

AUG 18 1965
BUSINESS DIVISION

State of New Jersey
Department of Education
Trenton

NEW JERSEY
SCHOOL LAWS

Enacted during the Legislative Session of 1963

SCHOOL LAW DECISIONS
January 1, 1963, to December 31, 1963

Keep with 1938 Edition of New Jersey School Laws

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SCHOOL LAWS, SESSION OF 1963

AMENDMENTS*

CHAPTER 11, LAWS OF 1963

AN ACT concerning education and amending sections 18:9-1 and 18:9-5 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 18:9-1 of the Revised Statutes is amended to read as follows:

18:9-1. *There is hereby established a body corporate and politic, with corporate succession, to be known as the "State federation of district boards of education." All boards of education of the various school districts in this State shall be members of the State federation.*

2. Section 18:9-5 of the Revised Statutes is amended to read as follows:

18:9-5. *The State federation shall be a body corporate and politic and shall have perpetual succession and shall have the following powers:*

a. To make, amend and repeal rules, regulations, and by-laws for its own government and guidance not inconsistent with this Title;

b. To adopt an official seal and alter the same at pleasure.

c. To maintain an office at such place or places within the State as it may designate;

d. To sue and be sued in its own name;

e. To borrow money, to issue bonds or notes therefor, and to secure the same by pledge or mortgage of its real and personal property;

f. To acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act. All such property shall be exempt from taxation under chapter 4 of Title 54 of the Revised Statutes.

3. This act shall take effect immediately.

Approved April 2, 1963.

* Italics show amendments of 1963.

CHAPTER 18, LAWS OF 1963

AN ACT concerning education and amending section 18:7-34 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 18:7-34 of the Revised Statutes is amended to read as follows:

18:7-34. The polls for election shall be and remain open between the hours of 5 and 9 P. M. and during any additional time which the board may designate between the hours of 7 *A. M.* and 9 P. M., and shall remain open as much longer as may be necessary to permit those present at the designated time to cast their ballots.

2. This act shall take effect immediately.

Approved April 2, 1963.

CHAPTER 27, LAWS OF 1963

AN ACT concerning regional school districts and further amending chapter 113 of the laws of 1939.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 1 of chapter 113 of the laws of 1939 is further amended to read as follows:

1. Every proposition, question or proposal heretofore or hereafter adopted by the legal voters of any regional school district authorizing the issuance of bonds for the purchasing or taking or condemning of land for school purposes shall, unless otherwise expressly provided therein, be deemed to include and authorize the purchase of any schoolhouse or schoolhouses or other buildings situate thereon and the furniture and other necessary equipment therefor and the materials and supplies therefor, and the issuance of said bonds for said purpose in the amount or amounts set forth in such proposition, question or proposal. The bonds so issued shall be dated and sold in all respects in accordance with the provisions of chapters 7 and 8 of Title 18 of the Revised Statutes, and shall mature within the period or respective periods of time prescribed by such provisions, in each case computed from the date of such bonds.

Notwithstanding the provisions of section 18:8-1 of said Revised Statutes, or of any other law, the board of education of any regional school district may from time to time acquire for school purposes, by purchase, condemnation or otherwise, lands or premises not exceeding 45 acres in extent and situated in whole or in part in any one or more municipalities adjoining the regional school district, and all of the proceedings to acquire such lands or premises shall be in accordance with the provisions of said Title.

2. This act shall take effect immediately.

Approved May 8, 1963.

CHAPTER 51, LAWS OF 1963

AN ACT to amend the "Public Employees' Retirement-Social Security Integration Act," approved June 28, 1954 (P. L. 1954, c. 84).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 22 of the act of which this act is amendatory is amended to read as follows:

22. Under this act there shall be the contingent reserve fund, annuity savings fund, retirement reserve fund, and the *special reserve fund*.

2. Section 28 of the act of which this act is amendatory is amended to read as follows:

28. *The special reserve fund shall be the fund to which all profits on the sale of securities and any earnings in excess of the amounts annually allowed under the provisions of section 33 of this act shall be transferred. No additional amounts shall be credited to the special reserve fund at any time when the total accumulations in such fund shall equal 1% of the book value of the investments of the retirement system. In this event, any such excess shall be credited to the contingent reserve fund. All losses from the sale of securities shall be charged against the special reserve fund.*

3. This act shall take effect immediately.

Approved May 27, 1963.

CHAPTER 52, LAWS OF 1963

AN ACT to amend the "Teachers' Pension and Annuity Fund-Social Security Integration Act," approved June 1, 1955 (P. L. 1955, c. 37).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 27 of the act of which this act is amendatory is amended to read as follows:

27. The special reserve fund shall be the fund to which all profits on the sale of securities *and any earnings in excess of the amounts annually allowed under the provisions of section 25 of this act* shall be transferred. *No additional amounts shall be credited to the special reserve fund at any time when the total accumulations in such fund shall equal 1% of the book value of the investments of the retirement system. In this event, any such excess shall be credited to the contingent reserve fund.* All losses from the sale of securities shall be charged against the special reserve fund.

2. This act shall take effect immediately.

Approved May 27, 1963.

CHAPTER 53, LAWS OF 1963

AN ACT to amend the Public Employees' Retirement-Social Security Integration Act, chapter 84, P. L. 1954, approved June 28, 1954.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 58 of the act of which this act is amendatory is amended to read as follows:

58. Prior to January 1, 1960, contributions to the Social Security Fund by members of the retirement system shall be deducted from the contributions required to be paid to the retirement system by such members as provided in section 25 of this act.

Contributions by members of the retirement system to the Social Security Fund shall be made in the manner prescribed by the State Agency or Social Security. Contributions to the Social Security Fund shall not be subject to any provisions of this act, dealing with the withdrawal of contributions, loans, or the payment of any annuities, pensions, disability or death benefits. Any change in the rate of contribution to the Social Security Fund after December 31, 1959, shall result in a corresponding change in the amount of contributions payable by the members.

In the event a member of the retirement system is also a member of another retirement system, supported in whole or in part by the State or by an interstate instrumentality in which this State participates, which provides for a reduction in the amount of the retirement allowance by the amount of the member's Social Security benefit, the amount of the Social Security contribution to be deducted from the member's contribution to this retirement system shall be computed on the basis of the proportion that the member's compensation subject to this retirement system bears to the member's total compensation subject to such systems.

2. Section 59 of the act of which this act is amendatory is amended to read as follows:

59. Upon attainment of age 65 by a retired member or upon retirement of a member after the attainment of age 65, the board of trustees shall reduce such member's retirement allowance by the amount of the old age insurance benefit under Title II of the Social Security Act payable to him. Membership in the retirement system shall presume the member's acceptance of and consent to, such reduction. However, such reduction shall be subject to the following limitations:

a. The amount of the old age insurance benefit shall be computed in the same manner as computed by the Federal Social Security Administration, except that in determining such benefit amount only wages or compensation for services performed in the employ of the State, one or more of its instrumentalities, one or more of its political subdivisions, or one or more instrumentalities of its political subdivisions, shall be included.

b. The retirement allowance shall not be reduced below the amount of the annuity portion of the retirement allowance being paid at the time of his retirement.

c. The reduction shall apply in the following cases only:

- (1) Retirement for age.
- (2) Retirement for disability.
- (3) Retirement for age on a deferred retirement allowance, as provided in section 38 of this act.
- (4) Where an allowance is being paid upon resignation after 25 years of service, as provided in section 41 of this act.

d. Any increase in the amount of the old age insurance benefit under Title II of the Social Security Act to take effect after December 31, 1959, shall be disregarded in determining the amount of reduction from the retirement allowance of a member.

e. Whenever the amount of reduction from the retirement allowance shall have been once determined, it shall remain fixed for the duration of a retirement allowance, except that any decrease in the amount of the old age insurance benefit under Title II of the Social Security Act shall result in a corresponding decrease in the amount of reduction from the retirement allowance, and except that any error may be corrected, as provided in section 54 of this act.

f. Whenever a member of the retirement system is also a member of another retirement system, supported in whole or in part by the State or by an interstate instrumentality in which this State participates, which provides for a reduction in the member's retirement allowance by the amount of his Social Security benefit, the reduction shall be prorated among the said retirement system on the basis of the proportion that the retirement allowance from each system bears to the total reduction required so that the total amount of the reduction by all such retirement systems shall not exceed the amount of the old age insurance benefit computed in accordance with the provisions of this section.

3. This act shall take effect immediately.

Approved May 27, 1963.

CHAPTER 54, LAWS OF 1963

AN ACT to amend the Teachers' Pension and Annuity Fund-Social Security Integration Act, chapter 37, P. L. 1955, approved June 1, 1955.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 67 of the act of which this act is amendatory is amended to read as follows:

67. Prior to January 1, 1960, amounts equal to the Social Security contributions by each member upon compensation upon which such member's contributions to the retirement system are based shall be deducted from the contributions required to be paid to the retirement system by such member

as provided in section 29 of this act. On and after January 1, 1960, amounts equal to the Social Security contributions by each member upon compensation upon which such member's contributions to the retirement system are based shall be deducted from the contributions required to be paid to the retirement system by such member to the extent of the Social Security rate of contribution in effect on December 31, 1959. Any change in the rate of contribution to the Social Security Fund after December 31, 1959, shall result in a corresponding change in the amount of contributions payable by the member.

Contributions by members of the retirement system to the Social Security Fund shall be made in the manner prescribed by the State Agency for Social Security. Contributions to the Social Security Fund shall not be subject to any provision of this act dealing with the withdrawal of contributions, loans, or the payment of any annuities, pension, disability or death benefits.

In the event a member of the retirement system is also a member of another retirement system, supported in whole or in part by the State or by an interstate instrumentality in which this State participates, which provides for a reduction in the amount of the retirement allowance by the amount of the member's Social Security benefit, the amount of the Social Security contribution to be deducted from the member's contribution to this retirement system shall be computed on the basis of the proportion that the member's compensation subject to this retirement system bears to the member's total compensation subject to such systems.

2. Section 68 of the act of which this act is amendatory is amended to read as follows:

68. When a member who retires reaches age 65 or upon retirement of a member after the attainment of age 65, the Board of Trustees shall reduce the retirement allowance by the amount of the old age insurance benefit under Title II of the Social Security Act paid or payable to him whether received or not. Membership in the retirement system shall presume the member's acceptance of and consent to such reduction. However, such reduction shall be subject to the following limitations:

(a) The amount of the old age insurance benefit shall be computed in the same manner as computed by the Federal Social Security Administration, except that in determining such benefit amount only the wages or compensation for services performed in the employ of the State, or one or more of its instrumentalities, one or more of its political subdivisions, or one or more instrumentalities of its political subdivisions, or one or more instrumentalities of the State and one or more of its political subdivisions shall be included.

(b) Eligibility to the old age insurance benefit shall be computed in the same manner as computed by the Federal Social Security Administration, except that in determining such eligibility only the quarters of coverage and wages or compensation for services performed in the employ of the State, or one or more of its instrumentalities, or one or more of its political subdivisions, or one or more instrumentalities of its political subdivisions, or one or more instrumentalities of the State and one or more of its political subdivisions shall be included.

(c) The retirement allowance shall not be reduced below the amount of the annuity portion of the retirement allowance fixed at the time of the member's retirement, unless the member shall, at the time of retirement, agree to such reduction in order to provide a higher level of payments prior to attaining age 65 based upon his accumulated deductions.

(d) The reduction shall apply in the following cases only:

(1) Retirement for age.

(2) Retirement for disability.

(3) Retirement for age on a deferred retirement allowance, as provided in section 36 of this act.

(4) Where an allowance is being paid upon resignation after 25 years of service, as provided in section 37 of this act.

(5) Where an allowance is being paid upon retirement after 35 years of service as provided in section 45 of this act.

(e) Any increase in the amount of the old age insurance benefit under Title II of the Social Security Act to take effect after December 31, 1959, shall be disregarded in determining the amount of such reduction from the retirement allowance.

(f) Whenever the amount of such reduction from the retirement allowance shall have been once determined, it shall remain fixed for the duration of the retirement allowance, except that any decrease in the amount of the old age insurance benefit under Title II of the Social Security Act shall result in a corresponding decrease in the amount of reduction from the retirement allowance, and except that any error may be corrected, as provided in section 63 of this act.

(g) The reduction provided in this section shall never be greater than the amount of the old age insurance benefit which may be paid or payable by the Federal Social Security Administration whether received or not.

(h) Whenever a member of the retirement system is also a member of another retirement system, supported in whole or in part by the State or by an interstate instrumentality in which this State participates, which provides for a reduction in the member's retirement allowance by the amount of his Social Security benefit, the reduction shall be prorated among the said retirement systems on the basis of the proportion that the retirement allowance from each system bears to the total reduction required so that the total amount of the reduction by all such retirement systems shall not exceed the amount of the old age insurance benefit computed in accordance with the provisions of this section.

3. This act shall take effect immediately.

Approved May 27, 1963.

CHAPTER 60, LAWS OF 1963

AN ACT to amend the "Higher Education Assistance Authority Act," approved June 17, 1959 (P. L. 1959, c. 121) and to repeal certain sections thereof.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 10 of the act of which this act is amendatory is amended to read as follows:

10. The authority shall have the following powers:

(1) To assist in the placing of loans to persons, who are residents of this State, and who are attending and are in good standing in, or who plan to attend, any qualified institution of collegiate grade, located in this State or elsewhere, which is approved by any regional accrediting association recognized by the national commission on accrediting, *or approved by the New Jersey State Board of Education* in order to assist them in meeting their expenses of higher education, and to guarantee such loans upon such terms and conditions as the authority may prescribe, but no loan or loans shall be placed or guaranteed by the authority for any such person to an amount in excess of, \$1,500.00 for any school year, nor to a total amount in excess of, \$7,500.00.

(2) To adopt rules not inconsistent with law governing the application for and the guarantee of loans made by the authority and governing any other matters related to its activities.

(3) To perform any other acts which may be deemed necessary or appropriate to carry out the objects and purposes of this act.

