contract. Nonetheless, it ruled on May 26, 1988 (Exh. J-22) that, whatever petitioner's undisputed personal circumstances, her absences still amounted to an adequate justification for its withholding of her increment, based on its policy prohibiting 5% or more "incidental" days (5 days or less, Exh. J-8). Petitioner's incidental day rate was 11.6%, and 12.7%, respectively, for the two years.

The Board relies not only on N.J.S.A. !8A:29-14 to defend its position, but on promulgated policies interpreting it. (Exhs. J-3 through J-9). It gave numerous notices to petitioner concerning the percentage of her attendance time, including especially incidental absences. Some of these notices followed conferences with the principal, Mr. Hilton (Exhs. J-13 through J-21, and J-23). Despite an evaluation by Dr. Lennox which included a recommendation for an increment (Exh. 39), the Board saw these absences as excessive, and enforced its policies (Exhs. J-3 through J-9). Under those policies, review of attendance was an element of the annual evaluation, and 5% or more "incidental" absences was deemed excessive (Exh. J-8).

The relevant decisional law which has evolved provides a number of guidelines for use in deciding on these facts:

A teacher's excessive absences may constitute good cause for a local board's withholding of a salary increment. Prior years' absences may be considered. Trautwein v. Bd. of Education, Borough of Bound Brook, 1980 S.L.D. 1539,1542. The burden of proving that teacher performance is satisfactory falls on the petitioner, not the Board. Ibid. Continued absences, notwithstanding legitimacy of excuse, does not detract from the teacher's burden of proof to show that their performance is unaffected, Angelucci v. Bd. of Education, Town of West Orange, 1980 S.L.D. 1077; Virgil v. Bd. of Education, Town of West Orange, 1981 S.L.D. 1,12. On the other hand, where a seriously ill petitioner takes statutorily accrued sick time for such illness, a Board may not obviate that entitlement by withholding an employment or adjustment increment as a penalty, without considering the particular circumstances for absence. Kuehn v. Bd. of Education, Township of Teaneck, 1983 S.L.D. 1582, 1583. Additionally, while a principal may override

recommendations of those who evaluate teachers through observation, he or she must show sufficient grounds, when absences are legitimate, for a conclusion that these absences caused discontinuity of instruction. Law v. Bd. of Education, Parsippany-Troy Hills (N.J. App. Div., October 25, 1983, A-280-82T2) (unreported), at 3. Past conduct over a reasonably relevant period of time may be considered, where it establishes a pattern which has continued into the school year in which the action to withhold the increment is taken. Where conduct not warranting board action to withhold salary increments in a single year continues in subsequent years, and a cumulative effect of the pattern imposes a deleterious impact on the delivery of educational services, the board may withhold future increments because of this continuing pattern. Borrelli v. Bd. of Education, Borough of Rutherford, State Board decision, July 3, 1985, at 5-6. Where employees go beyond accumulated sick leave, and are not denied use of statutorily entitled annual and accumulated sick leave, boards may withhold increments pursuant to lawful policies (In this case there were *uncompensated* absences amounting to one third of the school year, although for legitimate illness), Bialek, et al. v. Bd. of Education, OAL DKT. EDU 7908-84; adopted, Commr. of Ed. July 19, 1985; aff., State Board decision, Dec. 6, 1985. Where a policy guideline for purposes of evaluation results in unsatisfactory rating for use of sick leave, which cumulatively is authorized by statute, such a policy is beyond the authority of the Board. Mere mathematical assignment of a rating, unaffected by the reason for absence, is arbitrary and unreasonable within the meaning of Kopera, supra. Montville Township Education Association, et al. v. Montville Township BOE (N.J. App. Div., Dec. 6, 1985, A-1178-84T7) (unreported), at 4-6. Also, Meli v. Bd. of Education, Burlington Co. Vo-Tech (Meli I) (N.J. App. Div., Mar. 4, 1987, A-2237-85T7) (unreported), at 2; Meli v. Bd. of Education, Burlington Co. Vo-Tech (Meli II) (N.J. App. Div., May 21, 1987, A-5820-85T7) (unreported), at 4. A finding of adverse impact on performance requires that there be a discontinuity of instruction which would disrupt the educational process. Meli I, p. 5.

Under *Borrelli, supra* the Board here may evaluate all the years in contention. It may do so to determine whether there is continuity of conduct creating a pattern whose cumulative effect has a deleterious impact on delivery of educational services. If it draws that conclusion, petitioner must prove the Board's conclusion and consequent withholding of increment are unreasonable and arbitrary, in the sense of *Kopera, supra*.

Petitioner has met her burden of proof. She has established that her accumulated days were granted by statute and/or contract, and that they were

taken by reason of authenticated, serious medical cause: Krohn's disease. She has also shown that her evaluator, Dr. Lennox, recommended that she receive her increment (Exh. J-39). Finally, she has demonstrated that application of the Board policy underlying the decision on the facts here, is unreasonable.

It is true that Principal Hilton and Superintendent Copeland may override Dr. Lennox's judgment. The Board also may uphold that supervening recommendation. Nevertheless, there is a flaw in that process, as it has it unfolded. The recommendation of the school officials was, and is, grounded on a Board policy which defines an arbitrary figure of 5% or more "incidental absences" as "excessive" and "improper" (Exh. J-8). There are no mitigating factors which the policy anticipates, such as actual disruption of the delivery of educational services, or whether the days taken were part of a legislative or contractual grant. The policy only cautions that "employees may have increments withheld and/or be recommended for termination based on unacceptable attendance patterns" (Exh. J-8). None of the stipulated facts or exhibits suggest that the Board departed from this policy when it decided that petitioner's authorized medically-excused sick leave was an "unacceptable attendance pattern."

While the parties have stipulated that the Board "considered" petitioner's disease, it has not countered what is essentially a prima facie case. Petitioner argues in her brief that "the burden then shifts to respondent to show discontinuity of instruction resulting from petitioner's absences." (Pet.'s br., p. 9, fn. **) If petitioner is referring to burden of *proof,* the case law does not explicitly transfer it to the Board, as described. Nevertheless, once a prima facie case is established, the Board must respond or have adverse inferences drawn from the record. The Board's response only shows that the recommendation of the principal was consistent with Board policy. While the Board may have "considered" the fact of petitioner's illness, there is no showing, in answer to a *prima facie* case, of discontinuity causing educational harm, as the Board insists. There is only the formulaic statement in Principal Hilton's notice (Exh. J-23) and the policy itself (Exh. J-8).

So mechanistic an application of policy has plainly been rejected as a prerogative of management, *Kuehn, supra*. When that policy encroaches upon sick leave entitlement granted by the Legislature, the Board acts *ultra vires.* It seeks to nullify an express legislative intent to grant sick leave, when taken for good medical reasons (admitted here), simply by categorizing 5% or more "incidental" leave as an "unacceptable attendance pattern". The sick leave statute, N.J.S.A.

18A:30-1, et seq., carves out no such exceptions. Like reasoning applies to lawfully negotiated contractual leave, taken for permissible cause. The 5% test, by itself, cannot override a negotiated contractual sick leave provision.

Some of the foregoing case law has indicated that absences, even with valid medical excuse, may at some point establish an unacceptable level of absenteeism, once it is apparent that disruption of the educational process takes place, *Angelucci, Virgil, supra.* While that may be, circumstances comparable to those in the foregoing decisions are not present here. Petitioner's *prima facie* case has not been overcome.

The Board violated the New Jersey Law Against Discrimination at 10:5-4.1

The parties have not addressed the question of jurisdiction over this claim. It has been established that concurrent jurisdiction between the Commissioner and the Director, Division on Civil Rights inheres in both agencies, for the appropriate case. That jurisdiction tilts to the Commissioner when a case involves the content of educational programs, implicating the highest level of professional expertise and judgment in the educational field. Hinfev v. Matawan Regional Bd. of Education, 77 N.J. 514, 532 (1978). Whether enforcement of N.J.S.A. 10:5-4.1 with respect to accommodation of handicaps would also fall within the category of an appropriate case raises a question, Jameson v. Rockaway Tp. Bd. of Ed., 171 N.J. Super. 549 (App. Div. 1979); Gilchrist v. Bd. of Ed. of Haddonfield, 155 N.J. Super. 358, 366 (App. Div. 1978). That question need not be resolved, however. Even if the issue should be before the Commissioner, petitioner has not satisfied the burden of proof which attends all discrimination cases.

Petitioner has established a prima facie case that a handicap exists, and discrimination is suspect as a cause. However, the Board has responded with a legitimate nondiscriminatory reason: There is a lawful need to avoid the disruption of the educational process which accompanies discontinuity of teacher attendance. The Board withheld the increment pursuant to a correctly enacted, and uniformly applied policy addressing that need. The burden now shifts to petitioner to show that this articulated reason is a mere pretext for insidious discrimination. Texas Community Affairs Dept. v. Burdine, 450 U.S. 258 (1981). Petitioner has not carried her burden. Nothing of record shows that the Board imposed its policy, whatever its merits, as a pretext to engage in discrimination against petitioner. It was an across-the-board policy triggered by impersonal computation.

Whether respondent Board has violated the Rehabilitation Act of 1973 at §504

Petitioner argues that the Board should be found to have violated the federal Rehabilitation Act of 1973, 29 U.S.C. 701, at §794. She charges that it did so by discriminating against a handicapped individual, solely because of her handicap. Since petitioner has not met her burden of proof under the New Jersey Law Against Discrimination, it follows that she fails also under this federal statute, which would impose the same evidentiary process.

Additionally, it has not been shown that the Commissioner of Education, deciding controversies or disputes arising under the school law, pursuant to N.J.S.A. 18A:6-9, has jurisdiction to adjudicate a claim grounded in the federal Rehabilitation Act. Assuming that were so, there is no proof in the *stipulated* record that petitioner is part of a federally-funded recipient program, as required by 29 U.S.C. 794, or 28 C.F.R. 41.52 .

CONCLUSION

I **CONCLUDE** therefore, based on my review of the entire record, including the arguments of counsel, that:

1. Respondent Board has unreasonably withheld petitioner's employment and/or adjustment increment, *Kopera, supra*. That increment must be reinstated.

2. Petitioner has failed to prove discrimination under the New Jersey Law Against Discrimination, specifically at N.J.S.A. 10:5-4.1.

3. Petitioner has failed to show that the Commissioner of Education has jurisdiction over any violation of the federal Rehabilitation Act of 1973. Even if such jurisdiction existed, she has not proven discrimination by the Board which is prohibited by that federal law.

ORDER

I **ORDER** therefore that petitioner's increment for the 1988-89 school year be restored.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

March 6, 1989
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

March 7, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 9 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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VONITA SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board avers that the ALJ in making his conclusions of law misconstrued certain documents in the record supporting its position and misapplied the law on increment withholding. As to this, the Board contends that petitioner failed to establish by a preponderance of competent and credible evidence that it unreasonably or arbitrarily withheld her salary increment for the 1988-89 school year.

In support of this contention, the Board argues that petitioner's 67.5 days of absence over a three year period in which she exceeded her statutory and contractual entitlements establish a clear pattern of excessive absenteeism. In keeping with the rulings of the Commissioner in such cases as Bialek et al., supra, and Angelucci, supra, it concluded that her effectiveness as a teacher was diminished in that there was a disruption in educational services.

The Board also avers that its policy on staff attendance does not violate the Kuehn standard or N.J.S.A. 18A:30-1 et seq., arguing, inter alia, that it does not base its determination solely on a 5% or more incidental absentee rate. It points to the fact that if it did, then surely petitioner's increment would have been withheld in the 1985-86 and 1986-87 school years as well.

Lastly, the Board argues that it properly withheld petitioner's increment despite a satisfactory year-end evaluation. As to this it points to the fact that her supervisor identified the poor attendance rate as a problem area in need of improvement even though she recommended that an increment be granted. It maintains that (1) the principal and superintendent did not overrule the supervisor in that the action was taken by the Board prior to the supervisor's evaluation and (2) a satisfactory year-end evaluation does not preclude a Board from making a separate determination regarding an employee's performance so long as the independent grounds upon which it makes its determination are reasonably predicated. Carroll v. Bd. of Ed. of Sussex-Wantage Regional,

decided by the Commissioner August 26, 1985, aff'd with modification State Board February 4, 1987, aff'd New Jersey Superior Court, Appellate Division October 26, 1987.

Upon review of the record in this matter including the Board's exceptions, the Commissioner agrees with the ALJ's findings and conclusions and adopts the initial decision as his final decision. While the policy itself does not compel any given disciplinary penalty for exceeding the 5% incidental absentee rate used by the Board to identify excessive absenteeism, its application in the circumstances of this matter was clearly driven by the 5% incidental absence rate such that the Board's determination to withhold petitioner's increment appeared mechanistic and formulaic. As the ALJ states:

> ***While the Board may have "considered" the fact of petitioner's illness, there is no showing, in answer to a prima facie case, of discontinuity causing educational harm, as the Board insists. There is only the formulaic statement in Principal Hilton's notice (Exh. J-23) and the policy itself (Exh. J-8) (Initial Decision, ante)

While the principal in this matter and the Board are to be commended for the concern and efforts taken to confront poor attendance, they are cautioned that in order for an increment withholding to be upheld where absenteeism is the issue there must be clear evidence of having considered (1) the nature of the illness and not just the number of absences Kuehn, supra; Meli, supra) and (2) the impact of the absences on continuity of instruction. The consideration at both the principal and Board levels on these two critical elements appears to have been mechanistic and cursory. In other words, the record simply does not demonstrate clearly that the individual circumstances of the absences were weighed by either the principal or the Board vis-a-vis the 5% excessive absentee rate or that the concern for the impact of absences on continuity of instruction was considered beyond one brief reference in exhibit J-23. Exhibits J-13 through J-21 are merely fill in the blank forms.

This is not to say, however, that petitioner is right in her argument that the burden of proof shifts to the Board in regard to continuity of instruction for, as expressed in Meli, 1984 S.L.D. 906, 913, aff'd State Board 921:

> Common sense dictates that a teacher's continued absence must, at some point, have a negative impact upon her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress. This conclusion is summarized by the Commissioner in Reilly, supra, where the Commissioner stated as follows:

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process. (at 913-914)

What is necessary to demonstrate, however, is that the concern for continuity of instruction was specifically conveyed to the staff member during the period in which the excessive absenteeism was occurring, not merely at the end of the line of a series of fill in the blank memos.

Accordingly, the Board is ordered to restore any and all salary increments denied petitioner.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 18, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4292-88
AGENCY DKT. NO. 132-5/88

DARIUS TRANSKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY AND JEROME HARRIS,
Respondents.

Arnold M. Mellk, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

Gregory G. Johnson, Esq., for respondent (Lemuel H. Blackburn, Jr., attorney)

Record Closed: January 17, 1989 Decided: March 3, 1989

BEFORE **RICHARD J. MURPHY,** ALJ:

STATEMENT OF THE CASE

Petitioner Darius Transky challenges the action of the respondent, the Trenton Board of Education (Board), in withholding his increment for the 1988-89 school year, pursuant to N.J.S.A. 18A:29-14, on the grounds of alleged insubordination and excessive absence. The question presented is whether the petitioner can demonstrate that the withholding of his salary increment was arbitrary, capricious, unreasonable and thus without good cause under the statute. For the reasons set forth below, the action of the respondent Board of Education in withholding petitioner's increment is affirmed.

PROCEDURAL HISTORY

The petition in this matter was filed with the Commissioner of Education on May 18, 1988, and the case was transmitted to the Office of Administrative Law on June 14, 1988, for hearing as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on August 19, 1988, and the hearing was held on October 28 and December 2, 1988, and concluded on January 17, 1989, at which time the record closed.

FINDINGS OF FACT

The material facts are not in dispute (unless otherwise noted), though there is considerable controversy as to whether the Board had sufficient basis to withhold Transky's increment. The Board justifies this action on the basis of Transky's alleged insubordination toward his department supervisor, Jerome C. Harris, on October 30, 1987, when petitioner refused to accept reassignment of several students into his classroom. The Board also asserts excessive absence as an additional basis for withholding petitioner's increment. The insubordination alleged will be reviewed first in that it was first cited by Department Supervisor Jerome Harris on March 29, 1988 as the basis for his recommendation that Transky's increment be withheld (P-1). Harris added the justification of excessive absence two days later, on March 31, 1988 (P-2).

(1) Insubordination

The incident that ignited this increment controversy occurred on October 30, 1987, when the petitioner allegedly refused to admit into his class three students who had been transferred from another "house" within the school. Transky does not dispute that he did this, but he justifies his action by citing overcrowding in his class and school policy to discourage transfers. He also notes that another teacher who initially declined to admit additional students was not punished with a withheld increment.

By way of background, Trenton Central is organized on the basis of "houses" constructed according to the emphasis of course work offered. In a welcoming letter to parents and guardians, Principal Elizabeth L. Bates outlined the house plan at Trenton Central High School:

> Our students, your children, have wisely chosen their programs designed to prepare them for what they want in the future. We have given each student his program of choice and placed him in one of our Houses. Each House has a different group of administrators, counselors, and teachers of English, science, mathematics, and social studies. The students must remain in that House program for the entire year. We can not be moving students from House to House during a school year, but we can adjust for ability levels of students in every House. Also each House will provide reading, mathematics, and writing labs for the students of that House who have not passed all parts of the HSPT or MBS (N.J. State Tests).
>
> Out largest House is the Greenwood House which includes students seeking the vocational trades or business offices program. Mr. Carl Vizzoni and Mr. Alexander Brown will administer the Greenwood House.
>
> Our students who have been since grade eight preparing for college are a part of the Hamilton House under the leadership of Mr. Thomas Humphrey and Dr. Joseph DiBiase.
>
> The Chambers House will be guided by Mr. Paul Gmitter and Mr. Eugene Abdill, and will include students who are making a recent transition into an academic college preparatory program or have yet to choose a specific program.
>
> Our students will intermingle from three houses in lunch periods, gym classes, JROTC, art, music, and all elective classes so our school spirit will still center around Trenton Central High School while the House Vice Principals develop individual House pride.
>
> [P-7; emphasis added]

The Greenwood House, from which the three students were transferred, offers industrial and commercial courses and an appropriate course of mathematics, while the Chambers House, in which the petitioner teaches, offers algebra geared toward a college-bound group of students. Transky had taught math and psychology at Trenton High School since 1979, had served as chairman of the Faculty Cabinet, and had not previously had an increment withheld or been subjected to other discipline.

At all times relevant to this petition, Darius Transky's supervisor was Jerome C. Harris, who was assigned as the department supervisor for mathematics in grades 7-12. Harris is responsible for math programs in all of the "houses" of Trenton Central High School and reports to Principal Elizabeth Bates, who is not a mathematics teacher and

who, according to Harris, leaves the details of administration in that area to him. Harris regarded the "Chambers House," where Transky taught math, as a "transitional" house between the academically-oriented Hamilton House and the business-oriented Greenwood House. Harris did not specifically recall seeing principal Bates's August 11 letter to parents stating that students must remain in the selected house for the year, but he stated that it was possible that he had seen it. In fall 1987, a problem developed with overcrowding in the algebra classes offered by the Hamilton House. On October 23, 1987, Harris is issued a memo to all algebra teachers suggesting a procedure to alleviate this problem:

1. Students are assigned to a House if most (or all) of their classes coincide with that House's program.

2. We cannot deny any student the opportunity to take Algebra if she/he meets the proper placement criteria, regardless of House.

3. We did not offer Algebra in our Greenwood House only because it did not contain enough Algebra students to warrant any classes.

4. Any Greenwood House student eligible for Algebra was placed in a Hamilton House or Chambers House Algebra class, whichever had the smaller class size.

5. At present all Hamilton House Algebra classes number in the high 30s, double the sizes of their Chambers House counterparts.

6. It is in the Greenwood House Algebra students' best interests to place them in the Chambers House Algebra classes.

7. These students should not be behind in their subject matter since they have been attending classes in the Hamilton House.

8. These students are now being moved to Chambers House Algebra classes in order to alleviate overcrowding.

9. Upon their arrival to your classroom door, with a Schedule Change form and/or their counselor, please accept these students into your Algebra classes.

[R-1; emphasis added]

Transky responded to Harris's October 23, 1987 memo and criticized the proposed transfer of students from Greenwood to Chambers as not being a "sound educational concept," move in that Algebra was a more academic subject and should be reserved for the more academic Hamilton House (P-29). He also noted that he had discussed with Harris the difficulty of teaching Algebra to students needing remedial basic arithmetic. He also proposed a solution to the overcrowding, and cautioned Harris on breaking up the "House concept" (Ibid). Transky requested a reaction to his proposal, but there is no evidence of Harris's having given one, beyond his later direction to Transky to sign students into his class.

Pursuant to Harris's policy, on October 26, 1987, a request for change of schedule was approved for three students to transfer from Greenwood into Transky's algebra class in the Chambers House. Two of these students had current averages of 60 or below in their Greenwood math classes (P-8, P-10, P-19). This transfer took place approximately two weeks before the end of the marking period and the students' records were not transferred with them. Requests for change of schedule were also approved to transfer students from Greenwood into Geraldine Newsome's Chambers House algebra class. These transfers were approved by Stanley Krysztofik, a vice principal at Trenton Central High School assigned to support services. Both Transky and Newsome balked on admitting the new students out of concern with the appropriateness of the transfers, but Newsome did not put up as much resistance and allowed the students into her class. Transky was adamant in his decision not to admit the students from Greenwood House, and was concerned with Principal Bates's earlier policy statement that students must remain in their Houses for the entire year and not be moved during the course of the year (P-7). Transky claims, and the Board does not dispute, that he discussed the subject of the transfer with the three students who were scheduled to switch into his class and explored their ability to handle the class material, as well as the current averages in their Greenwood House. He claims that he therefore did not merely request that the students leave, but rather that he discussed pending assignments and requirements, as well as any catch-up work that was required. He stated that the students indicated that they had been getting along well with their previous teacher. Transky also maintains that the students were sent over without their records, and that he sent them back to their prior teacher to obtain their records, anticipating that they would return to his class with those records.

On October 29, 1987, Krysztofik requested in writing that Transky "Please sign the students into your class . . ." and cited Harris's memo of October 23, 1987, directing the transfers (R-4; item 9). Transky requested in writing that Krysztofik rescind these schedule changes and suggested that these students be put in the algebra class being created at the Greenwood House (Ibid). Transky responded with a memo that stated "I cannot sign students in from another house" (R-4; item 10). Krysztofik did not discuss the matter with Transky either before or after the schedule change; he testified that his scheduling duties were purely ministerial. The day before the memo from Krysztofik to Transky, Priscilla Anderson, the guidance counselor assigned to Trenton Central High School, sent the following memo to all teachers:

> Mrs. Bates & Mr. Kristofik have asked us to discourage student schedule changes. If you feel a change is necessary, we must arrange a conference with the student's parents/guardian, which will include: (1) Teacher (2) Student (3) Dept. Head (4) Counselor. If after the conference, all agree a change is necessary, please get written approval from the house administrator. I will then write a request for change of schedule. . . . [P-13]

This memo involved requests for transfers initiated by teachers or students, but provides evidence of the general policy of discouraging students chedule changes, which the petitioner cites in support of his decision to decline to admit the three students transferred in October 1987.

After Transky declined to comply with Krysztofik's request of October 29, the matter was brought to Harris's attention, and he sent the following memo to Darius Transky on October 30, 1987:

> We now have 20 Algebra I students identified as Greenwood House who are (or were) with Mrs. Husth.
>
> We are opening a new section of MN392 with Mrs. Lisa Dudley, which will commence at the start of the second marking period.
>
> Some of these students' schedule changes into your classes have already been processed by Mr. Krysztofik, and some have not. Those not processed by today will not be processed until the end of the first marking period; at which time they will transfer directly from Mrs. Husth to Mrs. Dudley. Those who have been processed are on your rolls until they receive a second schedule change.

> I will not permit students to be victims of beaurocracy [sic], and be bounced around daily between vice-principal and department supervisor and counselor and teacher like ping-pong balls. Regardless of logistics or legalities of House Plans or anything else, these students are entitled to their Algebra I instruction, they want to go to their classes daily, and they will. No matter how noble your reasons, you do not have the authority to bar these students from entering your classes. I am also tired of parents and counselors screaming at me.
>
> Mrs. Husth is willing to keep all of these students with her until the transfer to Mrs. Dudley, and she will give a first marking period grade. However, Mr. Krysztofik says that an initiated schedule change must be completed and signed by all involved teachers; he also said that an incomplete schedule change cannot be rescinded.
>
> My first concern is these students' continuous Algebra I education. Unless you hear differently from Mr. Krysztofik, Ms. Pratico, Mr. Abdill, or me, I am directing you to sign-in, accept, retain and teach these Greenwood House students until a second schedule change is processed. Keep their temporary attendance records, etc., on the attached rollbook pages, and forward them to Mrs. Dudley at the proper time.
>
> If you feel that a grievance is warranted, I invite you to contact your TEA representative; however, your cooperation is mandatory. Thank you. [R-2; emphasis added]

Transky responded to Harris's memo of October 30 with a note attaching guidance counselor Anderson's above-quoted memo of October 28 and stating that "I will follow Mrs. Bates instructions unless she rescinds her directive," referring to Principal Bates's August letter to parents (R-4; item 8). Transky also wrote a note to Principal Bates stating that:

> Who is determing how student schedule changes are to be made? Please answer me as I have been LEGALLY threatened by my Dept. Chairman if I don't do what he has told me to do against your directives. [Ibid]

Principal Bates testified that she was concerned when the petitioner would not accept students into his class, and she explained that the proper procedure was to accept the students by signing them in and then make a formal complaint to Krysztofik. In no instance, Principal Bates testified, were teachers permitted to merely refuse to accept students who had been transferred into their classes.