2. Section 11 of the act of which this act is amendatory is amended to read as follows:

11. Any application for a loan under this act shall be submitted to the authority for its approval, and the authority shall approve the same only if it finds that the applicant:

(1) Has been a resident of New Jersey for a period of not less than 6 months immediately preceding the date of his application for such loan, and has demonstrated high moral character, good citizenship, and dedication to American ideals, and

(2) Intends to make application for admission to, or has been admitted to, or is in regular attendance at and is in good standing in, a qualified institution of collegiate grade approved by any regional accrediting association recognized by the national commission on accrediting, *or approved by the New Jersey State Board of Education*, and

(3) Has demonstrated financial need for such loan as determined by the standards and procedures established by the authority and has complied with all the rules adopted by the authority pursuant to this act in connection with the granting of such loans.

3. Section 12 of the act of which this act is amendatory is amended to read as follows:

12. Upon approval by the authority of a loan application, any bank may make the loan as approved and upon the terms and conditions required under this act, but no moneys shall be advanced or paid under any such loan until the applicant shall have satisfied the authority, and the authority shall have certified to the bank that the applicant has been admitted to, or is in regular attendance and in good standing at a qualified institution of collegiate grade approved by any regional accrediting association recognized by the national commission on accrediting *or approved by the New Jersey State Board of Education*. Any bank making a loan shall co-operate with the authority in supervising the use of credit in accordance with its purposes.

4. Section 20 of the act of which this act is amendatory is amended to read as follows:

20. Whenever any approved note shall be in default to any bank for 30 days after the date of maturity thereof, or whenever any installment thereon is more than 3 months in arrears, the authority shall, upon the demand of *the* bank, purchase from said bank such note by paying to said bank out of the reserve fund the total amount of principal and interest then due and owing to said bank on said note, as herein provided.

5. Section 26 of the act of which this act is amendatory is amended to read as follows:

26. The authority may, with respect to the exercise of its functions related to loans guaranteed by it under this act, the provisions of any other law to the contrary notwithstanding:

(1) Consent to the modification with respect to rate of interest, time of payment of principal or interest or any portion thereof, or other provisions of any note, or any instrument securing a loan which has been guaranteed by the authority:

(2) Authorize payment or compromise, subject to the approval in writing of the Attorney General, of any claim upon or arising as a result of any such guaranty.

(3) Authorize payment, compromise, waiver or release, subject to the approval in writing of the Attorney General, of any debt, right, title, claim, lien or demand, however acquired, including any equity or right of redemption and the waiver or release of any debt, right, title, claim, lien or demand including any equity or right of redemption shall be sufficient if executed by the commissioner on behalf of the authority. The register or county clerk of any county and the clerk of any court is hereby authorized to cancel of record any lien, including but not limited to judgments, chattel mortgages and conditional sales agreements whenever the document evidencing such cancellation or request for cancellation is signed by the commissioner on behalf of the authority; and the register and the clerk of any county is authorized to record any documents of the authority signed by the commissioner.

(4) Purchase at any sale, public or private, upon such terms and for such prices as it determines to be reasonable and take title to, property, real, personal or mixed;

(5) Sell at public or private sale, exchange, assign, convey or otherwise dispose of any such property upon such terms and for such prices as it determines reasonable;

(6) Complete, administer, operate, obtain and authorize payment for insurance on and maintain, renovate, repair, modernize, lease or otherwise deal with any property acquired or held by it pursuant to this act;

(7) Authorize payment from the fund and any income received by the investment of said fund, subject to the rules of the authority, disbursements, costs, commissions, attorney's fees and other reasonable expenses related to and necessary for making and protection of guaranteed loans and the recovery of moneys, loans or management of property acquired in connection with such loans.

6. Sections 16, 17, 18, 19, 21 and 23 of the act of which this act is amendatory are repealed.

7. This act shall take effect immediately.

Approved May 27, 1963.

CHAPTER 121, LAWS OF 1963

AN ACT concerning pensions, amending the "Public Employees' Retirement-Social Security Integration Act," approved June 28, 1954 (P. L. 1954, c. 84); amending "An act supplementing 'An act to provide coverage for certain State, county, municipal, school district and public employees, under the provisions of Title II of the Federal Social Security Act, as amended, repealing chapters 14 and 15 of Title 43 of the Revised Statutes including acts amendatory thereof and supplementary thereto; granting refund of accumulated deductions paid thereunder or membership in the Public Employees' Retirement System created hereunder, specifying contributions to be paid and benefit rights therein,' approved June 30, 1954 (P. L. 1954, c. 84), and providing for benefits and rates of contribution of State law enforcement officers," approved January 6, 1956 (P. L. 1956, c. 257); and amending "An act amending and supplementing the 'Public Employees' Retirement-Social Security Integration Act,' approved June 28, 1954 (P. L. 1954, c. 84)," approved January 11, 1956 (P. L. 1955, c. 261).

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 57 of chapter 84 of the laws of 1954 is amended to read as follows:

57. a. Each member who is a member on *December 1, 1956* and each person who thereafter becomes a member *prior to the effective date of this amendatory act*, will be eligible to purchase the additional death benefit coverage hereinafter described, provided he selects such coverage within one year after *December 1, 1956* or after the effective date of membership, whichever date is later, or makes an election pursuant to subsection b of this section.

b. *Each member who, on the effective date of this amendatory act, shall not have elected such additional death benefit coverage or who had elected*

coverage, but for whom there is not in effect such additional death benefit coverage shall also be eligible to elect such additional death benefit coverage, provided he furnishes satisfactory evidence of insurability and on the date of such election is actively at work and performing all his regular duties at his customary place of employment. Applications under this subsection shall be filed within 1 year following the effective date of this amendatory act.

c. Each person becoming a member on or after the effective date of this amendatory act who on the date he becomes a member is less than 60 years of age shall automatically be covered for such additional death benefit coverage from the first day of his membership on which he is actively at work and performing all his regular duties at his customary place of employment. Such automatic coverage shall continue during the member's first year of membership and during such year he shall make contributions as fixed by the board of trustees. Additional death benefit coverage for such member shall continue in effect after the first year of membership on the continuance of payment of the required contributions therefor.

d. Each person becoming a member on or after the effective date of this amendatory act who on the date he becomes a member is 60 or more years of age may, within 1 year from the date of membership, elect to purchase such additional death benefit coverage, provided that the member furnishes satisfactory evidence of insurability and on the date of such election is actively at work and performing all his regular duties at his customary place of employment.

e. Notwithstanding other provisions of this section relating to the amount of death benefit any member who has acquired or shall acquire additional death benefit coverage, the death benefit payable in the event of death occurring on or after the effective date of this amendatory act and during the first year of membership shall be based upon the member's annual base salary. The effective date of coverage of any person electing to purchase additional death benefit coverage, pursuant to the provisions of subsections "a," "b" and "d" of this section shall be the first day of the month immediately following the date of such election unless evidence of insurability is required as a condition of such election in which event the effective date of coverage shall be the first day of the month which immediately follows the later of (a) the date of such election and (b) the date such evidence is determined to be satisfactory.

f. The board of trustees shall establish schedules of contributions to be made by the members who elect to purchase the additional death benefit coverage. Such contributions shall be so computed that the contributions made by or on behalf of all covered members in the aggregate shall be sufficient to provide for the cost of the benefits established by this section. Such schedules of contributions shall be subject to adjustment from time to time, by the board of trustees, as the need may appear.

g. Upon the receipt of proper proofs of the death in service of any such member while covered for the additional death benefit coverage there shall be paid to such person, if living, as the member shall have nominated by written designation duly executed and filed with the board of trustees, otherwise to the executor or administrator of the member's estate, an amount equal to 1½ times the compensation received by the member in the last year

of creditable service or some lesser amount as may be provided by the board of trustees and elected to purchase by the member; provided, *however*, that if such death in service shall occur on or after July 1, 1956, and after the member has attained age 70, the amount payable shall equal $\frac{3}{16}$ of the compensation received by the member in the last year of creditable service.

h. The contributions of a member for the additional death benefit coverage shall be deducted from his compensation, but if there is no compensation from which such contributions may be deducted it shall be the obligation of the member to make such contributions directly to the board of trustees or as directed by the board; provided, however, that no contributions shall be required after June 30, 1956, while a member remains in service after attaining age 70, but that his employer shall be required to pay into the fund on his behalf in such case an amount equal to the contribution otherwise required by the board of trustees in accordance with this section.

i. Any other provision of this act notwithstanding, the contributions of a member for the additional death benefit coverage under this section shall not be returnable to the member or his beneficiary in any manner, or for any reason whatsoever, nor shall any contributions made for the additional death benefit coverage be included in any annuity payable to any such member or to his beneficiary.

j. A member who has elected to purchase the additional death benefit coverage provided by this section may file with the board of trustees, and alter from time to time during his lifetime, as desired, a duly attested, written, new nomination of the payee of the death benefit provided under this section. Such member may also file and alter from time to time during his lifetime, as desired, a request with the board of trustees directing payment of said benefit in one sum or in equal annual installments over a period of years or as a life annuity. Upon the death of such member, a beneficiary to whom a benefit is payable in one sum may elect to receive the amount payable in equal annual installments over a period of years or as a life annuity.

k. All other provisions of this section notwithstanding, this section and the benefits provided under this section shall not come into effect until a required percentage of the members shall have applied for the additional death benefit coverage under this section. This required percentage shall be fixed by the board of trustees. Any such percentage may be made applicable to male members only or to other groupings as determined by the board of trustees of the Public Employees' Retirement System. Applications for such additional death benefit coverage shall be submitted to the secretary of the board of trustees in such manner and upon such forms as the board of trustees shall provide.

2. Section 4 of chapter 257 of the laws of 1955 is amended to read as follows:

4. Subject to the provisions of section 59 of the act to which this act is a supplement, upon service retirement as a law enforcement officer a member shall receive a service retirement allowance consisting of:

a. An annuity which shall be the actuarial equivalent of his accumulated deductions *together with regular interest* at the time of his retirement; and

b. A pension which, when added to the annuity, will produce a retirement allowance equal to 2% of his final compensation multiplied by his number of years of service *credit* as a law enforcement officer for which he has made contributions up to 25, plus $1\frac{2}{3}\%$ of his final compensation multiplied by his number of years of service *credit* other than service as a law enforcement officer, for which he has made contributions, plus 1% of his final compensation multiplied by his number of years of service *credit* as a law enforcement officer for which he has made contributions over 25 or for which he has made no contributions to the retirement system for the period while he was a law enforcement officer or, in the case of a veteran, while he was in office, position or employment of this State, or of any county, municipality or school district; provided, however, that in the case of any member electing to receive benefits under section 38(b) of the act to which this act is a supplement, such benefits shall be payable at age 60.

The death benefit provided in section 48 (d) of the act to which this act is a supplement shall apply in the case of any member retiring under the provisions of this section.

3. Section 1 of chapter 261 of the laws of 1955 is amended to read as follows:

1. a. For the purpose of section 41(c) and section 57 of chapter 84 of the public laws of 1954, a member of the Public Employees' Retirement System shall be deemed to be in service for a period of no more than 2 years while on official leave of absence without pay; provided, that satisfactory evidence is presented to the board that such leave of absence without pay is due to illness.

b. For the purposes of section 41(c) and section 57 of chapter 84 of the public laws of 1954, a member of the Public Employees' Retirement System shall be deemed to be in service for a period of no more than 93 days while on official leave of absence without pay when such leave of absence is due to any reason other than illness.

c. In order for a member of the Public Employees' Retirement System to be covered hereunder for the optional death benefits provided by section 57 of chapter 84 of the public laws of 1954, he shall continue to make contributions for same during the period such member is on official leave of absence without pay, *except that when such official leave of absence without pay is due to illness, no contribution shall be required of the member during the period he is deemed to be in service while on such leave of absence.*

4. Section 2 of chapter 261 of the laws of 1955 is hereby repealed.

5. This act shall take effect immediately.

Approved July 1, 1963.

CHAPTER 132, LAWS OF 1963

AN ACT concerning certain county vocational school districts and amending sections 18:15-41, 18:15-43, 18:15-51, 18:15-55, 18:15-56 and 18:15-57 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 18:15-41 of the Revised Statutes is amended to read as follows:

18:15-41. (A) County vocational school districts organized after July 1, 1931, shall not include the territory within the school district boundaries of any city having a resident public school enrollment of 15,000 or more, if such city is maintaining a system of vocational education approved for the purposes of Federal or State allotment of vocational funds by the Commissioner of Education under the regulations of the State Board of Education.

(B) *Notwithstanding the provisions of paragraphs (A) of this section, any county vocational school district created or organized subsequent to July 1, 1962 in a county of the second class having a population of not less than 375,000 nor more than 425,000 inhabitants, shall include the territory within the boundaries of any city referred to in said paragraph (A) after the date of filing in the office of the State Commissioner of Education of a certified copy of a resolution adopted by the board of chosen freeholders of such county subsequent to the organization of such county vocational school district and of a resolution adopted by the board of education of such city (with the concurrence expressed by resolution of the board of school estimate of such city and of the board or body having charge of the finances of such city), setting forth the finding and determination that it is in the best interests of such county vocational school district and of such city and its school district, that such county vocational school district shall include the territory within the school district boundaries of such city.*

(C) *The board of education of each county vocational school district and the board of education of each city referred to above in paragraph (B) of this section, are each hereby authorized and empowered to undertake and to enter into agreements of any nature whatsoever necessary, desirable, useful or convenient for and with respect to the assumption, operation, or administration by the county vocational school district of any system of vocational education then being maintained in such city, including, but not limited to, the transfer of principals, teachers, employees, pupils or classes, the purchase, grant, transfer or lease to the county vocational school district of any lands, schools, buildings, furnishings, equipment, apparatus or supplies constituting part of or used in connection with such city system, and the making of or provision for payments, costs or expenses in connection with any of the aforesaid, and copy of any such agreement shall be filed in the office of the State Commissioner of Education.*

(D) *All principals, teachers and employees of the school district in any city referred to above in paragraph (B) of this section and who are employed in or assigned to the system of vocational education in any such city shall be transferred to and continue their respective employments in the em-*

ploy of the county vocational school district from and after the date of transfer provided for in any agreement entered into pursuant to paragraph (C) of this section, and their rights to tenure, pension and accumulated leave of absence accorded under the laws of the State shall not be affected by the transfer to the county vocational school district.