As stated, Transky's initial response to Harris's directive of October 30, 1987, was to bring the matter to Bates's attention prior to complying. There is no written record of any direct response to the petitioner from the principal. Vice-principal Krysztofik reported directly to the principal in these matters, and he had already requested that Transky sign the students in, prior to Harris's October 30, 1987 memo. Sometime in the first few days of November 1988 (the proofs do not establish exactly when), Transky signed the students in. On November 9, 1987, Harris advised Principal Bates that he had decided to formally charge Transky with insubordination because of his response, or lack of response, to the October 30, 1987 directive to sign the students in. Harris stated, and the petitioner does not dispute, that:

> . . . I issued a directive, which I had you preview, to Mr. Transky on October 30 (attached) to admit any such students to his class. In spite of this, Mr. Transky still refused to comply.
>
> Not only did Mr. Transky disobey my confidential directive, he critiqued, it, and sent edited copies to several colleagues and administrators . . . He even sent an exposed edited green copy to me by a student.
>
> Most importantly, Mr Transky's deliberate, blatant lack of compliance cost these three students at least two days of Algebra instruction for which they tried to go to class . . . [R-4; item 11; emphasis added].

A month later, on December 9, 1987, Transky requested that the charge of insubordination be withdrawn, and he set forth a defense of his action in writing:

> I would appreciate you withdrawing and destroying the memo where you accused me of insubordination. I was merely trying to abide by the educational philosophy of the HOUSE PLAN CONCEPT. When you tried to transfer 3 GREENWOOD HOUSE students from their HAMILTON HOUSE Algebra class to my CHAMBERS HOUSE Algebra class 2 weeks before the end of the 1st quarter, you were doing a great educational disservice to those students . . . I could not accept them into my class and give them the grade they deserved for the 1st quarter . . . I recommended, in writing, that you set up an Algebra I class in the Greenwood House to service such students (I had always had several Business-Vocational Students take Algebra I to prepare to go to Trade School or Mercer County. You agreed this was a good idea and set up such a class . . . to begin 2nd quarter . . . My point in refusing to technically sign in such students was that they would appear on my 1st quarter computer grade sheets and I would have

> to give them their 1st quarter grade. Their 1st quarter Algebra teacher should have had these students appear on her Computer sheets and she should give them their 1st quarter grades. No sound educational system would mess up these students, but by insisting on doing the wrong thing, these students names appeared on Mr. Transky's 1st quarter rolls. To date, 2 of these 3 students have not been transferred to their proper Algebra class . . . Mrs. Newsome did exactly what I did and did not get a memo of insubordination. "R-4; item 11; emphasis added]

Harris responded on Transky's memo that Mrs. Newsome was not charged because she complied with his directive, despite some initial misgivings (Ibid). Mrs. Newsome testified that she was confused as to the procedure on schedule changes from house to house and had requested advice as to the proper procedure on November 2, 1987 (P-14). Vice-principal Krysztofik was asked to respond to this inquiry and did so by forwarding a copy of Principal Bates's August 11, 1987 letter to parents and highlighting that portion indicating that students must remain in the House program for the entire year and cannot be moved from house to house during the school year (P-7). Newsome's request of Bates had been prompted by Harris's memo of October 23, 1987, advising that students would be transferred from Greenwood to Chambers. She also wrote to Harris on October 27, 1987, to express a number of concerns not related to this case, but also complained about the transfers:

> ". . . please help me to see how one math teacher warrants a lightened class load while others do not. For years I asked to get some relief for my classes numbered in the high thirties, but nothing happened . . . How can you have the nerve to alienate the overcrowded Algebra I class in the Hamilton House by dumping on us in the Chambers House? Is there some unforeseen reason, I wonder? The only way my load was lightened in the past was the students slowly dropping out. Favoritism is a poor administrative gesture and to be blatant with it is even worse" (P-11).

Harris responded to Newsome on October 28, 1987:

> . . . it is my management prerogative and duty to set or revise any department procedure that I deem necessary, and I don't have to justify or defend any administrative decision I make to my staff. However, I do respect you, and appreciate your concern; therefore, my response follows:
>
> Teachers with overcrowded classes did report them in early September, but counselors were directed not to make any schedule changes, no matter how essential, until all late registrants were

> placed in classes (up through September 30). If you currently had overcrowded classes which included Greenwood House students and Hamilton House didn't, we would be moving your Greenwood House students to Hamilton House classes. The only "unforeseen reason" was student numbers . . . Mr. Krysztofik and I are working out a better, more permanent solution, which I shall share with you under separate cover .
>
> If you were as concerned as you say about our students, you would not have refused admittance of some Greenwood House transfer students into your class, you would not have ignored my enclosed October 23 "Alleviation Procedure" memo, you would not have denied these students their Algebra I instruction for which you are being paid. While writing this very letter, I had to answer a phone call and defend your actions, and your attitude, to an irate parent; I had no "leg to stand on." [P-12]

Newsome did not respond in writing to this letter, although she did request advice from Principal Bates on November 2. She also discussed the matter with Harris on or about October 28, and after that date did not refuse to accept students into her class. She was aware of Transky's refusal to comply with Harris's directive. The "better, more permanent solution" to which Harris refers in his October 28, 1987 letter to Newsome was the creation of an additional section under teacher Lisa Dudley in the Chambers House to handle the overcrowded conditions at Hamilton House algebra course.

(2) Excessive Absence

The second basis for withholding Transky's increment was his allegedly excessive absences. As discussed above, this matter was not initially cited by Harris in his first memo recommending increment withholding, but, after consultation with the district personnel office, it was included and formed part of the basis for the Board's decision to withhold. Harris claims that he was advised to add the additional matter of the excessive absence by Clifford Zdanowitz of the district office.

There is no dispute as to the facts of Transky's attendance. As of March 31, 1988, the 130th day of the work year, he had been absent for 19 and one-half days of incidental absence and six days of long term absence, which were consecutive days (P-4 - P-6). His attendance was perfect during October 1987, and Harris commended him to Principal Bates for that (R-4; item 11). The parties also stipulated that the Board had based its decision to withhold Transky's increment on absences in 1986-87 as well as on

1987-88 absences (25 and one-half days). In 1986-87, petitioner was absent for 89 days because of personal illness and other problems (P-3).

The Trenton Board of Education's policy on staff attendance, adopted in 1982, notes the importance of regular attendance and authorizes the superintendent and administrative staff to use reasonable means to verify absences and also to take additional lawful action, if warranted, to discourage unnecessary absences and ensure that employees do not abuse leave benefits (P-15). The respondent Board does not challenge the legitimacy of the petitioner's absences, which were related to depression and stress, but rather maintains that these absences were excessive. The Board regulation provides:

> Administrators shall review these attendance records periodically and at least a minimum of once a month. Following this review, on a case by case basis, they shall conduct a conference with any employee whose absentee patterns falls within the criteria listed below . . .
>
> (a) Excessive number of incidental absences; (5% or more by January of each year;
>
> (b) Absences on same day of week over a period of time;
> (c) Unauthorized absences;
>
> (d) Repeated absences before and/or after holidays and other non-working days;
>
> (e) Use of leave time for reason other than that for which said time is provided;
>
> (f) Absences creating extended weekends;
>
> (g) Other patterns of abuse of available leave benefits.
>
> The administrator shall submit to employees a written summary of conferences held and shall maintain a written record of the conference. This record may be used a [sic] part of the employee's evaluation and/or may become part of the employee's personnel file. Employees may have increments withheld and/or be recommended for termination based on unacceptable attendance patterns.
>
> The employee may review this conference record and/or his attendance record and submit a written statement or explanation in response, which shall also become part of that employee's record. [P-15 at 2; emphasis added]

An attendance conference form prepared by Jerome Harris indicates that attendance conferences were held with Transky on seven occasions between October 1987 and June 1988 (P-4). The category titled "Conference Summary" leaves room for comment, but in each case it merely indicates that a conference was held. The conference forms on file for 1986-87 list the days of absence during that period but provide no comments under the conference summary heading (P-5). The staff attendance policy was forwarded to Darius Transky at P.O. Box 7891 in Trenton, New Jersey, on an unspecified date following the policy promulgation in July 1982. Harris claims that he gave "numerical" summaries to the petitioner of his attendance in 1986-87 and 1987-88, and that he regarded this information as a sufficient "written" summary of the conference under the Board policy and regulation. Prior to March 1988, Harris did not specifically advise Transky that his attendance was unsatisfactory and, in fact, he never used that term when communicating with Transky on the issue of attendance. He claims that he expressed dissatisfaction with the attendance on a numerical basis by citing the number of days in the work year and the number of days absent (P-6). The notice of March 31, 1988, noting the 25 and one-half days of absence also requested that Transky carefully read his district regulations and procedures regarding absenteeism (Ibid). In light of the petitioner's extensive absence during the 1986-87 school year, he received no evaluation for that period. He was given a contract for the 1987-88 school year and there was no recommendation at that time that his increment for the next year be withheld because of his long-term absences. Harris denied at the hearing that the consideration of Transky's absences had been an "afterthought" in 1988, and maintained that it was considered at the district's suggestion and at his urging as part of the reason for denying an increment to Transky. Harris also conceded that prior to 1988 he had twice recommended that Transky not receive an increment, but that these recommendations had not been accepted by the Board. During Transky's absence in 1986-87, Harris had to arrange for extended coverage by substitutes to cover his classes.

Transky claims that, prior to the March 1988 notice that Harris was recommending the withholding of his increment, he had not been advised that he had been excessively absent, and he claims that he has never had a conversation or formal conference with Harris as to attendance. On April 28, 1988, he signed his evaluation which indicated that he should improve his incidental attendance, but he claims that he had not been put on notice of an attendance problem prior to that and that he did not regard Harris's memo of March 31 as a statement that his absence for 25 and one-half out

of 130 days of school was deemed unsatisfactory. As noted, that memo did not specifically state that this level of attendance was excessive and could possibly subject the petitioner to the withholding of an increment (P-6). Transky acknowledges that he received "something" concerning attendance from Harris prior to March 1988, but denies that he was ever verbally informed that his attendance was unsatisfactory. He further denies ever having seen the attendance conference form and claims that he never received a written summary as to his attendance. He acknowledges that some conferences were held with Harris, but claims that they did not address the issue of attendance. There is no dispute that Harris commended Transky for perfect attendance in October 1987. Harris claims that conferences were held on October 7, 1987, and November 6, 1987, as to attendance, but there is no description of the contents of the conferences on the attendance conference form (P-4) and Harris concedes that he never verbally advised Transky that his attendance was unsatisfactory or that it was becoming a problem. Harris also stated that he was aware of the Trenton Board's attendance policy but could not recall whether he had reviewed it before considering Transky's attendance record. There is no evidence that copies of the attendance conference reports were made available to the petitioner, although he does not dispute the days of absence noted on those reports.

Principal Bates recalled that she discussed the subject of absenteeism with the petitioner and that she had advised him that his absences were becoming excessive and hurting his class. She could not recall the specific date of this meeting and she has no record of it other than the evaluation form ultimately given to Transky. The petitioner claims that he met with Bates on or about December 23, 1987, but claims that the meeting was for a different purpose. Principal Bates's recollection of the timing of her meeting with Transky is not clear enough to contradict his account. There is evidence of a meeting between Bates, Harris and Transky, on January 22, 1988, but there are no records as to the exact subject matter covered by that meeting. Given the fact that Harris's recommendation made in November 1987 for withholding of an increment was based entirely on the subject of insubordination, I **FIND** it most probable that this meeting was confined to the subject of that insubordination and did not address the issue of excessive absences, which was not cited by Harris until March 1988, some three months later.

Beyond the question of insubordination and the allegation of excessive absences, Transky was regarded as an excellent teacher (R-3) and had been commended for his innovative proposals and activities (P-22, P-23).

ISSUE

The question presented is whether the action of the respondent Trenton Board of Education in withholding petitioner's increment for the 1988-89 school year was arbitrary, capricious and unreasonable so as to be invalid as an abuse of the Board's discretion under N.J.S.A. 18A:29-14.

DISCUSSION AND CONCLUSIONS

Boards of Education are empowered to withhold increments under certain circumstances:

> [a]ny board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education . . . The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. . . . [N.J.S.A. 18A:29-14; emphasis added]

Annual increments are "in the nature of a reward for meritorious service to the school district" and are a management prerogative that serves the purposes of "affording teachers economic security and of encouraging quality in performance." See, North Plainfield Education Assoc. v. Bd. of Ed. of North Plainfield, 96 N.J. 587, 593 (1984); see, also, Bernards Township Board of Education v. Bernards Township Education Association, 79 N.J. 311, 321 (1979). Lack of knowledge on the part of teachers and principals as to the criteria used by a school superintendent to make a recommendation of withholding of an increment can render that action arbitrary, especially where based on only one criterion of evaluation. See, Basile v. Bd. of Ed., 2 N.J.A.R. 199 (1980). There is no question that either insubordination or excessive absences can, under the appropriate circumstances, constitute good cause for the withholding of an increment.

The petitioner argues, as to the absences, that the Board of Education did not consider the circumstances of those absences nor the possible detrimental effect on education, but instead based its decision entirely on the fact that the number of absences violated a numerical guideline, even though petitioner's sick days were guaranteed by contract. Petitioner notes that he received his increment following the 1986-87 school year, notwithstanding his extensive absences due to illness in that period. Petitioner also characterizes the allegation of excessive absences as an afterthought used to support a dubious insubordination charge. As to insubordination, Transky claims that his refusal to sign-in students from other houses was based on school policy and sound educational practice. He further notes that, although other teachers also objected to the transfers, he alone was punished by the loss of an increment.

The Board defends its action by claiming that it reasonably concluded that the respondent's extensive absences had a negative effect on his students and that the petitioner had the burden of proving that his absences did not have such a negative effect. The Board also argues that Transky's action in refusing to accept students when specifically directed to do so was insubordinate and constituted good cause, together with the excessive absences, to warrant the withholding of his increment.

The purpose of the Commissioner's review on appeals of withheld increments is to determine whether the Board had a reasonable basis for its conclusion, and not to substitute his judgment for that of the Board and redetermine for himself whether a teacher's performance had in fact been unsatisfactory. See, Kopera v. Bd. of Ed. of Town of W. Orange, 60 N.J. Super. 288 (App. Div. 1960).

As to Transky's allegedly excessive absences during the 1987-88 school year, the Board did not offer any evidence that these absences caused the petitioner's effectiveness as a teacher to be diminished, nor did it submit any convincing proof that these absences resulted in a discontinuity of instruction or that they had any other negative impact on his students. Transky's services as a teacher, notwithstanding his absences, were deemed to be excellent. There is also no evidence that the Board considered the particular circumstances of Transky's absences in the 1987-88 school year. His attendance during that period had markedly improved over 1986-87, when he was absent for an extended period because of legitimate medical excuses, which the Board did

not challenge or use as the basis for withholding an increment for that period. The Board now cites those earlier absences as evidence of a chronic and continuing pattern of absenteeism that warrants the withholding of an increment for petititioner's performance in the 1987-88 school year.

In order for a Board of Education to reasonably and lawfully consider absences as part of a decision to withhold a increment, the Board must consider the particular circumstances of the absences and assess the degree of any discontinuity of instruction or other negative impact on students that was caused by the absences. See, Meli v. Bd. of Ed. of the Burlington County Vocational-Technical Schools, OAL DKT. EDU 3691-85 (Jan. 23, 1986), reversed, N.J. Comm. of Ed. (Mar. 10, 1986), aff'd, N.J. State Board (July 7, 1986), reversed, N.J. App. Div. (A-5820-85T7, May 21, 1987)(unreported). Withholding of an increment cannot be based solely on a number of absences, without consideration of these other factors. See, Kuehn v. Bd. of Ed. of Teaneck, OAL DKT. EDU 1077-81 (Oct. 9, 1981), reversed, N.J. Comm. of Ed. (Nov. 25, 1981), reversed, N.J. State Board (Feb. 1, 1983). In this instance, the Board has failed to offer any proof, beyond the mere numbers, that petitioner's absences in the 1987-88 school year had a detrimental effect on his students or on the educational process. By bringing up Transky's extensive absences in the 1986-87 school year (which were not then seen as reason to withhold his increment), the Board, in effect, concedes that his absences in the 1987-88 school year, which were far fewer did not have a sufficiently detrimental impact to warrant withholding of his increment for the next year. While a pattern of chronic absence over a number of years may be considered by a Board in its decision to withhold an increment, it appears that the respondent Board in this case brought up attendance problems in the 1986-87 school year to buttress its case against Transky, which chiefly rested on grounds of insubordination. Because the Board has not met the standards of proof established in Meli, I **CONCLUDE** that petitioner's increment for his performance in the 1987-88 school year should not be withheld on that basis.

I further **CONCLUDE**, however, that Transky's persistent action in refusing to admit students into his class was insubordination and was sufficiently serious to warrant the withholding of his increment. A single incident alone if intentional and sufficiently serious can provide a basis for withholding an increment. See, Smilon v. Mahwah Bd. of Ed., OAL DKT. EDU 6441-87, aff'd N.J. Comm. of Ed. (May 13, 1988), reversed N.J. State Board (January 4, 1989). Transky's action in refusing to admit three students into his

class in October 1987 was in direct defiance of a direct order from his department supervisor and was also contrary to a written request made by vice principal Krysztofik. Transky was not the only teacher who objected to transfers of students, but he was the only one who persisted in his objection to the point of defiance of a written order. However well intentioned, this behavior cannot be tolerated. While the petitioner had a right to challenge — through the channels provided — the directive to admit students, he did not have the power to unilaterally decline to sign students into his class and continue to refuse to admit them. His action in doing so despite orders to the contrary disrupted the education of the three students transferred who were, as Transky's supervisor correctly pointed out, treated like "ping-pong balls." I **CONCLUDE** therefore that the Board of Education had a reasonable basis, in the form of this intentional and continued insubordination, to withhold petitioner Darius Transky's 1988-89 increment for his performance in the 1987-88 school year.

ORDER

On the basis of the above findings of fact and conclusions of law it is **ORDERED** that the petition is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

MAR. 3, 1989
DATE

RICHARD J. MURPHY, ALJ

March 7, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 8 1989
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

ct

DARIUS TRANSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON AND JEROME HARRIS, MERCER COUNTY,	:	DECISION
RESPONDENTS,	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner excepts to the ALJ's determination that the Board had a reasonable basis in the form of intentional and continued insubordination to warrant withholding of his increment for the 1988-89 school year. In support of this, petitioner cites the initial decision, ante, wherein the ALJ notes his testimony that he did not refuse to admit the students but, rather, requested they bring their records upon transfer so he might determine their ability. However, the students did not return to his class.

Moreover, petitioner believes it important that the ALJ failed to refer to the testimony of his supervisor, Vice Principal Pratico,* characterizing such omission as one of a grave sort. According to petitioner, the substance of Ms. Pratico's testimony was that the transfer at issue was improper and that he was not required to sign in, accept, retain and teach the three students. Also, she is said to have testified that petitioner's action in the circumstances was the appropriate response to the math supervisor's directive.

Additionally, petitioner avers that Exhibit P-29 clearly establishes the fact that he was concerned about the students' receiving a thorough and efficient education and his role in participating in an orderly process. Further, it is petitioner's contention that there was uncontroverted testimony at the hearing that the creation of the additional section of algebra was due to his recommendation, yet the ALJ omitted any reference to that testimony.

Upon review of the record in this matter and petitioner's exceptions, the Commissioner agrees with the ALJ's findings and conclusions and adopts the initial decision as his own. Initially,

*Petitioner points out that the witness list at page 19 incorrectly lists Edna Pratico as "Edward Pratico."

it is noted that petitioner raises several exceptions referring to his own testimony and that of a vice principal; however, he has provided no transcripts of the proceedings. Hence, in accordance with In re Morrison, 216 N.J. Super. 143 (App. Div. 1987), the Commissioner has no duty to review them prior to rendering his decision. Morrison reads in pertinent part:

> ***Here, Morrison should have provided the Commission with the portions of the transcript relevant to the exceptions which he filed so that it could have reviewed them. Since he failed to do so, no duty arose for the Commission (or its delegate) to review them before deciding on a course of action regarding the findings and recommendations of the ALJ. (at 159)

Notwithstanding petitioner's exceptions to the contrary, the record amply supports that the Board's action was a reasonable exercise of its discretionary authority. As correctly stated by the ALJ:

> However well intentioned, [petitioner's] behavior cannot be tolerated. While the petitioner had a right to challenge -- through the channels provided -- the directive to admit students, he did not have the power to unilaterally decline to sign students into his class and continue to refuse to admit them. His action in doing so despite orders to the contrary disrupted the education of the three students transferred who were, as Transky's [mathematics] supervisor correctly pointed out, treated li#e "ping-pong balls." (Initial Decision, ante)

As to the issue of absenteeism, the Commissioner fully concurs with the ALJ that there is no evidence in the record that the Board considered the particular circumstances of petitioner's absences in the 1987-88 school year. Kuehn, supra; Meli, supra It is necessary, however, to clarify several other points of the ALJ regarding the issue of contractual and statutory entitlement to sick leave and increment withholding and the issue of burden of proof with respect to impact on excessive absenteeism or continuity of instruction.

Initially, the Commissioner would stress that regardless of how excellent a teacher's performance may be when present and even if absences are legitimate and within statutory and contractual entitlements, excessive absenteeism may be grounds for increment withholding. Trautwein v. Bd. of Ed. of Bound Brook, N.J. Superior Court, Appellate Division 1980 S.L.D. 1539; Angelucci et al. v. Bd. of Ed. of West Orange, 1980 S.L.D. 1066, aff'd State Board 1981 S.L.D. 1386; Ricketts and Pierce v. Bd. of Ed. of Haddonfield, decided September 17, 1984, aff'd State Board February 6, 1985, aff'd N.J. Superior Court, Appellate Division March 10, 1986; In re Burns, School District of Newark, decided March 8, 1984, aff'd State Board October 24, 1984

Moreover, the Board does not need to make a prima facie showing that the teacher's performance was lessened or that discontinuity of instruction was proved by the Board. In the Trautwein case the Appellate Division specifically rejected the Commissioner's and State Board's affirmance that no prima facie showing was made that Trautwein's performance was lessened by her excessive absences because "*** this improperly placed the burden of proof on the board rather than on the teacher, where it belonged." (at 1542) In Meli v Bd. of Ed. of Burlington County Vocational Technical School, 1984 S.L.D. 906, aff'd State Board 921, it was determined that:

> Common sense dictates that a teacher's continued absence must, at some point, have a negative impact upon her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress. (at 913)

Moreover, in increment withholding cases the burden of proving that a teacher's excessive absenteeism is not harmful to the education process rests with the petitioner in the matter, not with a board of education. The issue of the burden of proof was addressed in Angelucci, supra, which reads in pertinent part:

> No offering is made as to how this lack of harm would be determined. Conjecturally, it might be made by a comparison between some agreed upon testing procedure administered to pupils on a basis of no absenteeism of the teacher involved with the results of such testing during periods when the teacher was not in attendance. Yearly scores are eliminated because the comparative basis of the teacher being present is not available. Comparison with other similar grades or classes is discouraged by teachers themselves. The Commissioner foresees monumental problems compounded in any such determination. Assuming, arguendo, that as stated the absences of the teachers involved have no adverse effect on their pupils what limit might be expected to be drawn, if any. Could the teachers not be present at all during the year and still have their absence have no impact on the pupils. The teachers herein involved are admittedly of outstanding ability with resultant good evaluations. Such characteristics must have accrued to the teacher when present in the classroom and actively involved with pupils, not absent from that classroom no matter how legitimate the reason. The Commissioner further determines that the argument that the teachers' absences did not lessen their performance improperly places the burden of proof on the Board, rather than the teacher, where it belongs. (emphasis supplied) (1980 S.L.D. at 1077)

What is necessary for the Board to show, however, is that the concern for continuity of instruction was specifically considered (1) by the Board when weighing its decision to withhold an increment and (2) by the supervisor(s) during the period in which the excessive absenteeism was occurring. Merely amending a notification of intent to recommend a withholding due to other unrelated causes which had already been sent to petitioner (R-1 and 2) without question fails to meet either the requirement to consider the nature and circumstances of the employee's absences or to consider the impact on continuity of instruction.

Accordingly, as clarified herein, the ALJ's initial decision is adopted and the Petition of Appeal dismissed.

COMMISSIONER OF EDUCATION

April 19, 1989

DARIUS TRANSKY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON AND JEROME HARRIS, MERCER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, April 19, 1989

For the Petitioner-Appellant, Katzenbach, Gildea & Rudner (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Lemuel H. Blackburn, Jr., Esq. (Gregory G. Johnson, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We find, in addition, that the excerpts from the transcripts in this matter supplied to the State Board by the Petitioner do not provide any basis for altering this result.

September 6, 1989

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5145-88
AGENCY DKT. NO. 214-7/88

BOARD OF EDUCATION OF MIDDLE TOWNSHIP,
Petitioner,
v.
BOARDS OF EDUCATION OF DENNIS TOWNSHIP, STONE HARBOR BOROUGH AND AVALON BOROUGH, CAPE MAY COUNTY,
Respondents,
and
BOARDS OF EDUCATION OF DENNIS TOWNSHIP, STONE HARBOR BOROUGH AND AVALON BOROUGH,
Petitioners,
v.
BOARD OF EDUCATION OF MIDDLE TOWNSHIP, CAPE MAY COUNTY,
Respondent.