2. Section 18:15-43 of the Revised Statutes is amended to read as follows:

18:15-43. (A) The boards of education of schools established under the provisions of section 18:15-40 of this Title, shall receive pupils from other districts so far as their facilities will permit, provided a rate of tuition not exceeding the cost of such education is paid by the sending districts.

(B) The board of education of any county vocational school district referred to in paragraph (B) of section 18:15-41 of this article and the board of education of any other school district within the county thereof are each hereby authorized and empowered to undertake and to enter into agreements with respect to the attendance at schools of the county vocational school district, of residents or pupils of such other school district who are students attending the schools of the county vocational school district and as to the payments to be made or the rate of tuition to be charged on account of such students. The payment or rate of tuition per student shall be 50% of the pro rata annual cost of the operation and maintenance of the county vocational school district remaining after deduction from such cost of all amounts of aid received by the county vocational school district or the county thereof on account of such district or credited thereto from the State of New Jersey or the United States of America or agencies thereof, but excluding from such cost any amounts on account of required payments of interest on or principal of bonds or notes of the county issued for the purposes of such district. The annual aggregate amount of all of such payments or tuition may be anticipated by the board of education of the county vocational school district and by the board of chosen freeholders of the county with respect to the annual budget of the county vocational school district. The amounts of all annual payments or tuition to be paid by any such other school district shall be raised in each year in the annual budget of such other school district and paid to the county vocational school district.

3. Section 18:15-51 of the Revised Statutes is amended to read as follows:

18:15-51. The board of education of a county vocational school *district* may:

a. Purchase, sell, and improve school grounds, erect, purchase, lease, enlarge, improve, and repair school buildings, including any building or buildings *for school purposes* owned by any municipality *or school district* in such county, with or without furnishings and equipment, and purchase school furniture and other necessary equipment;

b. Take and condemn land and other property for school purposes in the manner provided by law regulating the ascertainment and payment of compensation for property condemned and taken for public use. If either party shall feel aggrieved by any proceedings and award thereunder, he may appeal in the manner provided by law for appeals from such proceedings and award;

c. Insure school buildings, furniture, and other school property, and receive, lease, and hold in trust any and all real and personal property for the benefit of the school *district*;

d. Employ and dismiss principals, teachers, janitors, mechanics, and laborers; fix, alter, and order paid their salaries and compensation, and prescribe the course of study to be pursued;

e. Appoint a treasurer, who shall not be a member of the board of education and fix his salary and term of office. The treasurer shall give bonds in such amounts and with such securities as the board shall determine;

f. Make, amend, and repeal rules, regulations, and by-laws not inconsistent with this Title, or with the rules and regulations of the State board, for its own government, for the transaction of business, and for the government and management of the school and school property under its control;

g. Suspend and expel pupils from school;

h. Provide textbooks and other necessary supplies and apparatus;

i. Adopt an official seal by which all its official acts may be authenticated;

j. Make an annual report to the commissioner on or before August 1 in the manner and form prescribed by him;

k. Appoint a secretary and fix his salary and term of office; and

l. Borrow by temporary loan such sum as may be necessary to meet the current expenses of such school *district*, not exceeding 80% of the anticipated receipts of money which may be distributed to such county for the purpose of carrying out the provisions of this article. Such temporary obligation, if any, shall be paid first out of the moneys received under this article.

4. Section 18:15-55 of the Revised Statutes is amended to read as follows:

18:15-55. On or before February 1 in each year the board of education of a county vocational school *district* shall prepare and deliver to each member of the board of school estimate an itemized statement of the amount of money estimated to be necessary for the current expenses of and for repairing and furnishing *schools or buildings of the county vocational school district* for the ensuing school year.

5. Section 18:15-56 of the Revised Statutes is amended to read as follows:

18:15-56 (A) Between February 1 and February 15 in each year the board of school estimate shall fix and determine the amount of money necessary to be appropriated for the use of the *county vocational school district* for the ensuing school year exclusive of the amount to be received from the State as provided in section 18:15-58 of this Title.

(B) The board of school estimate shall, on or before the last named date, make 2 certificates of the amount, signed by at least 3 of its members, one of which certificates shall be delivered to the board of education of the *county vocational school district* and the other to the board of chosen freeholders of the county.

(C) The board of chosen freeholders shall, upon receipt of the certificate, appropriate, in the same manner as other appropriations are made by it, the

amount so certified, and the amount shall be assessed, levied, and collected in the same manner as moneys appropriated for other purposes in the county are assessed, levied, and collected, *unless such amount is to be raised as otherwise hereinafter provided in this section.*

(D) The board of chosen freeholders of any county of the second class having a population of not less than 375,000 nor more than 425,000 inhabitants and which has created a county vocational school district subsequent to July 1, 1962, may provide that the amounts (other than amounts to be raised for interest and redemptions of bonds or notes issued by the county for purposes of such county vocational school district) to be raised for annual or special appropriations for such county vocational school district are to be apportioned on the basis of (1) the apportionment valuations, as defined in section 54:4-49 of the Revised Statutes, of the municipalities in such county, or (2) the average daily enrollment of pupils from municipalities within such county during the preceding school year, or (3) any combination or percentage of either of the aforesaid, as shall be determined by said board of chosen freeholders prior to October 1 for and with respect to the school year commencing on July 1 next succeeding said date. Determination as to any basis as aforesaid shall be made by resolution of such board of chosen freeholders, if such board, after consideration of the vocational school needs of such county and of the municipalities therein and of the costs and expenses of such county vocational school district and of the financial resources and abilities of such county and of the municipalities therein, shall find that such basis is in the best interests of the county and of such county vocational school district and the municipalities therein. Any basis so established shall continue without change for a period of 5 school years, unless prior to the end of such period the State Commissioner of Education, upon the request of the board of chosen freeholders or of the board of education of the county vocational school district, shall determine that some other or different basis, as herein permitted or provided for, shall be in the best interests of such county, such county vocational school district and the municipalities therein, and is a basis which could have been established by the board of chosen freeholders of such county. Until any other basis shall have been established, the basis referred to in clause (1) above shall be applicable to such county vocational school district, Where average daily enrollment of the preceding school year is to be used as the whole or any part of a basis for apportionment of amounts to be raised for annual or special appropriations, the State Commissioner of Education shall certify to the county vocational school district and to the county board of taxation, from the latest official statistics then available or estimates thereof, the average daily enrollment to be used until such time as actual average daily enrollment statistics shall be available and certified by the State Commissioner of Education as aforesaid. No amount to be raised for annual or special appropriations for the county vocational school district shall be appropriated as in this paragraph provided except with the concurrence and consent of the board of chosen freeholders if the basis for raising such annual or special appropriations of the county vocational school district shall require that more than 50% of such basis shall be apportionment valuations as referred to in clause (1) above.

6. Section 18:15-57 of the Revised Statutes is amended to read as follows:

18:15-57. Whenever a board of education of a county vocational school district shall decide that it is necessary to raise money for the purchase of

lands or buildings for school purposes, or for erecting, enlarging, *improving*, repairing, or furnishing a building or buildings for the use of the school *district*, it shall prepare and deliver to each member of the board of school estimate a statement of the amount of money estimated to be necessary for such purpose or purposes.

The board of school estimate shall fix and determine the necessary amount and shall make 2 certificates thereof, one of which certificates shall be delivered to the board of education and the other of *which* to the board of chosen freeholders of the county in which the school *district* is situated.

The board of chosen freeholders may appropriate such amount as other appropriations are made by it, and the amount shall be raised, assessed, levied, and collected at the same time and in the same manner as moneys appropriated for other purposes in the county are raised, assessed, levied, and collected; or the board of chosen freeholders may appropriate and borrow such amount for the purpose or purposes aforesaid *by issuance of bonds or notes of the county pursuant to the Local Bond Law, notwithstanding any debt or limitation or requirement for down payment therein provided for*. The proceeds of the sale of *such obligations* shall be *paid to* the treasurer of the county vocational school *district* and shall be paid out *by him* only on the warrants or orders of the board of education of the school *district*. *The treasurer shall in no event disburse such proceeds, except to pay the expenses of issuing and selling such obligations and for the purpose or purposes for which such obligations were issued. If for any reason any part of such proceeds are not applied to or necessary for such purpose or purposes, the board of education of the county vocational school district may transfer the balance remaining unapplied to the capital outlay account of the school district.*

7. This act shall take effect immediately.

Approved July 10, 1963.

CHAPTER 139, LAWS OF 1963

AN ACT concerning education in relation to the transfer of real estate no longer used for school purposes in certain cases, and amending section 18:5-27 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 18:5-27 of the Revised Statutes is amended to read as follows:

18:5-27. Whenever the board of education of a municipality shall determine that all or any part of a tract of land with or without a school building or buildings erected thereon is no longer desirable or necessary, or required for school purposes, such board may transfer and convey such land or any portion thereof, with or without improvements thereon, to such municipality, board, body, commission, volunteer fire company *or rescue squad*, actively engaged in the protection of life and property and duly incorporated under the laws of the State of New Jersey, or may transfer or convey such land to any American Legion Post, Veterans of Foreign Wars, or other recognized

veterans organization of the United States of America, located in such county or municipality, for a nominal consideration as a meeting place for any such American Legion Post, Veterans of Foreign Wars or other recognized veterans organization of the United States of America located in such municipality or county.

2. This act shall take effect immediately.

Approved August 9, 1963.

CHAPTER 148, LAWS OF 1963

AN ACT concerning election of members of boards of education and amending sections 18:7-15 and 18:7-19 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 18:7-15 of the Revised Statutes is amended to read as follows:

18:7-15. Notices of the election shall specify the day, time, and place thereof, and whenever 2 or more polling districts have been established, shall also contain the boundaries of the several polling districts *or they may be referred to by the number or numbers assigned to one or more of the election districts established with which they coincide* and the location of the polling place in each of such districts.

At least 10 days before the date of the election the district clerk shall post not less than 7 notices of the election, one on each schoolhouse within the district and others at such other public places therein as the board shall direct. A district clerk who shall fail to post notices in accordance with this section shall pay a fine of \$20.00, to be recovered in a civil action in a municipal court or county district court by any resident of the district.

The district clerk shall also cause such election to be advertised at least one week before the holding of such election in a newspaper circulating in the district.

2. Section 18:7-19 of the Revised Statutes is amended to read as follows:

18:7-19. Whenever the board shall establish 2 or more polling places in the district, they shall also and at the same time establish the boundaries of the polling districts, *which* boundaries shall coincide with the boundaries of *and may be referred to by the number or numbers assigned to one or more* of the election districts of the municipality or municipalities. No person shall vote at any such election elsewhere than at the polling place designated for the voters of the polling district in which he resides.

3. This act shall take effect immediately.

Approved August 30, 1963.

CHAPTER 164, LAWS OF 1963

AN ACT to amend "An act to provide for a schedule of minimum salaries and increments for certain persons holding office, position, or employment under any district or regional board of education, or any board of education of a county vocational school of this State, and supplementing article 2 of chapter 13 of Title 18 of the Revised Statutes," approved December 13, 1954 (P. L. 1954, c. 249).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 1 of the act of which this act is amendatory is amended to read as follows:

1. As used in this act:

"Teacher" shall include any full-time member of the professional staff of any district or regional board of education or any board of education of a county vocational school, the qualifications for whose office, position, or employment are such as to require him to hold an appropriate certificate issued by the State Board of Examiners in full force and effect in this State and who holds a valid permanent, limited or provisional certificate appropriate to his office, position, or employment.

"Salary schedule" shall mean a schedule of minimum salaries fixed according to years of employment.

"Full-time" shall mean the number of days of employment in each week and the period of time in each day required by the State Board of Education, under rules and regulations prescribed for the purposes of this act, to qualify any person as a full-time teacher.

"Year of employment" shall mean employment by a teacher for 1 academic year in any publicly owned and operated college, school or other institution of learning for 1 academic year in this or any other State or territory of the United States.

"Academic year" shall mean the period between the opening day of school in the district after the general summer vacation, or 10 days thereafter, and the next succeeding summer vacation.

"Employment increment" shall mean an annual increase of \$250.00 granted to a teacher for 1 "year of employment."

"Adjustment increment" shall mean, in addition to an "employment increment," an increase of \$150.00 granted annually as long as shall be necessary to bring a teacher, lawfully below his place on the salary schedule according to years of employment, to his place on the salary schedule according to years of employment; provided, that a fraction of an "adjustment increment" may be granted when such amount is sufficient to bring a teacher to his place on the schedule according to years of employment.

"Bachelor's degree or the equivalent" shall mean a bachelor's degree conferred by a college or university whose courses for such degree are acceptable to the State Board of Examiners for certification purposes or proof of the satisfactory completion of 128 semester hours in courses in any college or university, or colleges or universities, whose courses for the bache-

lor's degree are acceptable to the State Board of Examiners for certification purposes.

"Master's degree or the equivalent" shall mean a master's degree conferred by a college or university whose courses for such degree are acceptable to the State Board of Examiners for certification purposes or proof of the satisfactory completion of 30 additional semester hours in graduate courses beyond the course requirements for the bachelor's degree in any college or university, or colleges or universities, whose graduate courses for the master's degree are acceptable to the State Board of Examiners for certification purposes.

"Six years of training" shall mean a master's degree plus proof of the satisfactory completion of 30 additional semester hours in graduate courses in any college or university, or colleges or universities, whose graduate courses for the master's degree are acceptable to the State Board of Examiners for certification purposes.

"Doctor's degree" shall mean a doctor's degree conferred by a college or university whose courses for such degree are acceptable to the State Board of Examiners for certification purposes.

2. Section 2 of the act of which this act is amendatory is amended to read as follows:

2. Except as hereinafter provided, the salary schedule *for an academic year* in this State (1) for a teacher who does not hold a bachelor's degree or its equivalent and who is employed as a school nurse shall be as provided in Column A below, (2) for a teacher who does not hold a bachelor's degree or its equivalent and is not employed as a school nurse shall be as provided in Column B below, (3) for a teacher who holds a bachelor's degree or its equivalent shall be as provided in Column C below, (4) for a teacher who holds a master's degree or its equivalent shall be as provided in Column D below and (5) *for a teacher who has 6 years of training or who holds a doctor's degree shall be as provided in Column E below:*

<i>Years of Employ- ment</i>	<i>A</i>	<i>B</i>	<i>SALARY</i>			<i>E</i>	<i>Employ- ment Incre- ment</i>
			<i>C</i>	<i>D</i>			
1	\$4,400 00	\$4,400 00	\$4,700 00	\$5,000 00	\$5,300 00	-----	
2	4,650 00	4,650 00	4,950 00	5,250 00	5,550 00	\$250 00	
3	4,900 00	4,900 00	5,200 00	5,500 00	5,800 00	250 00	
4	5,150 00	5,150 00	5,450 00	5,750 00	6,050 00	250 00	
5	5,400 00	5,400 00	5,700 00	6,000 00	6,300 00	250 00	
6	5,650 00	5,650 00	5,950 00	6,250 00	6,550 00	250 00	
7	5,900 00	5,900 00	6,200 00	6,500 00	6,800 00	250 00	
8	6,150 00	6,150 00	6,450 00	6,750 00	7,050 00	250 00	
9	6,400 00	6,400 00	6,700 00	7,000 00	7,300 00	250 00	
10	6,650 00	6,650 00	6,950 00	7,250 00	7,550 00	250 00	
11	6,900 00	6,900 00	7,200 00	7,500 00	7,800 00	250 00	
12	-----	-----	7,450 00	7,750 00	8,050 00	250 00	
13	-----	-----	-----	8,000 00	8,300 00	250 00	
14	-----	-----	-----	-----	8,550 00	250 00	

3. This act shall take effect July 1, 1964.

Approved December 9, 1963.

CHAPTER 187, LAWS OF 1963

AN ACT to amend the title of "An act concerning education, providing for special educational services for emotionally and socially maladjusted pupils and for State aid in reimbursement of school districts of the cost of furnishing such services," approved June 15, 1959 (P. L. 1959, c. 104), so that the same shall read "An act concerning education, providing for special educational services for emotionally disturbed and socially maladjusted pupils and for State aid in reimbursement of school districts of the cost of furnishing such services," and to amend the body of said act.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The title of the act of which this act is amendatory is amended to read as follows:

"An act concerning education, providing for special educational services for emotionally *disturbed* and socially maladjusted pupils and for State aid in reimbursement of school districts of the cost of furnishing such services."

2. Section 4 of the act of which this act is amendatory is amended to read as follows:

4. Local boards of education may provide instructional and related special services for emotionally *disturbed* or socially maladjusted pupils by:

- a. establishing such services within the district,
- b. sharing services of special personnel employed by another school board,
- c. sending children to another school district,
- d. agreement among boards to provide joint services,
- e. arrangement through the Commissioner of Education for direct services through the county department of child study, *or*
- f. *sending children to privately operated, nonprofit, day classes in schools whose services are nonsectarian providing services for emotionally disturbed or socially maladjusted children if no suitable public school placement is available.*

Any program for emotionally or socially maladjusted pupils operated by a local school district, or by school districts acting jointly, shall be approved each year by the Commissioner of Education before it is placed in operation.

3. Section 7 of the act of which this act is amendatory is amended to read as follows:

7. Any board of education, *or privately operated, nonprofit school whose services are nonsectarian, or nonprofit educational organization providing day class services for emotionally disturbed or socially maladjusted children,* which receives pupils from a sending district under this act shall determine

upon a tuition rate to be paid by the sending board of education, which shall not exceed the cost per pupil as determined according to a formula prescribed by the Commissioner of Education, with the approval of the State Board of Education.

4. Section 11 of the act of which this act is amendatory is amended to read as follows:

11. Each local school district, whether operating separately or jointly with one or more other school districts, shall be reimbursed by State aid for:

a. The cost of the services of approved psychiatrists, psychologists, social workers, remedial specialists and other personnel, employed by it in the operation of a program for emotionally *disturbed* or socially maladjusted pupils approved by the Commissioner of Education, to the extent of $\frac{1}{2}$ of such costs *and* $\frac{1}{2}$ of the approved tuition paid to another local school district *or to a privately operated, nonprofit school whose services are nonsectarian, or to a nonprofit, voluntary educational organization, and*

b. for 75% of the cost to the district of furnishing transportation to *such* school *within the State*, when the necessity for furnishing such transportation and the cost and method thereof, have been approved by the county superintendent of schools of the county in which the district paying such cost is situated.

The State aid provided for by this section shall be in addition to all other State aid payable to the district.

5. This act shall take effect immediately.

Approved January 28, 1964.

CHAPTER 188, LAWS OF 1963

AN ACT to amend the title of "An act concerning counties and authorizing the board of chosen freeholders of any county to permit the use of space or rooms, together with furniture and equipment, in buildings owned or maintained by the county, by a county mental health association incorporated under the laws of this State, or by any private charity or organization in the county providing aid and assistance for the mentally retarded, with or without the payment of rent and to supply them with the services of county employees, supplementing Title 40 of the Revised Statutes," approved June 26, 1958 (P. L. 1958, c. 87), as said title was amended by chapter 185 of the laws of 1960, so that the same shall read "An act concerning counties and authorizing the board of chosen freeholders of any county to permit *certain organizations providing aid or assistance to mentally retarded or mentally ill persons to use county facilities and to supply them with the services* of county employees, and supplementing Title 40 of the Revised Statutes," and to amend the body of said act.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. The title of chapter 87 of the laws of 1958 is amended to read as follows:

“An act concerning counties and authorizing the board of chosen freeholders of any county to permit *certain organizations providing aid or assistance to mentally retarded or mentally ill persons to use county facilities* and to supply them with the services of county employees, *and* supplementing Title 40 of the Revised Statutes.”

2. Section 1 of the act of which this act is amendatory is amended to read as follows:

1. The board of chosen freeholders of any county may grant to any county mental health association *or to any nonprofit organization whose services are nonsectarian*, incorporated under the laws of this State, for the purpose of conducting a day-care center *or school for mentally retarded or mentally ill, persons* or to any private *or nonprofit organization* in the county *incorporated under the laws of this State whose services are nonsectarian*, providing aid or assistance *to mentally retarded or mentally ill, persons* use of space, rooms or offices in any building owned, maintained or acquired by such county, with or without the payment of rent, during any time when not then needed for public use by such board, under such conditions and regulations as such board shall determine, and may also grant to such incorporated association, or organization, as an incident to the use of such space or rooms, the right to use furniture and equipment of the county, and the right to use all services and utilities available in such building and may furnish them with the services of county employees.

3. This act shall take effect immediately.

Approved January 28, 1964.

SCHOOL LAWS, SESSION OF 1963

SUPPLEMENTS

CHAPTER 46, LAWS OF 1963

AN ACT concerning the establishment of free county libraries and supplementing chapter 33 of Title 40 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. The board of chosen freeholders of any county with a population of less than 150,000 which, on the effective date of this act, has not established a free county library pursuant to the provisions of article 1, chapter 33 of Title 40 of the Revised Statutes, may, by resolution, establish such a library for all the municipalities within the county. All libraries established pursuant to this act shall be governed by the provisions of article 1, chapter 33, Title 40 of the Revised Statutes insofar as they are not inconsistent with the provisions of this act.

2. This act shall take effect immediately.

Approved May 25, 1963.

CHAPTER 55, LAWS OF 1963

AN ACT concerning certain pensions and amending and supplementing chapter 5 of Title 43 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 43:5-1 of the Revised Statutes is amended to read as follows:

43:5-1. This chapter shall apply to all persons in the State service, *prior to January 1, 1922*, qualifying hereunder. It shall not apply to any officer or employee of the State drawing a pension or who shall be entitled to do so under any other law.

2. Any person now retired who shall be entitled to a pension under the provisions of chapter 5 of Title 43 of the Revised Statutes as a result of the provisions of this act must make an application for such a pension to the head of the department in which he was employed at the time of retirement within 45 days of the effective date of this act in order to be eligible to receive such a pension.

3. This act shall take effect immediately.

Approved May 27, 1963.

CHAPTER 58, LAWS OF 1963

AN ACT concerning school elections and supplementing Title 18 of the Revised Statutes and to repeal section 32 of "An act concerning education prescribing certain offenses in connection with school elections and penalties for the commission thereof, and supplementing Title 18 of the Revised Statutes," approved July 22, 1958 (P. L. 1958, c. 128).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. 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 person or 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.

2. Any person who prints, copies or publishes any such circular, handbill, card, pamphlet, statement, advertisement or other printed matter of the nature referred to in section 1 of this act shall maintain a record which shall include a copy of the full text thereof, a statement of the number of copies printed, copied, published or distributed and the true names and addresses of the persons paying for or to whom was billed the cost of such printing, copying, publishing or distribution, which record shall be retained for a period of not less than 2 years at the principal office of such person and shall be available for inspection by any interested person at all reasonable times between the hours of 10:00 A. M. and 4:00 P. M. on weekdays.

3. In event that any such circular, handbill, card, pamphlet, statement, advertisement or other printed matter of the nature referred to in section 1 of this act is to be printed, copied, published, exhibited, or distributed or the cost thereof is to be defrayed by an association, organization or committee, the name and address of the association, organization or committee may be used in compliance with the provisions of this act if there is used therewith the name of at least one person by whose authority, acting for such association, organization or committee, such action is taken.

4. This act shall not apply to any bona fide news item or editorial comment item, contained or published in any newspaper of bona fide general circulation.

5. Section 32 of "An act concerning education prescribing certain offenses in connection with school elections and penalties for the commission thereof, and supplementing Title 18 of the Revised Statutes," approved July 22, 1958, is repealed.

6. This act shall take effect immediately.

Approved May 27, 1963.

CHAPTER 79, LAWS OF 1963

A SUPPLEMENT to the "State Competitive Scholarship Act," passed May 25, 1959 (P. L. 1959, c. 46).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Notwithstanding the provisions of paragraph (b) of section 7 of the act to which this act is a supplement, any person, otherwise qualified, who, after admission and attendance with a satisfactory academic record at an institution of collegiate grade accredited or approved by the State Board of Education, by reason of changed financial circumstances is unable to continue in college without financial assistance or who, for such reason, has or shall have withdrawn from college within a period not greater than 1 year prior to the date of his application, may apply, and be admitted to competitive examination, for a State competitive scholarship. A scholarship awarded under this supplementary act shall be for the remainder of the holder's 4-year academic course of study subject to the same conditions as apply to other State competitive scholarships.

2. The State Scholarship Commission is authorized to adopt special rules and regulations to implement the application for and award of scholarships pursuant to this act.

3. This act shall take effect immediately.

Approved June 4, 1963.

CHAPTER 80, LAWS OF 1963

A SUPPLEMENT to the "State School Aid Act of 1954," approved June 30, 1954 (P. L. 1954, c. 85).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Every school district shall be entitled to special additional State aid pursuant to this act if 2 or more per cent of its average daily enrollment consists of pupils certified to the commissioner by the district with the approval of the county superintendent, are living in the district as residents on property owned by the State which is not taxable. This act shall not apply to school districts which receive from the State or any of its political subdivisions or agencies, a fixed amount in lieu of taxes.

2. For each such pupil residing on property owned by the State the amount of special additional State aid payable to the district under this act shall be \$200 per pupil provided that this amount plus the equalization or minimum aid, whichever is greater, to which the district is entitled to pursuant to the act to which this act is a supplement does not exceed the average cost of elementary or secondary education in the State as determined by the State Board of Education.

3. The Commissioner of Education shall prescribe the time and manner in which reports shall be made to claim special additional State aid pursuant to this act. The commissioner shall make estimates, determinations and certificates relating to special additional State aid in the same manner and at the same time as the same are made pursuant to sections 12 and 13 of the act to which this act is a supplement and payment of special additional school aid shall be included in the installment payments to be made by the State Treasurer pursuant to section 14 of said act.

4. The Commissioner of Education may make such additional rules and regulations necessary to implement the provisions of this act.

5. Sums due school districts under this act shall first be payable in the school year commencing July 1, 1963.

6. This act shall take effect immediately.

Approved June 4, 1963.

CHAPTER 91, LAWS OF 1963

AN ACT concerning education and supplementing chapter 8 of Title 18 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Whenever any school district uniting to form a regional district is comprised of 2 or more municipalities and shall have membership on the regional board of education in number equal to or more than the number of municipalities comprising the district, such membership on the regional board of education shall further be apportioned and from time to time reapportioned among the municipalities of the district by the county superintendent of schools of the county in which the school district is situated as nearly as may be according to the number of the inhabitants of said constituent municipalities in the same manner as if said municipalities comprised separate districts and were the only constituents of the regional district. Thereafter such members of the regional board of education shall be elected in the same manner and at the same time as if each municipality of the district were a constituent district of the regional district.

2. This act shall take effect immediately.

Approved June 10, 1963.

CHAPTER 130, LAWS OF 1963

AN ACT concerning education, and supplementing chapter 14 of Title 18 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. In addition to the provision of transportation for children living remote from any schoolhouse, and for mentally retarded and physically handicapped children, the board of education of any school district may provide, by contract or otherwise, in accordance with law and the rules and regulations of the State Board of Education, for the transportation of other children to and from public school.

The cost of transporting children pursuant to this act shall not be included in calculating the amount of State aid for transportation of pupils.

2. This act shall take effect immediately.

Approved July 8, 1963.

CHAPTER 136, LAWS OF 1963

AN ACT authorizing boards of education to accept gifts for higher education scholarship awards, providing for the management of property so received and supplementing chapter 5 of Title 18 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Any board of education may accept, receive, add to and hold in trust real or personal property, heretofore or hereafter acquired by inter vivos or testamentary gift, for the purpose of awarding scholarships to students for higher education in colleges, universities and graduate schools, whether located within or without this State, upon such terms and conditions, not inconsistent with this act, as may be imposed by the donor of said property. The board shall, by resolution, provide for the acceptance, application, custody and management of property donated to it for higher education scholarship purposes.