Stephan J. Edelstein, Esq., for petitioner-respondent Middle Township Board of Education (Schwartz, Pisano, Simon, Edelstein & Ben-Asher, attorneys; Nicholas Celso, III, Esq., of Counsel and on the brief)

A. Harold Kokes, Esq., for respondent-petitioner Dennis Township Board of Education

Paul W. Dare, Esq., for respondent-petitioner Stone Harbor Borough Board of Education

Carl W. Cavagnaro, Esq., for respondent-petitioner Avalon Borough Board of Education (Reuss, Cavagnaro & Kaspar, attorneys)

Record Closed: January 10, 1989 Decided: March 6, 1989

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

STATEMENT OF THE CASE

This matter has been transferred to the Commissioner of Education (Commissioner) from the Superior Court of New Jersey, Law Division, Cape May County, by an order issued by the Honorable John F. Callinan, J.S.C., dated June 29, 1988. Petitioner Middle Township Board of Education (Middle) filed a complaint before Superior Court demanding judgment against respondent Boards of Education Dennis Township (Dennis), Stone Harbor Borough (Stone Harbor) and Avalon Borough (Avalon) for the difference between the pupil tuition paid and the actual tuition which should have been paid for the school years 1979-80 and 1980-81, pursuant to sending-receiving relationships. Respondents deny petitioner Middle's claim. Respondent Avalon Board filed a counterclaim and amended counterclaim alleging, among other things, that Middle Board overcharged Avalon Board pupil tuition for the school years 1971-72 through 1977-78 and, therefore, demands judgment for the overpayment, among other things. The Dennis and Stone Harbor Boards join in Avalon's counterclaim.

Upon receipt from Superior Court, the Commissioner immediately transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On September 19, 1988, the Honorable Daniel B. McKeown, Administrative

Law Judge, conducted a prehearing conference at which, among other things, the issues to be determined by this administrative tribunal were settled and the matter was transferred to the undersigned. The herein record closed on January 10, 1989. Extensions were requested and granted for the execution of this Initial Decision.

ISSUES

The parties agreed at the prehearing conference that the following matters are in issue in the instant matter:

1. Which Statute of Limitation applies in this matter, if any, and is this matter barred by whatever Statute may be applicable.

2. Whether the so-called administrative 90-day rule at N.J.A.C. 6:24-1.2 applies in this matter and, if so, is the petition of appeal barred.

3. If the petition is not barred, whether the Middle Township Board of Education establishes by a preponderance of credible evidence it has an enforceable monetary claim against the Dennis Township Board of Education for underpayment of tuition costs in 1979-80 and 1980-81 for the amount of $131,314.80, for the same period against the Stone Harbor Board of Education in the amount of $24,195.45, and for the same period against the Avalon Board of Education in the amount of $68,674.80.

4. Whether, if the Middle Township Board of Education prevails against any or all named respondent boards on any part of its claim, is the Middle Township Board entitled to interest and attorney's fees.

5. Should the claims of Middle Township, regardless of merit, be dismissed on the equitable doctrines of estoppel and laches, unclean hands, or upon the entire controversy doctrine, or if the claim sounds in contract upon accord and satisfaction.

6. Whether the Dennis Township Board, the Stone Harbor Board, or the Avalon Board establish by a preponderance of credible evidence the truth of its counter-claim against Middle Township in the amounts of $213,324, $35,226.02 and $70,920.76 respectively.

7. Regardless of the merit to the counter-claims of Dennis Township, Stone Harbor, or Avalon should their claims be dismissed against Middle Township on laches, waiver, estoppel, statute of limitations, unclean hands, and if in contract upon accord and satisfaction.

MOTION

Dennis, joined by Stone Harbor and Avalon, moves for Summary Decision on Middle's Complaint and subsequent petition. Middle opposes the motion. Having carefully reviewed and considered the entire record before me, I FIND there are no material facts in dispute and **CONCLUDE** that the instant matter meets the criteria for summary decision as set forth in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 N.J. 67 (1954). I determine, therefore, that the herein matter is ripe for summary decision and shall proceed accordingly.

STATEMENT OF FACTS

The material facts are not in dispute. The following represents those facts which are set forth in the parties briefs in support of their respective positions to either grant or deny summary decision:

1. The Boards of Education of respondents Dennis, Stone Harbor and Avalon and petitioner Middle Board are and have been engaged in a sending-receiving school relationship since the 1971-72 school year, which has been memorialized by written contract.

2. The present dispute involves petitioner Middle's claim for alleged tuition under payments by each respondent for the 1979-80 and 1980-81 school years.

3. Petitioner alleges that the underpayments due and owing are the amount of $131,314.80 by Dennis; $24,195.45 by Stone Harbor; and, $68,674.80 by Avalon.

4. Each year the Commissioner causes to have conducted an audit of the financial records of the receiving school district to determine the proper per pupil cost to be paid by the sending district.

5. The Commissioner's 1979-80 audit was completed and forwarded to petitioner on November 9, 1981 with courtesy copies sent to each respondent, among others.

6. The 1980-81 audit and certified per pupil cost was submitted from the Assistant Commissioner to petitioner on April 13, 1982, with courtesy copies sent to each respondent.

7. On or about November 3, 1977, the then Cape May County Superintendent of Schools directed petitioner to modify its calculation with respect to vocational school pupils from its sending districts and that the tuition rate must be charged at one-half of the approved tuition rate.

8. For the school years 1979-80 and 1980-81, petitioner incorrectly reported to the Department of Education that respondent's vocational-technical pupils were full-time pupils rather than one-half time pupils.

ARGUMENTS OF THE PARTIES

I. Dennis Township Board's Position

A. Dennis argues that the Commissioner should find that petitioner's appeal for relief is barred by the 90 day rule, N.J.A.C. 6:24-1.2(b) which provides that:

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

The Dennis Board contends that Middle Township failed to file the petition in the present matter within the above 90 day period. Since the regulation in question is mandatory, petitioner's failure to file a timely petition is fatal to their case. Therefore, the present matter should be dismissed. *Bd. of Ed. of Borough of Kinnelon v. Bd. of Ed. of Borough of Riverdale*, OAL DKT. NO. EDU 6257-85 (April 14, 1986) (Commissioner's Decision, May 22, 1986).

Another case involving sending/receiving districts decided after *Kinnelon* also mandates that N.J.S.A. 6:24-1.2(b) is controlling in tuition rate disputes. *Bd. of Ed. of the Borough of Little Ferry v. Bd. of Ed. of the Borough of Ridgefield Park*, OAL DKT. NO. EDU 8561-87 (May 3, 1988) (Commissioner's Decision, June 16, 1988). The

Judge in *Little Ferry* also determined that N.J.S.A. 2A:14-1 (the six year Statute of Limitations) is not controlling in sending/receiving tuition disputes and that parties such as petitioner must file its petition within 90 days of receipt of the notices in question or its claim is time-barred and it loses its right to appeal. *Little Ferry*, slip opinion at p. 8).

Dennis argues that if the Commissioner does not dismiss the present petition, because it was filed in an untimely manner, the purpose of the above Rule would be abrogated. The above rule was enacted to ensure a quick adjudication of School Board matters so that petitions such as Middle's could become final in as expeditious a manner as possible.

If the Commissioner refused to extend the 90 day requirement for equitable reasons in *Little Ferry*, when the petitioner filed its petition less than six months after receipt of the figures in question, there is no reason to extend the rule in the present dispute, when the petitioner waited nearly five years.

B. The Court should grant Summary Decision where the pleadings, admissions on file, together with affidavits submitted on Motion clearly do not present any genuine issue of material fact requiring disposition at trial.

The law is well settled that a summary decision should be granted where a discriminating search of the merits, pleadings, depositions and admissions on file as well as the affidavits submitted on motion show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5.

With respect to petitioner's original complaint and subsequent petition, there is no genuine issue as to any material fact as is indicated in the record.

Middle does not dispute that the Commissioner's November 9, 1981, and April 13, 1982, findings were rendered over five (5) years before petitioner filed its original complaint. Consequently, the only question pending before the Court is legal in nature, which can be disposed of by way of Summary Decision.

For the foregoing reasons, N.J.A.C. 6:24-1.2(b) requires the Court to dismiss Middle's petition pursuant to N.J.A.C. 1:1-12.5. Respondent has properly presented the controversy for disposition by way of Summary Decision. Therefore, the Commissioner should grant respondent's Motion to Dismiss Middle's petition with prejudice.

Respondents Stone Harbor and Avalon adopt the Law and Arguments as set forth above by respondent and movant Dennis Township Board.

II. Middle Township Board's Position

The thrust of Middle's argument in opposition to Dennis' Motion for summary decision are two-fold; i.e., (1) that the administrative 90-day rule is not a legal bar to the present action and, (2) that N.J.S.A. 2A:14-1 governs actions on a contract and the statutory six-year limitation cannot be altered administratively.

Middle contends that respondents' reliance on *Kinnelon* and *Little Ferry* to support their contention that petitioner's action is time-barred by N.J.A.C. 6:24-1.2(b) is misplaced because those cited cases do not stand for the proposition asserted. Middle asserts that the rule of law in *Kinnelon* must be applied, if at all, with precision to the herein action on the contract.

Middle concedes that *Kinnelon* discloses the emergence of the Commissioner's view that the 90-day rule tolls when the complaining school district first learns of a discrepancy in tuition charges, not when the responding school district gives notice of its refusal to pay. Because the State Board of Education ultimately reversed the Commissioner in *Kinnelon* on other grounds, the Administrative Law Judge (ALJ) in the subsequent *Little Ferry* matter concluded that the Commissioner's ruling in *Kinnelon* was applicable to *Little Ferry* and adopted it to bar the claim asserted therein. The Commissioner, following a review and discussion of the exceptions to the ALJ's decision in *Little Ferry*, adopted the judge's decision as his own.

Middle argues, however, that a close reading of the foregoing cases reveals an important discrepancy. The Commissioner's decision in *Kinnelon* was predicted upon a claim that was not based upon an underlying contract between the parties.

The sending-receiving contract between the Kinnelon and Riverdale Boards of Education had expired at the end of the 1980-81 school year and, although it had been extended for an additional year, the parties had failed to arrive at a new agreement for the subsequent year. Therefore, there was no contract between Kinnelon and Riverdale for the 1983-84 school year, the school year in dispute.

Middle maintains that in view of these facts, it makes sense that the Commissioner would have rejected the ALJ's recommendation that the 90-day period of limitation should toll from the time the complainant was first advised that Riverdale would not pay any additional tuition, because that recommendation is reasonable only if an underlying contract exists. Given the existence of such a contract, then notice of refusal to pay would amount to anticipatory repudiation and/or breach, both of which would have been immediately actionable.

Middle observes that in the absence of an underlying contract the Commissioner held and the State Board affirmed without comment, that the action accrued on the date complainant first became aware of the amount actually owed. Under the general law of contracts, this holding would not make sense if a contract existed because no breach had been committed at the point at which the Commissioner says the cause of action accrues.

Middle asserts the inapplicability of the 90-day period of limitations following the rule in *Kinnelon* to the present claim is further evidenced by the terms and conditions for correction of tuition underpayments by sending districts as set forth in the Administrative Code. Pursuant to N.J.A.C. 6:20-3.1(d)4., charges for such underpayment do not become due and owing until the "...third year following the school year for which the tentative charge was paid..."

Middle contends that unlike *Kinnelon*, a valid contract was in effect in *Little Ferry*. Despite this critical factual discrepancy between the two cases, the ALJ in *Little Ferry* thought herself bound by the decision in *Kinnelon* and adopted the proposition that the 90-day rule applied. The Commissioner affirmed, but never recognized nor discussed the factual differences between the two cases.

Middle submits, therefore, that the *Little Ferry* decision represents a misapplication of the *Kinnelon* decision. Since *Kinnelon* was affirmed by the State

Board and *Little Ferry* was not. Therefore it argues, *Kinnelon* and not *Little Ferry* is binding on this tribunal. Because valid contracts undergird the herein action, Middle asserts that *Kinnelon* should be read to mean that the cause of action accrued on the date that each respondent refused Middle's demand for payment.

At its second point in opposition to respondent's motion for summary decision, Middle asserts that N.J.S.A. 2A:14-1 governs actions on a contract and the six-year limitation set forth therein cannot be altered administratively. It maintains that administrative agencies may not promulgate rules that impermissibly narrow or frustrate the policy or effect of a statutory provision. *Kamienski v. Bd. of Mortuary Science, Dept. of Law and Public Safety*, 80 N.J. Super., 366 (App. Div. 1963); *Terry v. Harris*, 175 N.J. Super., 482 (Law Div. 1980). Petitioner submits that the 90-day rule would impermissibly contravene the six-year statute of limitations.

Middle contends, among other things, that the statutory scheme of limitations of actions manifests a clear intention by the Legislature to pre-empt the entire area. The statutory language is phrased in global, all-inclusive terms: "Every action at law...for recovery upon a contractual claim of liability...shall be commenced within 6 years next after the cause...shall have accrued." N.J.S.A. 2:14-1. The six year statute of limitations embodies important policy considerations (*Fidelity & Deposit Co. of Md. v. Abagnale*, 97 N.J. Super. 132 (Law Div. 1967)) that cannot be administratively subverted.

Middle observes that N.J.S.A. 18A:38-19 provides the statutory authority for public school districts to enter into sending-receiving relationships. The statute is silent regarding the terms and conditions of such arrangements, except that it requires payment by the sending district of "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..." Although the statute prescribes the ceiling that the tuition payment may not exceed, it does not specify the lower limitation beyond which they may not fall. Presumably, this is one reason why the statute's implementing regulations require that the parties to a sending-receiving arrangement "shall enter into a written contractual agreement..." N.J.A.C. 6:20-3.1(d)(1). Having done so, the contracts between the parties here specify the amounts to be paid and incorporate by reference the Rules and Regulations of the State Board of Education.