2. This act shall take effect immediately.

Approved July 24, 1963.

SCHOOL LAWS, SESSION OF 1963

ACTS AND RELATED LAWS

CHAPTER 73, LAWS OF 1963

AN ACT concerning public records and their examination by citizens of this State, providing certain exceptions to the right to examine public records, and conferring jurisdiction upon the Superior Court in respect to such examination.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. The Legislature finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State, with certain exceptions, for the protection of the public interest.

2. Except as otherwise provided in this act or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any Federal law, regulation or order, or by any regulation promulgated under the authority of any statute or executive order of the Governor, all records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State or of any political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof (each of which is hereinafter referred to as the "custodian" thereof) shall, for the purposes of this act, be deemed to be public records. Every citizen of this State, during the regular business hours maintained by the custodian of any such records, shall have the right to inspect such records. Every citizen of this State shall also have the right, during such regular business hours and under the supervision of a representative of the custodian, to copy such records by hand *and shall also have the right to purchase copies of such records. Copies of records shall be made available upon the payment of such price as shall be established by law. If a price has not been established by law for copies of any records, the custodian of such records shall make and supply copies of such records upon the payment of the following fees which shall be based upon the total number of pages or parts thereof to be purchased without regard to the number of records being copied:*

<i>First page to tenth page</i>	<i>\$0.50 per page,</i>
<i>Eleventh page to twentieth page</i>	<i>0.25 per page,</i>
<i>All pages over 20</i>	<i>0.10 per page,</i>

If the custodian of any such records shall find that there is no risk of damage or mutilation of such records and that it would not be incompatible with the economic and efficient operation of the office and the transaction of public business therein, he may permit any citizen who is seeking to copy more than 100 pages of records to use his own photographic process, approved by

the custodian, upon the payment of a reasonable fee, considering the equipment and the time involved, to be fixed by the custodian of not less than \$5.00 or more than \$25.00 per day.

3. Notwithstanding the provisions of this act, where it shall appear that the record or records which are sought to be examined shall pertain to an investigation in progress by any such body, agency, commission, board, authority or official, the right of examination herein provided for may be denied if the inspection, copying or publication of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to prohibit any such body, agency, commission, board, authority or official from opening such record or records for public examination if not otherwise prohibited by law.

4. Any such citizen of this State who has been or shall have been denied for any reason the right to inspect, copy or obtain a copy of any such record as provided in this act may apply to the Superior Court of New Jersey by a proceeding in lieu of prerogative writ for an order requiring the custodian of the record to afford inspection, the right to copy or to obtain a copy thereof, as provided in this act.

5. This act shall take effect *30 days following the date of approval.*

Approved May 31, 1963.

CHAPTER 123, LAWS OF 1963

AN ACT concerning retirement and establishing a Supplemental Annuity Collective Trust *in the Department of the Treasury.*

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The purpose of this act is to enable active members of the several State administered retirement systems to make voluntary additional contributions to provide annuities to supplement their retirement allowances provided by such systems.

2. As used in this act:

a. "Fiscal year" means any year commencing on July 1 and ending on June 30 next following.

b. "Participant" means any member of a State administered retirement system, who has elected to make voluntary additional contributions thereunder as hereinafter provided.

c. "State administered retirement system" means any of the following retirement plans: Public Employees' Retirement System of New Jersey established pursuant to c. 84, P. L. 1954; Teachers' Pension and Annuity Fund established pursuant to c. 37, P. L. 1955; Police and Firemen's Retirement System of New Jersey established pursuant to c. 255, P. L. 1944; Consolidated Police and Firemen's Pension Fund established pursuant to c. 358, P. L. 1952; Prison Officers' Pension Fund established pursuant to

c. 220, P. L. 1941; and State Police Retirement and Benevolent Fund established pursuant to c. 188, P. L. 1925.

3. Each State administered retirement system shall establish, as a part thereof, a supplementary annuity program under which it will receive voluntary contributions from its members, which shall be in addition to any contributions required of them by that retirement system, for the purpose of providing annuities to supplement their retirement allowances. Each such State administered retirement system shall, upon receipt of such contributions, place the same in the Supplemental Annuity Collective Trust, hereinafter described.

4. There is hereby established *in the Department of the Treasury* the Supplemental Annuity Collective Trust of New Jersey, which shall accept amounts received for supplemental annuities from the State administered retirement systems and combine the same for purposes of this act. The Supplemental Annuity Collective Trust hereby established shall consist of a Variable Division and a Fixed Division.

5. In order to facilitate the administration of the supplemental annuity programs of the State administered retirement systems, the State administered retirement systems shall vest the general responsibility for control and management of their supplemental annuity programs in the Supplemental Annuity Collective Trust under the direction of a council consisting of the State Treasurer, who shall be the chairman, the Commissioner of the Department of Banking and Insurance, and the State Budget Director. In the event of a vacancy in one of the above enumerated offices, the official assuming the responsibility of that office shall act as a member of the council.

The Director of the Division of Pensions shall be the secretary of the council. The administration of the programs shall be performed by the personnel of the Division of Pensions and the costs of administration shall be borne by the State.

The Attorney General shall be the legal advisor of the council.

The council shall retain the services of an actuary. The actuary shall make an actuarial review of the Supplemental Annuity Collective Trust at least once in every 3-year period and at such other times as the council, in its discretion, shall deem advisable.

The council shall promulgate such rules and regulations, not inconsistent with the provisions of this act, as it shall deem necessary for the effective operation of the trust.

The council shall publish annually a report of its operations and the financial condition of the Supplemental Annuity Collective Trust. It shall also give each participant who has not commenced to receive annuity payments an annual statement of his account.

The council shall not commingle the assets of the Variable Division and the assets of the Fixed Division.

The records of the Supplemental Annuity Collective Trust shall be subject to audit by the State Auditor and to examination by the State Department of Banking and Insurance.

6. A member of a State administered retirement system may become a participant by filing an application for enrollment in either the Variable Division or the Fixed Division, or both, in accordance with rules and regulations established by the council.

7. Contributions shall be made by a participant through payroll deductions of integral dollar amounts not in excess of 5% of the participant's salary. Participants who are making contributions through payroll deductions may also make lump-sum contributions by direct payments in integral dollar amounts of not less than \$50.00, provided, however, that the total contributions for any 1 year may not exceed 10% of the participant's annual salary.

Contributions by a participant shall cease upon retirement, death, or upon termination of membership in a State administered retirement system.

8. The assets of the Variable Division and the Fixed Division may be invested through the same agency as other State funds are invested; provided, however, that the council is hereby authorized to use other funding media, including group annuity contracts *containing such provisions as the council determines to comply substantially with the applicable statutory requirements, which are made available by life insurance companies authorized to issue such contracts in this State and having assets in excess of \$1,000,000,000.00.*

9. The assets of the Variable Division shall be invested and reinvested principally in common stocks and securities which are convertible into common stocks. Such common stocks and securities shall be restricted to those listed on a securities exchange in the United States.

10. The Variable Division shall consist of the following accounts:

a. The Variable Accumulation Account shall be the account to which the contributions of participants in the Variable Division are credited. An individual account shall be maintained in the Variable Accumulation Account for each participant in the Variable Division.

b. The Variable Benefit Account shall be the account from which variable benefits are paid. Upon retirement of a participant in the Variable Division, his account in the Variable Accumulation Account shall be transferred to the Variable Benefit Account.

c. The Variable Reserve Account shall be the account to which all investment earnings or losses of the Variable Division shall be credited or charged. Such investment earnings or losses shall be determined at least quarter-annually in accordance with accepted accounting practices and shall reflect appreciation and depreciation in the market value of investments. Mortality adjustments of the Variable Benefit Account, determined in accordance with rules and regulations adopted by the council with the advice of the actuary, shall be charged or credited to this Variable Reserve Account. The balance in this account shall then be distributed to the Variable Benefit Account and to the individual accounts in the Variable Accumulation Account in accordance with rules and regulations of the council.

11. Upon retirement under a State administered retirement system, a participant in the Variable Division shall receive a variable benefit under

which the amount of the initial payment is determined by (1) appropriate actuarial factors as adopted from time to time by the council with the advice of the actuary, and by (2) the value of his account as of the close of the calendar month in which the retirement becomes effective; and the amount of each subsequent payment shall be determined so as to reflect the amounts distributed to the Variable Benefit Account in accordance with the provisions of section 10, pursuant to rules and regulations adopted by the council. The benefit payable to a retired participant shall be in the form of a life annuity, unless the participant requests, upon written application filed with the council prior to retirement, that the value of such benefit be paid as a single cash payment or under such other optional method of settlement as the council may establish by rules and regulations on the advice of the actuary. In the event the value of a participant's account at retirement results in an annuity with initial monthly payments of less than \$10.00, the benefit shall be paid in a single cash payment.

12. The assets of the Fixed Division shall be invested and reinvested principally in fixed income securities which are legal investments for life insurance companies organized under the laws of this State.

13. The Fixed Division shall consist of the following accounts:

a. The Fixed Accumulation Account shall be the account to which contributions of participants in the Fixed Division are credited. An individual account shall be maintained in the Fixed Accumulation Account for each participant in the Fixed Division.

b. The Fixed Benefit Account shall be the account from which fixed benefits are paid. Upon retirement of a participant in the Fixed Division, his account in the Fixed Accumulation Account shall be transferred to the Fixed Benefit Account.

c. The Fixed Reserve Account shall be the account to which all investment earnings or losses of the Fixed Division shall be credited or charged. Such investment earnings or losses shall be determined as of the end of each fiscal year in accordance with accepted accounting practices. Interest bearing investments shall be valued so that the yield to maturity will remain uniform. Earnings shall include profits or losses on the sale of investments, but no adjustment in the book value of investments shall be made by reason of fluctuations in current market prices. Mortality adjustments of the Fixed Benefit Account, determined in accordance with rules and regulations adopted by the council with the advice of the actuary, shall be charged or credited to this Fixed Reserve Account. This account shall also be charged with the amount of interest required to be credited to the Fixed Benefit Account and with the interest to be credited to the individual accounts in the Fixed Accumulation Account. The interest to be credited to the individual accounts in the Fixed Accumulation Account shall be at rates established by the council from time to time and shall be credited on the basis of balances in such accounts at the beginning of the fiscal year.

14. Upon retirement under a State administered retirement system, a participant in the Fixed Division shall receive a fixed benefit under which the initial payment is determined by (1) appropriate actuarial factors, as adopted from time to time by the council with the advice of the actuary, and by (2)

the value of his account as of the close of the calendar month in which the retirement becomes effective; and each subsequent payment shall be in the same amount, for the term of the benefit. The benefit payable to a retired participant shall be in the form of a life annuity, unless the participant requests, upon written application filed with the council prior to retirement, that the value of such benefit be paid as a single cash payment or under such other optional method of settlement as the council may establish by rules and regulations on the advice of the actuary. In the event the value of a participant's account at retirement results in an annuity with initial monthly payments of less than \$10.00, the benefit shall be paid in a single cash payment.

15. Any participant who ceases to be a member of a State administered retirement system and who does not qualify and apply for benefits under another provision of this act shall be paid a single cash payment. The amount of such payment shall be an amount equal to the value of his account as of the last day of the calendar month in which he ceases to be a member of a State administered retirement system.

16. In the event of the death of a participant prior to retirement, an amount equal to the value of his account as of the last day of the month in which the death occurs shall be paid to the designated beneficiary in a single cash payment or in the event that no beneficiary was designated or if the designated beneficiary predeceased the participant such amount shall be paid to the estate of the participant. If, however, the designated beneficiary is a natural person, he may elect to receive, in lieu of a single cash payment, the actuarial equivalent thereof, under any method of settlement which would have been available to the participants pursuant to the provisions of sections 11 or 14 of this act.

17. The council may terminate any inactive account in either division if the value of such account is less than \$100.00 and, in such event, shall refund the value of the account in a single cash payment.

18. All other provisions of this act notwithstanding, neither division shall become operative until the required number of participants shall have filed applications. The required number of participants shall be established by the council. Any such number may be made applicable to either the Variable Division or the Fixed Division separately or may be made applicable to both divisions combined.

19. This act shall take effect immediately.

Approved July 1, 1963.

CHAPTER 151, LAWS OF 1963

A SUPPLEMENT to "An act to provide for the creation, setting apart, maintenance and administration of a city employees' retirement system in cities of the first class having, at the time of the enactment of this act, a population in excess of 400,000 inhabitants; and merging and superseding the provisions of pension funds established pursuant to article 2 of chapter 13, chapters 18 and 19, of Title 43 of the Revised Statutes, in said cities," approved November 22, 1954 (P. L. 1954, c. 218).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Any member, or eligible employee upon becoming a member of a retirement system, established pursuant to the act to which this act is a supplement, may purchase and receive prior service credit for time served in active service in the Armed Forces of the United States while a permanent employee of the city. Such member shall pay into the fund, in a lump sum or by regular payroll deduction installments approved by the pension commission, an amount equal to the contributions which a member would have been required to make for such a period based upon the member's salary, at the time of entering into active service in the armed forces, at the member's contribution rate in effect at the time of applying to make such purchase.

2. Applications for purchase of prior service credit pursuant to this act shall be filed with the pension commission, in a manner to be by it prescribed, within 6 months after the effective date of this act or within 3 months after the member's return to city employment upon termination of military service, whichever occurs later.

3. Upon approval of an application for the purchase of prior service credit pursuant to this act and calculation of the amount due the fund from the member therefor, the pension commission shall notify the financial officer of the city that a like amount is payable by the city. The financial officer of the city shall include such amounts in his budget requests for inclusion in the annual appropriations by the governing body as the city's contribution to the retirement system.

4. The pension commission may adopt rules and regulations to implement the provisions of this act.

5. This act shall take effect immediately.

Approved September 5, 1963.

SCHOOL LAWS, SESSION OF 1963

RESOLUTION

SENATE RESOLUTION No. 6

A SENATE RESOLUTION creating a special Senate Committee to determine the advisability of providing vocational training facilities for our youth.

WHEREAS, A relatively new factor in unemployment is the problem of young persons just out of school who are unable to find work and who find themselves in "vacuum" years where employers are generally unwilling to hire them because of their age; and

WHEREAS, It is imperative that means be found to increase employment opportunities for our youth; now, therefore,

BE IT RESOLVED *by the Senate of the State of New Jersey:*

1. There is hereby created a special Senate Committee to be composed of 5 members of the Senate to be appointed by the President, no more than 3 of whom shall be of the same political party. The special committee is directed to study the advisability of providing vocational training for our youth for the purpose of increasing their employment opportunities and in connection therewith to determine the feasibility of using our State college and public school facilities for such vocational training.

2. The special committee created by this resolution shall have all the powers granted to special committees of either House of the Legislature by chapter 13 of Title 52 of the Revised Statutes and is authorized to request and obtain the assistance and co-operation of the officers, and employees of any State department or instrumentality in connection with its studies and inquiries.

3. The committee shall report specially to the Senate as soon as may be, accompanying its report with any legislation it shall recommend for enactment.

Filed May 6, 1963.

I.

TENTATIVE HIGH SCHOOL TUITION RATE MUST BE FIXED
ACCORDING TO PROCEDURE ESTABLISHED BY
STATE BOARD RULES

BOARD OF EDUCATION OF THE CITY OF CAPE MAY,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LOWER, BOARD OF EDUCATION
OF THE BOROUGH OF WEST CAPE MAY, AND BOARD OF EDUCATION OF
THE BOROUGH OF CAPE MAY POINT, CAPE MAY COUNTY,
Respondents.

For the Petitioner, Nathan C. Staller, Esq.

For the Respondents, Marvin D. Perskie, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, which received high school pupils in the school year 1959-60 from the respondents' school districts, seeks the payment of sums of money alleged to be due to it by virtue of a difference between the tuition rate set for that year and the actual per pupil cost as subsequently determined by the State Department of Education. Respondents deny that they are legally obligated to make any additional tuition payments.

The facts in this matter are stipulated and the case is argued in briefs and memoranda of counsel.

Respondent school districts had for many years designated petitioner's district as the receiving district for their high school pupils. Customarily, in December, petitioner by letter notified respondents of the tuition rate for the following school year, so that respondents would have the information for preparation of budgets. On December 12, 1958, petitioner sent identical letters to the Boards of Education of West Cape May and Township of Lower, as follows:

"The Tuition Rates for the Cape May City Schools for the school year 1959-60 were set Wednesday evening, December 11, 1958 at the regular Meeting of the Board of Education and will be as follows:

High School	\$401.00
Grades 1 - 8	241.00
Kindergarten	100.00

"We are giving you this information at this time in order that you may be able to use it for Budget purposes."

At about the same time, petitioner sent to the Board of Education of Cape May Point a form of "Contract for Tuition Pupils," setting forth the same tuition rates, with the condition understood that

"This tuition charge is to be based upon the actual 1958 to 1959 Receiving Board school cost, plus the best available data predicting the 1959 to 1960 increase."

This contract was signed and executed on January 20, 1960.

Respondents paid tuition to petitioner at the rate of \$401.00 per high school pupil throughout the 1959-60 school year. On January 24, 1961, the Cape May County Superintendent of Schools notified petitioner that the audit by the State Department disclosed that the actual cost per pupil, computed on the formula designed by the State Board of Education for determining tuition, was \$502.15 for the school year 1959-60. On February 14, 1961, petitioner unanimously adopted the following motion:

"* * * that inasmuch as the State Department of Education has certified the per pupil cost for high school purposes at \$502.15 per pupil for the school year 1959-60, and as we charged our sending districts \$401.00 per pupil for the school year 1959-60, due to the fact that an actual rate could not be set and we now bill the sending districts for an additional \$100.00 per pupil for the school year 1959-60."

Accordingly, on February 16, 1961, respondents were billed for additional tuition in the following amounts:

Board of Education of Lower Township	\$20,784.00
Board of Education of Borough of West Cape May	4,575.00
Board of Education of Borough of Cape May Point	200.00

Each of the respondent Boards replied to the additional billing by letter, indicating that by virtue of the letters of December 12, 1958, or, in the case of Cape May Point, the contract heretofore described, they regarded the tuition rate as having been set at \$401.00, and that they had no further obligation for additional tuition.

Petitioner claims the right to bill for additional tuition based on actual cost per pupil pursuant to a revision of a rule of the State Board of Education approved June 25, 1958, described as Rule 1101, the pertinent part of which reads:

"D. A tentative tuition rate may be set by agreement between the receiving district and the sending district, and such tentative rate shall be based upon the estimated cost per pupil for the ensuing school year, as to be reflected in the proposed budget of the receiving district.

"1. If the sending district and the receiving district reach an agreement before January first, they shall so notify the Commissioner.

"2. If the sending district and the receiving district cannot reach an agreement on the estimated cost per pupil by January first, then the tentative tuition rate shall be based upon the actual cost per pupil for the completed school year immediately preceding.

"3. If the Commissioner later determines that the tentative tuition rate was greater than the actual cost per pupil during the school year for which the

tentative rate was charged, the receiving district shall return to the sending district the amount by which the tentative rate exceeded the actual cost per pupil, or, at the option of the receiving district, shall credit the sending district with the amount by which the tentative tuition rate exceeded the actual cost per pupil.

"4. If the Commissioner later determines that the tentative rate was less than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district may charge the sending district all or part of the amount by which the actual cost per pupil exceeded the tentative rate, to be paid not later than during the second school year following the school year for which the tentative rate was paid."

At a meeting held in November, 1958, at which a majority of the superintendents of schools of Cape May County were present, the County Superintendent of Schools explained the contents and application of this rule. The Commissioner will take judicial notice of the fact that on July 8, 1958, in a letter of transmittal accompanying a copy of this rule sent to all secretaries of district boards of education, he stated that "the new rule * * * is effective as of July 1, 1958."

Respondents argue that petitioner must be barred from claiming additional tuition under the State Board rule heretofore quoted. They contend that the rule proposes an alternate method of establishing a tuition rate, which a receiving district "may" employ, and that petitioner may not enjoy the benefit of a subsequent adjustment based upon actual costs unless they have first established a tentative rate in accordance with the procedures prescribed by the State Board rule. Such procedures, respondents contend, were not followed. The letters of notification and the Cape May Point contract sent out by petitioner in December, 1958 did not arise out of any "agreement between the receiving district and the sending district," nor was any offer made to arrive at an agreement. The rates set at the December 11 meeting of the Cape May Board were in no way described as tentative. In an exhibit attached to the stipulation, the relationship between the tuition rate set and the actual cost per pupil is shown for the school years from 1948-49 to 1959-60. Respondents point to the fact that at no time previous to the 1958-59 school year was the tuition as high as the actual cost, and no effort was made to make a supplementary charge for the difference. In 1958-59, the tuition rate was 60 cents higher than actual cost, and no offer was made to refund the difference. Respondents therefore argue that they were given no reason to believe that the rate quoted by letter, or by the contract in the case of Cape May Point, was a tentative rate, subject to later adjustment in accordance with the rule of the State Board of Education, *supra*. Petitioner, on the other hand, claims that respondents, being fully aware of this rule, should have known "that any amount of tuition per pupil fixed by the receiving district is prospective * * * and no matter what the rate is, whether agreed upon or not, it is subject to the later determination of the Commissioner," according to the terms of the rule. Petitioner goes on to argue that the tuition rate is "tentative in every respect whether the word 'tentative' is used or not used in the determination by the receiving district."

The Commissioner agrees with petitioner's position that a rate fixed according to the procedures set forth in Part D of the State Board's rules, *supra*,

is prospective. He does not agree, however, that every tuition rate is prospective. Nothing in the State Board rule bars a receiving board of education from fixing a firm tuition rate subject only to the determination of the actual cost per pupil by a final audit of the receiving district's cost according to the formula set forth in the State Board's rule, and certified by the Commissioner, in order that the rate shall not exceed actual cost per pupil. R. S. 18:14-7 provides, in part:

“ * * * The boards of education of the districts containing high schools so designated shall determine the tuition rate to be paid by the boards of education of the districts sending pupils thereto, but in no case shall the tuition rate exceed the actual cost per pupil. * * * ”

To state the matter conversely, the procedure for establishing a tentative rate, subject to later adjustment, is not a mandatory procedure. R. S. 18:14-7, *supra*, must be read *in pari materia* with the last sentence of R. S. 18:14-1, which states:

“Nonresidents of the school district, if otherwise competent, may be admitted to the schools of the district with the consent of the board of education *upon such terms as the board may prescribe.*” (Emphasis added)

Plainly an administrative rule of the State Board of Education may not deprive a school district of a right granted it by law. “Such an endeavor, however wisely exerted, oversteps the boundaries of administration and trespasses upon the field of the Legislature.” *Frigiola v. State Board of Education*, 25 N. J. Super. 75, 81 (App. Div. 1953). “Administrative implementation cannot deviate from the principle and policy of the statute.” *Abelson's, Inc. v. N. J. State Board of Optometrists*, 5 N. J. 412, 424 (1950). The rule of the State Board upon which the instant controversy is based is purely procedural, designed to facilitate orderly budgeting of anticipated tuition receipts by the receiving district, and tuition costs by the sending districts. Thus, a receiving district has certain options with regard to setting the amount to be charged for tuition:

(1) It may set a fixed rate from no charge to the best estimate of actual cost. Such a rate would not be subject to revision or adjustment unless it exceeded the actual cost per pupil for tuition purposes subsequently determined. Under this procedure, a sending district can anticipate with exactness the amount to be raised for tuition purposes, can feel sure that its bills have been paid, and that it need not fear a notice some years later that it still owes an until-then-unknown amount for past services.

(2) It may set a tentative rate. Such a rate would be subject to subsequent revision and adjustment of payment if it is determined later that the actual cost was higher or lower than the tentative rate charged. The procedure by which such a rate is set and subsequently adjusted is established by rule of the State Board, *supra*.

The State Board rule says that a “tentative tuition rate may be set by agreement between the receiving district and the sending district,” and prescribes a time limit for reaching such an agreement and a procedure for determining the tuition rate when agreement cannot be reached. There is nothing in the stipulation or the exhibits in the instant matter to indicate any designation of the rate fixed by petitioner on December 11, 1958, as tentative,

or to give respondents any reason to believe that the rate was subject to further negotiation before January 1, the deadline for reaching any "agreement" on a tentative rate. Nor is any offer made by petitioner to show that the Commissioner was notified that a tentative rate had been agreed upon, as required by the rule. The rule is specific; the procedures thereunder are precise. Petitioner cannot now claim any benefits which might accrue to it under a rule which it made no attempt to observe in the first place. It is not enough for petitioner to assert that because respondents knew of the State Board rule they should have been aware of petitioner's intention to establish a tentative tuition rate. In the face of petitioner's customary procedure in setting and announcing a rate, and in the absence of any overt conduct indicating petitioner's intention to utilize a right to fix the rate as tentative, respondents were justified in regarding the announced rate to be as fixed and final as it had been for many previous years.

The Commissioner finds and determines that petitioner fixed the tuition rate for pupils sent to its high school by respondents for the school year 1959-60 at \$401.00 per pupil, and that it failed to observe and follow the procedures prescribed by a State Board of Education rule for establishing this rate as a tentative rate, subject to later adjustment. Accordingly he determines that petitioner is barred from claiming additional tuition in the amounts of \$20,784.00 from respondent Board of Education of the Township of Lower, \$4,575.00 from respondent Board of Education of the Borough of West Cape May, and \$200.00 from respondent Board of Education of Cape May Point.

The petition is denied.

COMMISSIONER OF EDUCATION.

January 7, 1963.

II.

HIGH SCHOOL TUITION RATES ARE NOT CONTRACTUAL

BOARD OF EDUCATION OF THE BOROUGH OF RED BANK,
MONMOUTH COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SHREWSBURY,
MONMOUTH COUNTY,

Respondent,

AND

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE SILVER,
MONMOUTH COUNTY,

Intervener.

For the Petitioner, Theodore D. Parsons, Esq.

For the Respondent, Alston Beekman, Jr., Esq.

For the Intervener, Edward C. Stokes, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner herein seeks payment of \$10,879.63 from respondent as the amount due it for additional tuition for high school pupils in the school year 1958-59 resulting from the determination of the actual per pupil cost for tuition purposes in petitioner's high school in that year. The Board of Education of the Borough of Little Silver has been given leave to enter the case as intervener because petitioner has billed that Board for an additional \$10,722.54 under like circumstances and any decision in the dispute herein would establish a precedent in any future action between petitioner and the Board of Education of Little Silver.

Respondent has submitted a counter-petition, alleging that by virtue of a tuition contract between it and petitioner, the formula for determining the tuition rate was fixed, and that petitioner has not observed that formula. Respondent seeks a determination of such overcharges as may have resulted and an order directing repayment.

The case is presented to the Commissioner in a Stipulation of Facts and briefs and memoranda of counsel.

Over a long period of time Red Bank has been designated as the receiving district for high school pupils from Shrewsbury Township and Little Silver school districts, pursuant to the provisions of *R. S. 18:14-7*. In 1955 Red Bank and Shrewsbury, and in 1958 Red Bank and Little Silver entered into contracts, pursuant to *R. S. 18:14-7.3 et seq.*, whereby for 10 years petitioner agreed to receive, and respondent and intervener agreed to send their high school pupils to petitioner's high school and "pay the tuition for the said high school pupils, in accordance with the Formula of the New Jersey Department of Education as heretofore."

On December 12, 1957, respondent and intervener received the following letter from the secretary of the Red Bank Board of Education:

"At a meeting of the Red Bank Board of Education on December 10th the tuition rate for the school year 1958-59 for the Red Bank High School was set at \$510.00 per pupil. This cost is less than the actual amount of cost.

"I am enclosing this information for your budget purposes."