Middle argues that under the express terms of the contract between the parties, "the sending district shall be billed for the difference between the...[amount paid] and the actual cost per pupil." Accordingly, respondent is contractually bound to remit the amounts demanded by petitioner here.

At Point II of its Brief, Middle contends that the herein matter is not ripe for summary decision because a material issue of fact exists as to the precise timing of respondent's refusal to meet petitioner's demand for payment.

Petitioner Middle's other arguments are not germaine to the central issue in this matter and, therefore, will not be repeated here.

DISCUSSION AND CONCLUSIONS

Petitioner's argument that the 90-day rule is inapplicable to the present matter must fail. Similarly, petitioner's contention that N.J.S.A. 2A:14-1 governs the herein action is also without merit. This is so because the Commissioner in his *Little Ferry* decision was well aware that a sending-receiving contract was in existence between the contending parties. In adopting Judge Klinger's findings and conclusions, the Commissioner was clearly cognizant of the ALJ's holding that:

> The 90-day rule set forth in N.J.A.C. 6:24-1.2 more specifically applies to contractual relationships between sending and receiving school districts and therefore must be applied rather than the six-year limitation of N.J.S.A. 2A:4-1 (*Little Ferry*, slip op. at 7).

In adopting this finding and conclusion, among others, the Commissioner held that:

> ...three months was certainly adequate time within which to make a determination as to whether such discrepancies [in tuition payments] did in fact exist and, if so, whether it should challenge such figures before the Commissioner. Having failed to do so, the Commissioner agrees with the determination of the ALJ below that the instant matter was subject to the ninety-day time restraints, that it rested on its rights and, further that it has failed to bear its burden of presenting an equitable reason to extend the

> ninety-day requirement of N.J.A.C. 6:24-1.2.... (Little Ferry, Commissioner's Decision, Slip op. 13-14).

Thus, the Commissioner has unequivocably adopted the rule that school boards of education which wish to challenge the propriety of tuition payments in a sending-receiving relationship must do so within 90 days of receipt the audit of the receiving school districts per pupil costs, as certified by the Assistant Commissioner, for per pupil costs for tuition purposes. I **CONCLUDE** therefore, as did Judge Klinger in *Little Ferry*, that Middle Township was obliged to set forth its appeal to the Commissioner with respect to the tuition rate allegedly underpaid to it within 90 days of receipt of the Commissioner's determination of the tuition rate for the year in question or lose its right to appeal.

I **CONCLUDE** that all claims by Middle Township against respondents' Dennis Township, Stone Harbor Borough and Avalon Borough for underpayment of tuition charges for the 1979-80 and 1980-81 school years are barred by the 90-day rule, N.J.A.C. 6:24-1.2.

I further **CONCLUDE**, for the reasons expressed herein, that respondent's counter claims against petitioner Middle Township are similarly barred by the 90-day rule.

ORDER

It is, therefore, **ORDERED** that summary decision is hereby **GRANTED** in favor of the Boards of Education of Dennis Township, Stone Harbor Borough and Avalon Borough against petitioner Middle Township Board of Education for failure to file its appeals in a timely manner as prescribed by N.J.A.C. 6:24-1.2(b).

It is further **ORDERED** that respondent's counterclaims for alleged tuition overpayments are hereby **DISMISSED WITH PREJUDICE**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

6 March 1989
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

9 March 1989
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 9 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

dho

BOARD OF EDUCATION OF MIDDLE TOWNSHIP, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF DENNIS TOWNSHIP ET AL., CAPE MAY COUNTY, RESPONDENTS.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner submitted timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner excepts to the ALJ's conclusion that the 90-day rule applies to the instant matter. Petitioner takes the view that "a more reasonable rule would be that the applicable statute of limitations, whether the 90-day rule or the 6-year period set forth in N.J.S.A. 2A:14-1, ought not begin to toll until a receiving district refuses a demand for payment predicated on an underlying contract." (Exceptions, at p. 2) It relies on its Brief in Opposition to Motion for Summary Judgment and in Support of Counter-Motion by Middle Township Board of Education for Summary Judgment (brief) in support of this contention.

Also relying on its brief, petitioner disagrees with the ALJ's reliance upon Board of Education of Little Ferry v. Board of Education of the Village of Ridgefield Park, decided by the Commissioner June 16, 1988, aff'd State Board November 1, 1988. Petitioner claims that there is a difference between Board of Education of the Borough of Kinnelon v. Riverdale, decided by the Commissioner May 22, 1986, rev'd State Board January 6, 1988, appeal pending N.J. Superior Court, Appellate Division, in that in Kinnelon the contract between the two schools had expired, while in Little Ferry a contract still existed at the time of the dispute. Petitioner further asserts that the rule of law articulated in Little Ferry and followed by the ALJ does not make sense in sending-receiving relationships predicated on contract. It argues that

> no breach of contract occurs until and unless a receiving (sic) [sending-ed.] district refuses to submit to a legitimate demand for payment. To hold as the court does in the present matter and as the Commission (sic) did in Little Ferry, that the 90-day rule or statute of limitations began to toll (sic) [run-ed.] when petitioner first learned of a discrepancy in payments is illogical, as well as contrary to the general law of contracts. (Id., at p. 3)

It suggests such a resolution is

> illogical, because it militates against the informal, non-adjudicative efforts of the parties to resolve such matters themselves (see petitioner's brief at 3) and documents related thereto), and it is contrary to the law of contracts because no breach may occur before the period of limitations has run. (Id.)

Further, petitioner excepts to the ALJ's conclusion that the 90-day rule applies, submitting instead that "the Commissioner is bound to apply the legislative statute of limitations, N.J.S.A. 2A:14-1, which plainly is intended to apply to all actions sounding in contract." (emphasis in text) (Id.)

Finally, petitioner takes exceptions to the summary dismissal granted in this case. Relying on its brief at Point II, it claims the date(s) on which the respective respondents actually refused petitioner's demands for payment are in dispute and are material to adjudication of this matter.

Petitioner would ask that the initial decision granting respondents summary decision be reversed.

Having carefully and independently reviewed the instant matter, the Commissioner adopts the conclusions of the ALJ that the instant petition is time barred pursuant to N.J.A.C. 6:24-1.2, but for reasons different from those expressed by the judge below.

Initially, the Commissioner rejects petitioner's argument that N.J.S.A. 2A:14-1, which sets the statute of limitations for matters sounding in contract at 6 years, controls the time when the matter herein becomes time barred. The Commissioner's quasi-judicial authority to hear and decide matters is limited solely to education law and regulations promulgated thereon. N.J.S.A. 18A:6-9; N.J.A.C. 6:24-1.1 et seq. Thus, if petitioner seeks to apply the law of contract to the instant fact pattern, it is free to seek adjudication of any such claim in court. The transfer of this case from the court by Judge Callinan is for resolution of education law matters. Hence, the Commissioner may only, and will only, apply those laws and regulations applicable to his limited area of jurisdiction. Accordingly, the Commissioner dismisses as being without merit petitioner's claims under N.J.S.A. 2A:14-1.

As to the matter of whether the instant petition is time barred pursuant to N.J.A.C. 6:24-1.2, the Commissioner would first state that while the facts in this case differ somewhat from those in Kinnelon, supra, and Little Ferry, supra, the same rationale applied therein, establishing when the time for filing a petition of appeal begins to run, can be applied to the matter herein.

In both Kinnelon and Little Ferry, the sending districts challenged the tuition rate established. In those cases, the Commissioner held that the time for filing a petition of appeal

challenging the amount due begins to run (not toll, as suggested by petitioner), from when the sending district first learns of an alleged discrepancy in tuition charges. In the instant matter, petitioner, the receiving district, seeks a "judgment against respondent Boards *** for the difference between the pupil tuition paid and the actual tuition which should have been paid for the school years 1979-80 and 1989-81, pursuant to sending-receiving relationships." (Initial Decision, ante) For the sake of clarification, the Commissioner sets forth verbatim the chronology of events leading to the instant dispute as set forth in petitioner's brief at pp. 2-3.

> Tuition calculations are predicated upon the receiving district's costs divided by the average daily enrollment of all pupils enrolled in the registers. N.J.A.C. 6:20-3.1. Petitioner faithfully complied with this procedure until it was notified by the then County Superintendent, on or about November 3, 1977, of a modification to be used for the 1978-79 school year. (Pa-4). The memorandum directed that vocational school students attending receiving school districts must be charged at one-half the tuition rate.
>
> Petitioner's billing for 1978-79 reflected the newly announced computational procedure. (Pa-5).
>
> For the school years 1979-80 and 1980-81, however, a reporting error was made, resulting in the present action. Due to a clerical error, petitioner incorrectly reported the vocational-technical students it received from respondents to the State Department as full-time students. Since the State's audit of actual costs is predicated upon the enrollment data submitted by petitioner, petitioner received an understated audited cost which it, in turn, reported to each respondent in 1981 and 1982, respectively (Pa-6).
>
> In or about February, 1983, petitioner first discovered that an error had been made. (Pa-7). When the increased charges were communicated to respondents, they requested a re-examination of audited figures. (Pa-8). As a result thereof, Assistant Commissioner Bernard Steinfelt reported to petitioner's board secretary, via telephone conversation on or about December 6, 1984, the correct tuition rate that petitioner should have charged for the years in question. (Pa-9).
>
> Soon thereafter, petitioner attempted to resolve the matter informally by working cooperatively with respondents. (Pa-10).

> On or about April 23, 1984, petitioner's legal counsel attempted to resolve the matter administratively through the State Department of Education. (Pa-11).
>
> When both informal and administrative resolution efforts failed, petitioner filed suit on the contracts in New Jersey Superior Court, Law Division, on April 21, 1987. The matter was transferred to the Commissioner of Education on or about June 29, 1988.

Applying the same logic extant in Kinnelon and Little Ferry, the Commissioner finds and determines that the 90-day period began to run in this matter from the date on or about April 23, 1984 when petitioner's legal counsel concluded that the matter would not be solved locally and resolved to seek State intervention administratively. At that time petitioner should have preserved its right to seek the Commissioner's review by filing a Petition of Appeal. It was not until three years later that petitioner filed suit on the contracts in New Jersey Superior Court, without preserving its rights to appeal before the Commissioner by filing a Petition of Appeal within 90 days of the date when it became clear that the sending districts would not pay the additional sums it felt it was entitled to receive. As it was stated in Little Ferry:

> ***Notwithstanding Little Ferry's contention that it "sought to meet with Respondent to try to get further clarification of the discrepancies" (Exceptions, at p. 2), three months was certainly adequate time within which to make a determination as to whether such discrepancies did in fact exist and, if so, whether it should challenge such figures before the Commissioner.***
> (Slip Opinion, at pp. 13-14)

Accordingly, the Commissioner adopts the conclusion of the Office of Administrative Law that the claims brought by Middle Township against Respondents Dennis Township, Stone Harbor Borough and Avalon Borough for underpayment of tuition charges for the 1979-80 and 1980-81 school years are barred by the 90-day rule. Similarly, the Commissioner also finds untimely the Avalon Board's counterclaim and amended counterclaim, joined by the Dennis and Stone Harbor Boards, alleging that the Middle Board overcharged it pupil tuition for the school years 1971-72 through 1977-78. In so concluding, the initial decision is therefore adopted but for the reasons expressed in this decision, not for those expressed in the ALJ's initial decision. Consequently, the Petition of Appeal and respondents' counterclaims are dismissed with prejudice.

COMMISSIONER OF EDUCATION

April 20, 1989

BOARD OF EDUCATION OF MIDDLE TOWNSHIP,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF DENNIS TOWNSHIP,	:	
RESPONDENT-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF STONE HARBOR,	:	DECISION
RESPONDENT-RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF AVALON,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 20, 1989

For the Petitioner-Appellant, Schwartz, Pisano, Simon & Edelstein (Nicolas Celso, III, Esq., of Counsel)

For the Respondent-Respondent Board of Education of Dennis Township, Loveland, Garrett, Russell & Young (Robert F. Garrett III, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Stone Harbor, Paul W. Dare, Esq.

For the Respondent-Respondent Board of Education of the Borough of Avalon, Reuss, Cavagnaro & Kaspar (Carl W. Cavagnaro, Esq. of Counsel)

The State Board of Education affirms the Commissioner's determination that the appeal in this matter, initiated by the Board of Education of Middle Township (hereinafter "Appellant") by complaint filed in New Jersey Superior Court, Law Division, on April 21, 1987, seeking additional monies with respect to tuition payments from the respondent sending districts for the 1979-80 and 1980-81 school years, is time barred pursuant to N.J.A.C. 6:24-1.2. We, however, modify the Commissioner's decision to the extent that he found that the 90-day period in this case began to run from

April 23, 1984, the date on which Appellant's counsel sought the assistance of the Assistant Commissioner, Division of Finance, rather than the date on which Appellant received, as the result of its request of March 3, 1983 for reexamination of the audited figures, verification from the Division of Finance of the error it had discovered in February 1983.