On July 8, 1958, all boards of education received from the Commissioner a copy of an amended rule of the State Board of Education, effective July 1, 1958, which in addition to the formula for determining "actual cost per pupil" in computing high school tuition as referred to in *R. S. 18:14-7*, contained a new Part D as follows:

"D. A tentative tuition rate may be set by agreement between the receiving district and the sending district, and such tentative rate shall be based upon the estimated cost per pupil for the ensuing school year, as to be reflected in the proposed budget of the receiving district.

"1. If the sending district and the receiving district reach an agreement before January first, they shall so notify the Commissioner.

“2. If the sending district and the receiving district cannot reach an agreement on the estimated cost per pupil by January first, then the tentative tuition rate shall be based upon the actual cost per pupil for the completed school year immediately preceding.

“3. If the Commissioner later determines that the tentative tuition rate was greater than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district shall return to the sending district the amount by which the tentative rate exceeded the actual cost per pupil, or, at the option of the receiving district, shall credit the sending district with the amount by which the tentative tuition rate exceeded the actual cost per pupil.

“4. If the Commissioner later determines that the tentative rate was less than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district may charge the sending district all or part of the amount by which the actual cost per pupil exceeded the tentative rate, to be paid not later than during the second school year following the school year for which the tentative rate was paid.”

On December 16, 1958, petitioner's superintendent of schools sent a letter to the boards of education in its sending districts, stating that the audit for the 1957-58 school year disclosed costs for tuition purposes to be \$523.77, instead of the \$510.00 actually charged. The letter also estimated per pupil cost for tuition purposes for the 1958-59 school year at \$536.26 and referred to the new State Board rule, *supra*, including Part D. It continued:

“The Red Bank Board of Education has directed me to notify the sending Districts that the tentative rate for the School Year 1958-59 shall be set tentatively at \$536.00. Each District in 1958-59 is paying \$510.00 per pupil. It is imperative to us in Red Bank to know immediately whether the Sending Boards will pay this difference in the coming school year or if the Boards wish to pay half in 1959-60 and the other half in 1960-61. We, in Red Bank, cannot finish our budget until your decision is known. Unless we hear from you to the contrary by December 22nd, we shall assume that the Boards will pay the additional fee in the School Year 1959-60.

“It must be emphasized that the \$536.00 is an estimated figure and that if the tuition cost is less than \$536.00 a credit or refund will be forthcoming to the Sending Districts for any over-estimate.”

The letter reported further that a tentative rate for 1959-60 has been set at \$551.00. On December 23, 1958, this figure was revised to \$561.00.

On April 4, 1960, after receiving from the County Superintendent the report of the State Department audit which showed actual cost per pupil for tuition purposes for 1958-59 to be \$550.28, petitioner billed respondent and intervener for the difference between that figure and the \$510.00 rate actually paid, or \$40.28 per pupil. For respondent, the extra charge amounted to \$10,879.63; for the intervener, \$10,722.54. On advice of counsel, the boards refused to pay these bills, and petitioner now seeks an appropriate order from the Commissioner.

Petitioner's claim rests squarely on its alleged right to regard the \$510.00 rate charged, and the amended estimate of \$536.00 made in December 1958 as a tentative rate subject to later adjustment as described in Part D of the State Board rule, *supra*. Respondent and intervener contend that the \$510.00 rate set in December 1957 was a firm, not a tentative rate, set in the same manner as in many years previous. They further contend that the State Board rule was prospective as to the fixing of a tentative rate, and that the earliest tentative rate possible under the terms of the rule would be the rate for 1959-60.

With this latter contention the Commissioner is in full accord. While the amended rule of the State Board of Education became operative as of July 1, 1958, its effectiveness at that date could by the language of the rule apply only to the mathematical formula for computing "actual cost per pupil" for tuition purposes. The section of the rule having to do with setting a tentative rate (Part D, *supra*) was clearly prospective. It provided a procedure for (a) fixing a tentative rate by agreement between receiving and sending districts not later than January 1 preceding the school year in which the rate would be effective, and so notifying the Commissioner or (b) if no agreement can be reached, basing the tentative rate on the actual cost per pupil for the completed school year immediately preceding. Clearly, petitioner's action in December 1958, modifying the rate already set for 1958-59 according to revised estimates of costs for *that* year, cannot be regarded as taken in fulfillment of the procedures required in the rule. Nor indeed was it possible for respondent to follow the rule with respect to a tentative rate for 1958-59, since the setting of such a rate would have had to take place prior to the adoption of 1958-59 school budgets, before the amended rule was in existence. On these grounds, the Commissioner finds that petitioner's claim for additional tuition for 1958-59, based upon the provisions of the State Board of Education rule allowing the fixing of a tentative rate, is without merit. Having so determined, he finds no need to rule upon the other points raised in briefs of counsel.

However, the Commissioner would point out, as he has done in the case of *Board of Education of City of Cape May v. Board of Education of the Township of Lower, et al.*, decided on this day, that the State Board rule in question does not deprive a receiving board of education of its right to charge the full actual cost per pupil. In ruling on Cape May's claim to additional tuition under this rule, the Commissioner said:

"Nothing in the State Board rule bars a receiving board of education from fixing a firm tuition rate subject only to the determination of the actual cost per pupil by a final audit of the receiving district's costs according to the formula set forth in the State Board's rule, and certified by the Commissioner, in order that the rate shall not exceed actual cost per pupil. R. S. 18:14-7 provides, in part:

' * * * The boards of education of the districts containing high schools so designated shall determine the tuition rate to be paid by the boards of education of the districts sending pupils thereto, but in no case shall the tuition rate exceed the actual cost per pupil. * * * '

"To state the matter conversely, the procedure for establishing a tentative rate, subject to later adjustment, is not a mandatory procedure. R. S.

18:14-7, *supra*, must be read *in pari materia* with the last sentence of R. S. 18:14-1, which states:

‘Nonresidents of the school district, if otherwise competent, may be admitted to the schools of the district with the consent of the board of education *upon such terms as the board may prescribe.*’ (Emphasis added)

‘Plainly an administrative rule of the State Board of Education may not deprive a school district of a right granted it by law. ‘Such an endeavor, however wisely exerted, oversteps the boundaries of administration and trespasses upon the field of the Legislature.’ *Frigiola v. State Board of Education*, 25 N. J. Super. 75, 81 (App. Div. 1953). ‘Administrative implementation cannot deviate from the principle and policy of the statute.’ *Abelson’s Inc. v. N. J. State Board of Optometrists*, 5 N. J. 412, 424 (1950). The rule of the State Board upon which the instant controversy is based is purely procedural, designed to facilitate orderly budgeting of anticipated tuition receipts by the receiving district, and tuition costs by the sending districts. Thus, a receiving district has certain options with regard to setting the amount to be charged for tuition:

“(1) It may set a fixed rate from no charge to the best estimate of actual cost. Such a rate would not be subject to revision or adjustment unless it exceeded the actual cost per pupil for tuition purposes subsequently determined. Under this procedure, a sending district can anticipate with exactness the amount to be raised for tuition purposes, can feel sure that its bills have been paid, and that it need not fear a notice some years later that it still owes an until-then-unknown amount for past services.

“(2) It may set a tentative rate. Such a rate would be subject to subsequent revision and adjustment of payment if it is determined later that the actual cost was higher or lower than the tentative rate charged. The procedure by which such a rate is set and subsequently adjusted is established by rule of the State Board, *supra*.”

There remains the counter-petition of respondent asking the Commissioner to determine whether petitioner has, in fact, overcharged respondent for tuition in one or more years during the life of the ten-year contract, and, if such be the case, to order restitution. Respondent bases its petition on that part of the contract which states:

“3. That the Board of Education of the Township of Shrewsbury, in consideration of the foregoing, and of the education to be furnished to its high school pupils by the Borough of Red Bank will pay the tuition for the said high school pupils, in accordance with the Formula of the New Jersey Department of Education as heretofore.”

It is stipulated that on December 23, 1954, petitioner sent the following letter to respondent:

“At a meeting of the Red Bank Board of Education held on December 27, 1954, the tuition rate for the school year of 1955-56 was set at \$435.00 per pupil.

“The exact cost per pupil for tuition purpose was \$470.81 but this was arrived at by using the State Formula which allowed for a 5% rental, our Board has cut this to about 2½ per cent.”

Subsequently petitioner and respondent entered into the aforesaid ten-year contract, effective in September 1955.

Respondent contends that the expression “as heretofore” in the contract binds petitioner to continue to charge a tuition rate computed on the same basis as it employed to set the tuition rate for the school year 1955-56 “regardless of whether or not the same might become permissive at a subsequent date.” Respondent believes that petitioner has not followed the practice employed for 1955 of charging rental at approximately 2½ per cent of the cost of the high school plant, instead of the 5% rental permitted by the State Board, and certainly for the years commencing with 1958-59 has charged the full actual cost per pupil including a 5% plant value rental fee.

Petitioner argues that no contractual relationship exists with regard to the fixing of tuition rates. It points to the history of the legislation concerning high school tuition rates, which until 1929 provided that the sending and receiving boards of education “shall determine the amount to be paid for the education” of children in designated receiving high schools. See *C. 96, L. 1900, p. 192, § 120, p. 229; 4 C. S., p. 4766, paragraph 119*. In 1927, in the case of *Board of Education of Lodi v. Board of Education of Garfield*, 1938 *S. L. D. 815*, affirmed State Board of Education 817, the Commissioner found that a “tacit contract” existed between the respective boards for the tuition to be paid by Lodi to Garfield. In 1929 the Legislature changed the method of fixing tuition rates by agreement between boards to determination by receiving boards. Chapter 281, P. L. 1929, reads in part as follows:

“ * * * The boards of education of the districts containing such high schools shall determine the tuition rate to be paid by the boards of education of the districts sending pupils thereto; provided, however, that such amount shall in no case exceed the actual cost per pupil * * * .”

Subsequent modifications of the law (*C. 301, L. 1933, p. 308; R. S. 18:14-7, as amended by C. 210, L. 1944, p. 745; C. 68, L. 1956, p. 154*) have not changed the method of fixing tuition rates enacted in 1929. *R. S. 18:14-7* now reads, in part:

“ * * * The boards of education of the districts containing high schools so designated shall determine the tuition rate to be paid by the boards of education of the districts sending pupils thereto, but in no case shall the tuition rate exceed the actual cost per pupil. * * * ”

Petitioner argues that the change made by the Legislature in 1929, following upon the Commissioner’s decision in *Lodi v. Garfield*, *supra*, indicates legislative intent to make the fixing of tuition statutory rather than contractual. The Commissioner concurs in this. The Legislature is deemed to be conversant with its own legislation and with judicial construction placed thereon. *Asbury Park Press v. City of Asbury Park*, 19 *N. J.* 183, 190 (1955). See also *Barringer v. Miele*, 6 *N. J.* 140 (1951); *Caputo v. The Best Foods, Inc.*, 17 *N. J.* 259 (1955); *Miele v. McGuire*, 31 *N. J.* 339 (1960). *R. S. 18:14-7* clearly delegates to the receiving board alone the right and responsibility for

fixing the tuition rate, limited only in that the rate may not exceed the actual cost per pupil. The State Board rule, *supra*, which provides the mathematical formula for determining "actual cost per pupil," does indeed provide a procedure for fixing a tentative rate *by agreement*, but the ultimate determination whether the sending board will be required to pay all or any part of the difference between the agreed tentative rate and the audited actual cost still rests with the receiving board.

But what of the contract between petitioner and respondent which provided that the tuition shall be determined according to the State Department formula "as heretofore"? Respondent argues that the words "as heretofore" cannot be meaningless, but the Commissioner cannot find them otherwise. Nothing in *R. S. 18:14-7.3*, which gives the authority for such a contract, provides authority to contract a tuition rate. The statute reads as follows:

"Whenever a board of education, now or hereafter furnishing high school education for the pupils of another school district pursuant to section 18:14-7 of the Revised Statutes, finds it necessary to provide additional facilities for the furnishing of education to high school pupils, it may, as a condition precedent to the provision of such additional facilities, enter into an agreement with the board of education of such other district for a term not exceeding ten years whereby it agrees to provide such education to the pupils of such other district during the term of such agreement, in consideration of the agreement by the board of education of such other district that it will not withdraw its pupils and provide high school facilities for them in its own district during the term of said agreement, except as provided in this act."

This statute provides only that when certain conditions exist a sending-receiving *agreement* may be entered into for a specified term not exceeding ten years, voidable only by the Commissioner upon application and proof of specific conditions, as set forth in *R. S. 18:14-7.4*. Any contractual arrangement as to tuition goes beyond the authority which is given to boards by the terms of *R. S. 18:14-7.3*, and which is specifically limited by the delegation to receiving boards of authority to fix tuitions, as set forth in *R. S. 18:14-7*. So long as petitioner fixes tuition rates in accordance with the rules of the State Board of Education made to implement *R. S. 18:14-7*, it is within its statutory authority. There is nothing in the stipulation or in respondent's argument to suggest that petitioner has at any time charged more than actual cost per pupil.

The Commissioner therefore finds and determines that petitioner is without authority under the terms of the statutes and State Board of Education rules to charge a higher tuition rate for the school year 1958-59 than the rate of \$510.00 set by petitioner on December 10, 1957. He further finds that no contractual relationship legally exists which restricts petitioner's right to fix a tuition rate not exceeding actual cost per pupil as computed according to the provisions of the appropriate State Board of Education rule.

The petition of petitioner and the counter-petition of respondent are each dismissed.

COMMISSIONER OF EDUCATION.

January 7, 1963.

III.

BOARD MAY MAKE RULES REGARDING LOSS OF PAY FOR
ABSENCE FOR PERSONAL REASONS

FLORENCE P. GREENBERG,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK IN THE
COUNTY OF MIDDLESEX,

Respondent.

For the Petitioner, Cassel R. Ruhlman, Jr., Esq.

For the Respondent, Frederick F. Richardson, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case seeks restoration of one day's pay which she claims was illegally deducted by respondent. A hearing to establish the facts in the matter was held at the Middlesex County Court House, New Brunswick, on April 18, 1962, before the Assistant Commissioner in charge of Controversies and Disputes.