Although the exact operative date cannot be definitely determined on the basis of the record in this matter,[1] it is apparent that verification of the error was provided along with the corrected tuition figures for the years in question prior to April 23, 1984. Thus, under any construction of the facts as alleged, it is impossible to arrive at a conclusion that the claim in this case, first made three years later, was timely.

In affirming the Commissioner's determination that the claim is time-barred, we reject Appellant's argument that N.J.A.C. 6:20-3.1(d) as now in effect renders the 90 day rule inapplicable in this case. That regulation, which represents substantial amendment of the prior regulations, see Kinnelon v. Riverdale, decided by the State Board, January 6, 1988, slip op. at 6, aff'd, Docket #A-2857-87T7 (App. Div. March 22, 1989), was adopted in 1984 and consequently was not in effect when Appellant established the tuition rates for 1979-80 and 1980-81.

August 2, 1989

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[1] We note that the sequence of events as set forth by Appellant indicates that "Assistant Commissioner" Bernard Steinfelt provided it with the correct tuition rate on December 6, 1984. While the exhibit cited, which is otherwise undated, includes a handwritten notation of that date apparently made by the Board Secretary, Pa-9, this date is inconsistent with both the sequence set forth and exhibit Pa-10, which includes letters dated February 6, 1984 over signature of the Board Secretary advising the respondent sending boards that Appellant wanted to meet with them to discuss tuition costs. Further, Exhibit Pa 11, dated April 23, 1984, indicates that the corrected figures had been provided to Appellant by that date.

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5147-88
AGENCY DKT. NO. 219-7/88

JAY B. SHAW,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,
Respondent.

Joseph Michelini, Esq., for petitioner (O'Mally and Surman, attorneys)
Richard K. Sack, Esq., for respondent

Record Closed: January 3, 1989 Decided: March 14, 1989

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

STATEMENT OF THE CASE

Petitioner alleges that the Board of Education of the Township of Manchester (Board) violated the New Jersey Open Public Meetings Act (Act), N.J.S.A. 10:4-12, when it appointed William G. Byrnes to fill the unexpired term of board of education member Elmer Worthen who resigned from the elected position on February 29, 1988.

PROCEDURAL ASPECTS

This matter was originally filed before the Superior Court of New Jersey, Law Division, on a Complaint in Lieu of Prerogative Writ. The Honorable Stephen A.

Pepe, J.S.C., by way of Order dated June 1, 1988, transferred the matter to the Commissioner of Education (Commissioner) for a hearing pursuant to N.J.S.A. 18A:6-9. On July 13, 1988, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on September 1, 1988 at which, among other things, the issues to be determined by this tribunal were agreed upon and the hearing date of November 14, 1988 was established. The hearing was held on the scheduled date at the Bricktown Municipal Court, Bricktown, New Jersey. The parties requested and were granted leave to submit posthearing briefs. The last submission was received by the undersigned on January 3, 1989, which constituted the closing date of these proceedings. Subsequent requests for extensions were granted for the execution of this initial decision.

ISSUES

Pursuant to the Prehearing Order issued on September 2, 1988, the following are the settled issues to be determined by this tribunal:

1. Whether the Board violated the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-12, when it appointed William G. Byrnes to fill the unexpired term of board of education member Elmer Worthen, who resigned?
2. Whether the subsequent action by the Board cured any defects with respect to the alleged violation of the Open Public Meetings Act?

FINDINGS OF FACT

Based upon the testimony and other evidence adduced at the hearing, the following constitute my **FINDINGS OF FACT** in this matter:

On February 29, 1988, Elmer A. Worthen resigned from the Board, thus, creating a vacancy of a seat on the Board. Mr. Worthen's resignation was submitted and accepted subsequent to the 54th day preceding the date of the annual school election to be held on April 5, 1988, therefore, precluding any candidate from filing

a nomination petition to stand for election for the unexpired Worthen vacancy. N.J.S.A. 18A:14-9.

In addition to the Worthen vacancy, there were two expired terms to be filled at the annual school election held on April 5, 1988. Petitioner herein was an unsuccessful candidate for one of the seats on the Board having lost the election by a margin of 48 votes. Petitioner is a retired New York State attorney now residing within the Board's jurisdiction.

On or about April 10, 1988, the Board caused to have placed in the Ocean County Observer newspaper notice of the one-year unexpired term caused by Worthen's resignation and seeking applications of qualified candidates to complete the term. By way of letter dated April 10, 1988, petitioner applied for the vacant position (P-2). On April 19, 1988, the Board's Superintendent of Schools acknowledged petitioner's letter application and invited petitioner to a personal interview with the Board at 7:00 p.m. on April 21, 1988 (P-3). The Board interviewed a total of nine candidates interested in the vacancy on April 20 and 21, 1988. All of the interviews were closed to the public. There is no evidence that the Board took any vote to fill the vacant seat at the conclusion of the candidate interviews on April 21, 1988. No minutes were taken of the interviews.

Petitioner was interviewed by members of the Board on April 21, 1988. By letter dated April 22, 1988, petitioner was advised that he had not been selected to fill the one-year unexpired term on the Board (P-4).

On April 19, 1988, the Board published a notice that it would convene in special meeting on April 27, 1988 for the purpose of filling the vacant seat on the Board. The Board convened its Special Meeting on April 27, 1988 with a quorum of four of its seven members, the Superintendent and Board Secretary also attending. The first of three items on the Board's agenda provided for a resolution to appoint William G. Byrnes to fill the one-year unexpired term on the Board (P-1). Prior to any action by the Board, its president opened the meeting for public participation and discussion by the public with regard to any item appearing on the Board's agenda (J-1). Petitioner was recognized by the Board president at which time petitioner expressed his belief that the Board may have committed a violation of the Open Public Meetings Act N.J.S.A. 10:4-6 et seq. Petitioner thereupon

distributed to each member of the Board a prepared memorandum dated April 26, 1988, wherein petitioner stated:

> The closed meeting of the Manchester School Board of April 20, 1988 for the purpose of interviewing candidates for the vacant position on the board appears to have violated the Open Public Meetings Act.
>
> See: *Gannet Satellite Information Network, Inc. v. Board of Education of Borough of Manville*, 201 N.J. Super. 65, 492 (A. 2d) 703 which held:
>
> "Closed meeting of school board, in which candidates were interviewed to fill vacancy created by departing board member and in which decision was made to appoint person to fill vacancy, violated Open Public Meetings Act [N.J.S.A. 10:4-12], as there was no opportunity whatsoever for public to witness deliberation, policy formulation and decision making of public body, and person was appointed to fill position normally filled by elected official. N.J.S.A. 10:4-12, subd. b (8)."
>
> "Personnel exception of Open Public Meetings Act [N.J.S.A. 10:4-12(b)(8)] does not apply to elected officials whose continued retention in office is dependent upon approval of public, not on any particular agency or department." 1
>
> [signed]
> Jay B. Shaw
> 657-9829 (P-5)

There followed a lengthy discussion by petitioner where petitioner interpreted the Act to the Board in view of the holding in *Gannett Satellite*. Petitioner suggested that the Board consult with its attorney before it continued with any further action at this meeting because a violation of the Act can be referred to the Ocean County Prosecutor and the Public Advocate. Petitioner also stated that in the event the Board intended to continue with its meeting [to appoint Byrnes], petitioner would take whatever remedies were available to him at law, together with reporting it to the Ocean County Prosecutor and the Ocean County Superintendent of Schools (J-1).

1. The quotations cited by petitioner are not from the body of the case but, rather, are taken from the head-notes of the Key Number System of the West Publishing Company preceding the official published court opinion. 201 N.J. Super. at 66.

After further discussion between petitioner, Board members and school administrators, a Board member requested that it recess to a caucus session. Petitioner asserted that a caucus would be in violation of the Act. Petitioner subsequently asserted that the process by which the Board interviewed the candidates for the vacant seat was in violation of the Act and the Board's appointment of Byrnes, if enacted, becomes a violation of the Act. Petitioner asserted that in the event the Board did not appoint Byrnes at this meeting and that the Board started the interview process over again, petitioner would make no complaint (J-1).

The Board voted to go into caucus under the provisions of N.J.S.A. 10:4-2 b (7) and discussed petitioner's assertions and allegations with its attorney by telephone. The Board thereafter reconvened its meeting at which time it opened with a brief discussion of Byrnes' qualifications by three Board members. With the completion of the Board's discussion, a motion was made and seconded to appoint Byrnes to the vacant seat on the Board. By a roll call vote, all four Board members voted in the affirmative to the Byrnes appointment. The Board president thereupon opened the discussion for public participation at which time an unidentified member of the public requested information about Byrnes' background. The Board president represented that Mr. Byrnes was present and would provide the citizen with the requested information. Mr. Byrnes was then administered the oath of office and took his seat on the Board (J-1). The Board seat now occupied by Byrnes will stand for election for the full three-year term at the Board's annual school election to be held on or about April 4, 1989.

DISCUSSION AND CONCLUSIONS

The statutory provisions to which petitioner asserts the Board violated are found at N.J.S.A. 10:4-12 and which read as follows:

> a. Except as provided by subsection b. of this section all meetings of public bodies shall be open to the public at all times. Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting.
>
> b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

...

> (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

The Board, at its April 27, 1988 special meeting asserted that N.J.S.A. b (8) was applicable to the appointment of a member of the Board to fill a vacant seat for the completion of an unexpired term. The facts herein clearly demonstrate that the Board did, in fact, interview interested candidates for the vacant board member position and that those interviews occurred in closed session to the exclusion of the public.

Petitioner, however, cites the matter of *Gannett Satellite Info. Network v. Bd. of Educ.*, 201 N.J. Super. 65 (Law Div. 1984) where the court held that the so-called "personnel" exception to the Act (N.J.S.A. 10:4-12 b(8)) "does not apply to elected officials whose continued retention in office is dependent on the approval of the public, not on any particular agency or department." Id. at 70. The *Gannett* court did hold, however, that a board of education could exclude the public from its deliberations on the qualifications of the various candidates eligible to fill an unexpired term. Moreover, the court held that the actual appointment of the successful candidate must take place in an open public session. Id. at 69.

It is observed here that actions taken at meetings not held in strict compliance with the prescriptions of the Act are merely "voidable" under appropriate circumstances rather than "void." N.J.S.A. 10:4-15; *Polillo v. Deane*, 72 N.J. 562, 579 (1977). Further, the statute, N.J.S.A. 10:4-15a. provides that "a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act." In the context of the Act, de novo means "to consider anew, or afresh, for a second time. *Houman v. Mayor of Pompton Lakes*, 155 N.J. Super. 129, 164 (Law Div. 1977). As the transcript of the Board's special meeting held on April 27, 1988 demonstrates, the Board heard from petitioner who objected to the Board's proposed action. Subsequent to discussion and a recess, the

Board reconvened and took a roll call vote in full view of the public to appoint Byrnes to the vacant seat. Because the Board arrived at the same result as it had during its prior deliberations does not prove that its members did not reconsider the evidence. In fact, those members who spoke prior to the vote expressed the opinion that there were several "good candidates" of the nine interviewed and it was their collective judgment that Byrnes was the best qualified (J-1).

It has been observed that the Legislature has not accurately defined the precise nature of the de novo action to an otherwise voidable action by a public body which has acted without conforming to the Act. It is clear that the statutory language and court decisions construing the statute requires that the public body must "act anew." *Polillo; Houman*.

The facts here demonstrate that the Board interviewed interested candidates on April 20 and April 21, 1988. Petitioner was interviewed on the evening of April 21, and by letter dated April 22, 1988, he was advised that he was not the successful candidate to fill the one-year unexpired term on the Board. The facts further demonstrate that the Board's Agenda for its special meeting held on April 27, 1988 included a resolution to appoint Byrnes to the unexpired term. It can be inferred from these facts that the Board members engaged in the interview process had, at least, arrived at some consensus that petitioner was not the successful candidate and that Byrnes was to be nominated to fill the unexpired term. There is no evidence, however, that the Board members involved in the interview process took a formal vote to nominate Byrnes nor were any minutes recorded to reflect the Board's preference as to the successful candidate prior to April 27, 1988.

It is petitioners position that the Board's collective opinion, arrived at in private, that Byrnes was the best qualified candidate constitutes a violation of the Act. This, notwithstanding the court held proposition that the Board could reasonably discuss the various candidates qualifications in private session. *Gannett*, at 69.

In consideration of the totality of the circumstances of this matter, I **CONCLUDE** that the Board was in technical violation of the Act when it held interviews with candidates for the vacant seat in closed sessions and outside the view of the public. N.J.S.A. 10:4-12.

I **CONCLUDE** that the Board was not in violation of the Act when it discussed the qualifications of the candidates in closed session. *Gannett*, supra. at 69.

I further **CONCLUDE** that by its actions on April 27, 1988, the Board cured any technical defect or violation of the Act by acting de novo when it considered its recommendation "anew, afresh, for a second time." *Houman*, at 164; N.J.S.A. 10:4-15.

ORDER

Accordingly, it is hereby **ORDERED** that the complaint of Jay B. Shaw be and is hereby **DISMISSED** because of lack of proofs to demonstrate the alleged violation.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

14 March 1989
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

17 March 1989
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 20 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

dho

JAY B. SHAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with and adopts as his own the findings and conclusions of the ALJ for the reasons expressed in the initial decision. The petition is therefore dismissed.

COMMISSIONER OF EDUCATION

APRIL 26, 1989

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9369-88
AGENCY DKT. NO. 374-12/88

DEBORAH ABRAHAMSEN,
Petitioner,
v.
MIDDLETOWN TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Mark J. Blunda, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks)

Peter P. Kalac, Esq., for the Board (Kalac, Newman & Lavender)

Record Closed: February 15, 1989 Decided: March 15, 1989

BEFORE DANIEL B. MC KEOWN, ALJ:

Deborah Abrahamsen (petitioner), a non-tenured teacher whose employment for 1988-89 was not renewed by the employing Middletown Township Board of Education (Board), alleges that the determination of the Board not to offer her continuing employment violates the letter and intent of the Tenure Law, N.J.S.A. 18A:27-3.2, and Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974); is in violation of an oral agreement between she and the Board for continued employment; is unlawful in that the Board knowingly and intentionally misrepresented material facts which constitute fraud; is in violation of public policy; and, is unlawful because her non-reemployment is in retaliation for her exercise of her legal rights. Petitioner seeks reinstatement, tenure, back pay with interest, all benefits withheld from her, seniority credit, punitive damages, and counsel fees. The Commissioner of Education transferred the matter on

December 22, 1988 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. Shortly thereafter, the Board filed a motion for summary decision on January 4, 1989 with the Newark Office of Administrative Law. A prehearing conference was conducted February 15, 1989 at which time Board counsel advised this judge of the motion earlier filed with the clerk's office. Counsel for petitioner advised he filed his responsive papers with the clerk's office on January 11, 1989.

Counsel to the parties submitted duplicate copies of their motion papers on February 14, 1989 after which the record on the motion closed. The conclusion is reached in this initial decision that petitioner has failed to establish legal entitlement to continued employment with the Board and that, accordingly, the petition of appeal is dismissed for failure to state a cause of action.

BACKGROUND FACTS

For purposes of the motion for summary decision the facts established by the pleadings, affidavits, and exhibits and as seen most favorably for petitioner are these.

Petitioner possesses an instructional certificate with an elementary endorsement. She was initially employed by the Board as a supplemental teacher during January 1986 and was then assigned to teach music and physical education at the Board's Middletown Village elementary school. Petitioner's employment was continued for the 1986-87 academic year and she was assigned to teach grade 4 at the Board's Leonardo elementary school. Petitioner's employment was continued into the 1987-88 academic year and the Board assigned her to teach a 4th grade at its Lincroft elementary school.

During April 1988, petitioner was advised orally and in writing that her employment for 1988-89 was not being renewed. Petitioner contends that the Board's assistant superintendent for personnel told her that she was not to be renewed because of uncertainties concerning budget and enrollment. Petitioner attests that as the result of conversations with her school principal, the assistant superintendent for personnel, and the superintendent of schools she was led to believe she would have priority for continued employment should an opening for 1988-89 become available.

The record shows that in response to petitioner's request on April 25, 1988 for a statement of reasons for her non-reemployment, the assistant superintendent advised that the replacement teacher, Ms. Hunzinski, for whom she was assertedly employed to replace was returning September 1, 1988.

Petitioner vigorously denies she was employed to replace Ms. Hunzinski because petitioner points out Ms. Hunzinski was a 3rd grade teacher who, according to Board minutes, was granted a leave of absence between March 13, 1987 through June 30, 1987 and was replaced by Juanita Gilbert during that time and during the 1987-88 academic year. Furthermore, petitioner notes that she was assigned to teach grade 4, not grade 3, during 1986-87 and 1987-88.

Petitioner notes that on May 17, 1988 the superintendent of schools in answer to a parent's inquiry regarding petitioner's performance as a teacher wrote that parent as follows:

> Thank you for your letter regarding Mrs. Abrahamsen. In my personal observation and speaking with [the school principal], we concur that she is doing a fine job. Mrs. Abrahamsen is a credit to our profession and a dedicated teacher.
>
> In some buildings we have not finalized our staffing since we are not certain of the total number of students that will be assigned to each building.
>
> Perhaps you should know that those staff members such as Mrs. Abrahamsen will be given priority in the event that there are any vacancies occurring within the district.
>
> It is certainly satisfying to receive a letter that supports an excellent teacher. Too frequently we will receive the other type of letters. It is refreshing to receive a letter that highlights the positive qualities of one of our staff members.
>
> Again, thank you for your letter. We shall make every effort to place Mrs. Abrahamsen for the 1988-89 school year***

Petitioner alleges that subsequent to September 6, 1988 she learned that the Board hired teachers for 1988-89 from outside the school district and also re-hired teachers with less service for elementary positions for which she was qualified and available to teach. Furthermore, petitioner alleges that an agreement existed between the Board and the Middletown Township Education Association by which non-tenured teachers whose employment was not renewed would be reemployed before outside

candidates were offered employment as teachers. Petitioner contends that her employment was not continued because she exercised her legal rights. In this regard, petitioner attests in an affidavit filed in opposition to the Board's motion for summary decision that when she questioned her school principal regarding her non-reemployment, he asked her how badly she needed the job and said "There are other circumstances which I am not at liberty to discuss—but it has nothing to do with your job performance." Furthermore, petitioner attests that the Lincroft school nurse told her "George (Ahlers) [the school principal] wants me to tell you that if you want the job this September to back off. Dr. Connor [the assistant superintendent] is very annoyed with you for having wrote (sic) that letter."

Petitioner has not been reemployed by the Board for the 1988-89 academic year. This concludes a recitation of all relevant facts for purposes of the Board's motion for summary decision.

ARGUMENTS OF THE PARTIES

The Board contends that because petitioner has not served the requisite period of time in its employ to have acquired the legislative status of tenure, she cannot now argue that her tenure rights have been violated and on that basis seek reappointment with backpay and punitive damages. In this regard, the Board relies upon Board of Education of the Township of Wyckoff v. Wyckoff Education Association, 168 N.J. Super. 497, 500 (App. Div. 1979) and the cited case therein, Winston v. South Plainfield Board of Education, 125 N.J. Super. 131, 143 (App. Div.) aff'd. 64 N.J. 582 (1974). The Board notes that whatever process was due petitioner as a non-tenured teacher was granted her in that she requested a statement of reasons and a written statement of reasons was given her. The Board also relies upon Dore v. Bedminster Township Board of Education, 185 N.J. Super. 447 (App. Div. 1982) for the proposition that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure.

The Board also asserts that regardless of the merit of petitioner's claim, it is barred by the application of N.J.A.C. 6:24-1.2, the 90-day rule, by which a petitioner is obligated to 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 which is

the subject of the requested contested case hearing. The Board explains petitioner was informed on April 25, 1988 that she would not be reappointed for the 1988-89 school year and her petition is dated as filed November 29, 1988.

The Board demands summary decision in its favor on the merits of the case and it demands dismissal of the matter upon the application of the 90-day rule.

Petitioner opposes the Board's motion for summary decision and contends material facts are in dispute when Board agents tell petitioner she was not reemployed because the teacher she was to have replaced was returning when, in fact, she was not employed to take the place of that teacher; that the Board breached its agreement to offer her any elementary positions which became available; that the Board violated public policy; and, that the Board retaliated against her for the exercise of her legal rights. Petitioner demands that summary decision be denied the Board because she has established through her affidavit and exhibits viable causes of action against the Board.

DISCUSSIONS AND CONCLUSIONS OF LAW

Petitioner did not acquire tenure in the employ of the Board. A non-tenured teacher does not have the right to have an employment contract renewed. The discretion vested in a board over matters of non-tenured teacher employment is extremely broad. Such discretion may not be exercised in violation of a non-tenured teacher's constitutional or statutory rights.

The bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. A non-tenured teacher whose employment is not renewed by a board of education is entitled to a plenary hearing only if facts are alleged which, if true, would constitute a violations of constitutional or legislatively conferred rights. In this case, there is no allegation made that the Board violated a specific constitutional or legislatively conferred right. Nowhere is it alleged that the Board would have reemployed petitioner for 1988-89 but for some direct, affirmative, clear retaliatory measure taken against her regarding her exercise of some constitutional or statutory right. More likely than not, petitioner refers to her right of either free speech, or her constitutional right for the redress of grievances as being that right which she claims was impaired. However, she makes merely a bare assertion or

generalized allegation of the infringement of such rights because there is no basis upon which she claims the Board had determined to reemploy her but then changed its mind. Petitioner fails to allege that but for some asserted infringement of her constitutional right, she would have had a legal right to continued employment.

The State Board of Education in Guerriero v. Glen Rock Borough Board of Education, 1986 S.L.D. ____ (Feb. 7, 1986) held that the issue regarding non-reemployment of non-tenured teachers is very limited and not at all concerned with whether the affected person is a good teacher by objective criteria. This Board determined not to offer petitioner reemployment for whatever reason. Such a determination is well within its discretionary authority to determine who shall teach in its schools. The Board's determination not to offer petitioner employment for 1988-89 does no violence to any identified constitutional or statutory right enjoyed by petitioner.

Accordingly, the conclusion is reached here that the facts pleaded by petitioner failed to state a cause of action for which relief could be granted. Petitioner obviously disagrees with the determination made by the Board regarding her teaching skill. Nevertheless, the Board has the authority to determine who shall teach in its schools. Accordingly, the Board's motion for summary decision on the merits must be **GRANTED.**

The Board's motion to dismiss the matter on the procedural ground of the 90-day rule must be **DENIED.** Part of petitioner's claim is that she did not know until September that the Board hired seven persons from without the district to positions for which she felt she had a legitimate claim. I agree with petitioner that the cause of action for purposes of the applicaiton of the 90-day rule did not arise until that day in September 1988 when she learned that teachers from without the district were so employed by this Board. Accordingly, the application of N.J.A.C. 6:24-1.2 is not appropriate in this circumstance.

In sum, the Board's motion for summary decision on the merits of this case is **GRANTED.** Petitioner, I **CONCLUDE,** fails to state a justiciable cause of action. The petition of appeal is **DISMISSED.**

The hearing scheduled in the matter for May 8 and 9, 1989 is hereby **CANCELLED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in 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.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 15, 1989
DATE

DANIEL B. MC KEOWN, ALJ

March 16, 1989
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 20 1989
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

ij

DEBORAH ABRAHAMSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that petitioner's exceptions to the initial decision, as well as the Board's reply to those exceptions, were filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The exceptions and reply thereto have been reviewed by the Commissioner and they are incorporated by reference herein.

On the basis of those relevant facts presented in the record of this matter, the Commissioner finds and determines that the Board erroneously concluded that the reason for petitioner's nonreemployment was due to the return from a leave of absence of a regular teacher whom petitioner had replaced. It is evident from the record that this was not the case. However, the Commissioner further finds and determines that because of the return of the teacher in question, there was no position of employment for petitioner to fill for the ensuing school year. Consequently, the Commissioner does not concur with petitioner's claim that the Board violated statutory prescription when it determined not to renew her employment for the year in question.

In the Commissioner's judgment, what is at issue herein is whether petitioner has any claim to continued employment as a nontenured teacher 1) by virtue of what she claims is a promise of employment made by the superintendent in a letter to a parent or 2) by virtue of her contention that the assistant superintendent violated a letter of agreement with the president of the teachers' association in which it is alleged that he would give first priority for reemployment to those teachers whom the Board did not reemploy at the end of the 1987-88 school year.

In this regard, the Commissioner finds and determines that even if this matter were to proceed to a plenary hearing on the merits of petitioner's allegations and assuming arguendo that petitioner could prove her claims with regard to those alleged promises for future employment made by her superiors, it would not

constitute a valid cause of action for which relief could be granted by the Commissioner. The Commissioner has previously held that actions of this nature by local school administrators are without authority and therefore are not binding upon local boards of education.

The Commissioner has previously ruled in Ronnie Abramson v. Board of Education of the Township of Colts Neck, 1975 S.L.D. 418, aff'd State Board 424, aff'd N.J. Superior Court, Appellate Division 1976 S.L.D. 1103 that:

> ***local boards of education clearly have the authority, which is not possessed by school administrators, to make the final judgments with respect to the employment of personnel to staff the schools of this State. (at 423)

The Commissioner finds that the record is barren of any evidence by petitioner which would support a claim that the Board had, in fact, adopted any policy or entered any agreement which would assure her reemployment as a nontenured teacher for the 1988-89 school year. The Commissioner so holds.

In conclusion, the Commissioner finds and determines that the action of the Board in terminating petitioner's employment at the conclusion of the 1987-88 school year was in substantial compliance with the applicable provisions of N.J.S.A. 18A:27-10 and 27-3.2. Moreover, it is further found and determined that the Board's action in not reemploying petitioner is supported by those prior case law rulings in Dore, supra, and Guerriero, supra.

Accordingly, the Commissioner adopts as his own the findings and conclusions in the initial decision and hereby grants summary judgment in the Board's favor. The instant petition is hereby dismissed.

COMMISSIONER OF EDUCATION

May 1, 1989