Petitioner, a teacher under tenure in the New Brunswick school system, requested leave without pay from her duties on two days immediately prior to the Christmas recess in 1960. The request was granted, petitioner was absent on December 21 and 22, 1960, and school was closed on December 23 for the Christmas holidays. In computing her salary for the month of December, the board of education deducted an amount equivalent to three days' pay pursuant to a rule adopted by it which provides for forfeiture of salary for certain vacation days which follow or precede absences for personal reasons. The rule reads as follows:

"H. *School year*: Each school month is to consist of four school weeks with each made up of 5 school days. The school year includes all legal holidays and all such days on which schools are closed by order of the Board. The school year shall consist of ten months or 200 school days inclusive of holidays. Salaries are paid on the basis of a full school month of twenty days which will usually include days which fall during vacation periods, when schools are officially closed. Professional staff members who take non-paid personal leave on the days immediately preceding or following a vacation period will also forfeit salary for paid days in that school month which come during the vacation period."

In implementing this rule the board of education distributed a school calendar for 1960-61 which listed particular days applicable to the rule:

	<i>Pay Date</i>	<i>Earned Pay Date</i>	<i>Teaching Days</i>	<i>Additional "Paid" Days In The Payroll Month</i>
September	25th	Oct. 3	19	1 (Sept. 6, at work)
October	25th	Oct. 31	19	1 (Oct. 12, workshop)
November	23rd	Nov. 29	16	4 (Nov. 8, 10, 11, 24)

	<i>Pay Date</i>	<i>Earned Pay Date</i>	<i>Teaching Days</i>	<i>Additional "Paid" Days In The Payroll Month</i>
December	22nd	Jan.	2	12
				8 (Dec. 12, 13, 14, 15, 16, storm) (Dec. 23, 26 & Jan. 2)
January	25th	Jan.	30	19
February	24th	Feb.	27	18
March	24th	Mar.	27	20
April	25th	Apr.	28	19
May	25th	May	26	20
June	23rd	June	23	18
				2 (May 30; June 23, at work)
			180	20

Petitioner admits knowledge of the rule and calendar above.

Petitioner contends that the rule is unreasonable, that it constitutes a reduction in salary contrary to the Teachers' Tenure Act (*R. S. 18:13-16 et seq.*) and is therefore unlawful.

Respondent argues that its regulation is a proper exercise of its rule-making power under *R. S. 18:6-19* which reads as follows:

"The board shall make, amend, and repeal rules, regulations, and by-laws not inconsistent with this title or with the rules and regulations of the state board of education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in the district, and also for the employment and discharge of principals and teachers."

and *R. S. 18:13-5* which reads as follows:

"A board of education may make rules and regulations not inconsistent with the provisions of this title governing the engagement and employment of teachers and principals, the terms and tenure of the employment, the promotion and dismissal of teachers and principals, and the salaries and the time and mode of payment thereof. A board may from time to time change, amend, or repeal such rules and regulations.

"The employment of any teacher by a board, and the rights and duties of the teacher with respect to his employment, shall be dependent upon and governed by the rules and regulations in force with reference thereto."

It contends that the rule became necessary because of the increasing number of teachers who sought to extend the regular school vacation periods by taking personal leave immediately prior to or following such a recess, to the extent that it became a problem to find enough substitute teachers to maintain the school program. Faced with the alternative of refusing all such leaves, the Board says it elected to adopt the instant rule as a deterrent to this practice in the hope of controlling it. It bases its establishment of ten twenty-day periods including vacations on *R. S. 18:13-7* which states in part: "In every contract, unless otherwise specified, a month shall be construed and taken to be twenty school days or four weeks of five school days each. The salary

specified in every contract shall be paid in equal semi-monthly or monthly installments, as the board of education shall determine" and on that portion of R. S. 18:13-23.11 which provides: "A day's salary is defined as 1/200 of the annual salary."

The attack herein is upon a rule of a district board of education. As petitioner states in her brief, the Commissioner has held that any such rule must meet three tests: (1) it must be reasonable, (2) it must not be inconsistent with other provisions of Title 18 or the rules of the State Board of Education and (3) its effect must be toward the maintenance and support of a thorough and efficient system of public schools. *Angell & Ackerman v. Newark Board of Education*, 1959-60 *S. L. D.* 141 at 143. This rule must then be considered in the light of these criteria.

Petitioner argues that the rule is neither rational, fitting, proper or sensible, nor even understandable. She contends that no legitimate purpose is served by the rule because the Board has the power to prohibit absence for personal reasons if it deems such absence contrary to the best interest of the schools.

The Commissioner cannot agree. That the Board of Education could have acted to prohibit all such leaves as are involved herein, is without question. That it chose instead to temper such a prohibition by adoption of the instant rule is an indication of its wish to consider the interests of individual members of the staff while attempting to control a situation which was getting out of hand. It is also clear that the Board of Education took appropriate steps to acquaint all teachers with the rule and its application to the current school calendar and that petitioner knew of the rule. To hold that a rule which would rigidly forbid all leaves such as this would be more reasonable than one which attempts to deal with the problem equitably is not supportable.

Petitioner argues further that the rule is inconsistent with the provision of the Teachers' Tenure Act, R. S. 18:13-16 *et seq.*, because it subjects her to a reduction in salary, however small. The Commissioner cannot agree that forfeiture of a day's pay as a result of infraction of a proper rule of the employer constitutes a reduction in salary. The Teachers' Tenure Act, designed to protect the quality of education available to pupils by insuring that teachers would work under some measure of economic security, cannot be stretched to cover the forfeiture of a day's compensation under circumstances such as those herein. Petitioner's annual salary in this case has not been reduced nor has it been affected differently than had she been absent for a day of sick leave in excess of her statutory allotment. The Commissioner sees no inconsistency with the statutes in the application of the instant rule.

The Commissioner finds further that the rule meets the third test, stated above, in that its effect is toward the maintenance and support of a thorough and efficient system of public schools. The purpose of the rule is to prevent breakdowns in the operation of the school program occasioned by excessive staff absence. That this is a valid purpose appears obvious.

The Commissioner finds and determines that the adoption of the rule in question by the New Brunswick Board of Education was a reasonable and valid exercise of its discretionary authority consistent with the statutes.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

January 8, 1963.

IV.

WHEN CIRCUMSTANCES WARRANT, COMMISSIONER WILL DIRECT
LOCAL BOARD OF EDUCATION TO PERMIT
NON-SCHOOL USE OF FACILITIES

McGUIRE AIR FORCE BASE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH HANOVER,
BURLINGTON COUNTY,

Respondent.

For the Petitioner, Major John Abbotts.

For the Respondent, Henry B. Kessler, Esq.

Jay B. Tomlinson, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, through its Base Commander, appeals from the refusal of respondent to permit the use, during non-school hours, of the school facilities located on the military base for the purpose of moral and religious training of dependent children of military personnel stationed there.

Testimony in this appeal was taken at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at McGuire Air Force Base on December 12, 1962.

The statutes pertinent to this appeal are *R. S. 18:5-22*, which reads as follows:

"The board of education of any school district may, subject to reasonable regulations to be adopted by such board, or upon notification by the commissioner of education, permit the use of any schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the following purposes:

"a. By persons assembling therein for the purpose of giving and receiving instruction in any branch of education, learning, or the arts, including the science of agriculture, horticulture, and floriculture.

"b. For public library purposes or as stations of public libraries.

"c. For holding such social, civic, and recreational meetings and entertainments and for such other purposes as may be approved by the board of education.

"d. For such meetings, entertainments, and occasions where admission fees are charged as may be approved by the board of education.

"e. For polling places, for holding elections, for the registration of voters, and for holding political meetings."

and *R. S. 18:5-23*, which reads:

“Any action taken by a board of education under section 18:5-22 of this title is subject to appeal to the commissioner, as provided in section 18:3-14 of this title.”

Petitioner is required, pursuant to Air Force Regulation 265-1, paragraph 28, to

“* * * establish an adequate religious education program for military personnel and their dependents. Minimum requirements for this program will be operation of Sunday and weekday religious schools, availability of properly equipped facilities, furnishing of necessary funds.” (Tr. 19)

In order to provide the necessary “properly equipped facilities,” petitioner, through its commander and chaplains, sought the use, particularly on Saturdays and Sundays, of school facilities located on McGuire Air Force Base, which are administered by respondent Board of Education. The requests were denied, pursuant to the Board’s policy, as follows:

“School facilities, except under unusual circumstances, will not be available on Sundays or holidays, and if used by non-school groups on Saturdays, an additional charge for custodial services may be made. Unusual circumstances as determined by the Board of Education would include using the school in emergency conditions occasioned by man made or natural causes such as fire, flood, fall out, epidemics, and other catastrophes.”

On September 6, 1962, representatives of McGuire Air Force Base met with respondent Board and its Superintendent of Schools to discuss at length petitioner’s request. At the conclusion of the meeting, the Board voted to affirm its policy. This appeal followed on October 15, 1962. On October 26, 1962, the Board reaffirmed its position.

Respondent makes it clear that its decision to deny the use of the requested facilities has no basis in ill-will or recalcitrance; rather that its decision was an exercise of its legal discretionary authority in the best interests of the schools and the taxpayers.

The right of a local board of education to make rules and regulations for the government and management of public school property cannot be gainsaid. It is clearly affirmed in *R. S. 18:6-19* and *18:7-56*. However, *R. S. 18:5-23, supra*, specifically authorizes the Commissioner to review on appeal any determination or regulation in respect to use of school facilities by non-school groups who qualify under the terms of *R. S. 18:5-22, supra*.

There are four elementary schools in respondent’s district. Three of these are located on the Air Force Base itself; it is the use of facilities in these schools which petitioner seeks herein. These buildings were constructed with federal funds to provide for the education of children of military personnel stationed at the Base, and are operated for school purposes by respondent Board of Education under a permit granted by the United States Commissioner of Education pursuant to Public Laws 815 and 874. Under this permit the Board agrees to conduct in the facilities an educational program for children residing on the Base as a part of its total school system. Further, the Board’s use of the facilities under the permit is “subject to such reasonable rules and regulations relative to ingress, egress, security, and non-school use

as may be prescribed by the Secretary of the Air Force or the Officer in charge of the installation with the approval of the [United States] Commissioner [of Education]." Approximately 2,000 of the district's 2,330 pupils attend school in these three buildings, and all of these 2,000 are dependents of military personnel on the Base. Under P. L. 874, a major portion of the current expense cost of providing the educational program for these children is paid to the district from federal funds.

At present, approximately 700 boys and girls on the Base are receiving the federally required program of moral and religious instruction in such makeshift quarters as can be provided in various available facilities. The testimony of the chief chaplain was that these facilities are ill-adapted to educational uses, and the program is suffering thereby. He estimated that if the program were properly housed in the requested school buildings, the potential enrollment could reach as high as 1,800 pupils.

The Base Commander testified that no other suitable facilities for the program exist on the Base, and that in his judgment and experience federal funds would not be available to duplicate educational facilities which are already in existence and not in use at the desired time. Both he and the chaplain described the procedures that would be employed to supervise the children, protect the property, and restore it after use so that the public school operation would not be affected. Assurance was given that funds would be available to pay reasonable building operation costs and to compensate for any property damage that might result from use of the facilities for the program. The chaplain expressed his intention to cooperate fully in working out details of scheduling that would be mutually satisfactory to the school authorities.

While in any ordinary circumstances the Commissioner would refrain from substituting his judgment for that of a board of education in an action involving the discretionary authority of the board, the particular circumstances in the instant matter cannot be regarded as ordinary and may, in fact, be unique in New Jersey.

The federal government has recognized and accepted an obligation to provide for the education of the children of military personnel on its installations in this State and elsewhere. Rather than set up independent educational systems that would operate parallel to those of the several states, it has provided through P. L. 815 and 874 that these children should be educated in the established school programs of the state, under the direction of local boards of education. In order that this should impose no extra financial burden upon the local taxpayers, it has furnished both facilities and operating funds. The federal government retains title to these facilities, but grants to the board of education the right to use them for public school purposes under the conditions of a formally executed permit, the relevant parts of which have been recited.

The Commander of the Air Force Base is required to provide a program of religious and moral training. No other suitable facilities being available, he seeks to use these federally-constructed school buildings at times when respondent Board will not require them for the purposes for which the aforementioned permit was executed. He provides assurances that the Board's obligations for operating costs and repair will not be increased by this non-school use.

In the light of this peculiar set of circumstances, the Commissioner finds that petitioner's request is reasonable and cannot properly be denied. He therefore directs respondent to grant the request, subject to such reasonable agreements as to schedules, operating procedures, and reimbursement for operating costs as may be mutually determined by the parties herein.

COMMISSIONER OF EDUCATION.

January 18, 1963.

V.

BOARD OF EDUCATION MAY MAKE RULES FOR
COMPETITIVE EXAMINATIONS FOR PROMOTION

E. ALMA FLAGG, HARRY L. WHEELER, ROLSTON W. GAITER,
AND PHILIP HOGGARD,

Petitioners,

v.

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

Respondent,

ANTOINETTE ROSENFELDER, GEORGE A. COUGHLIN, ALICE MITCHELL,
HOWARD L. ACKERMAN, MICHAEL J. DAINER, HERBERT R. LICHTMAN,
ANTHONY CARUSO, DAVID WURM, FRANK DEFINO, DOMINICK
COLANERI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALICE
SEID, KATHLEEN MARTORANA, AND CLAIR BURNS,

Intervening Respondents,

AND

HERBERT SCUORZO,

Intervening Respondent.

For the Petitioners, Samuel H. Nelson, Esq.

For the Respondent, Jacob Fox, Esq.

For the Intervening Respondents, Clapp & Eisenberg
(Robert P. Gorman, Esq., of Counsel
Alfred C. Clapp, Esq., on the Brief)

For Herbert Scuorzo, Ernest Scuorzo, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners are teachers in the Newark Public Schools, who seek to have set aside the results of a promotional examination for vice-principalships conducted under rules and regulations of respondent Board of Education, as a result of which they obtained the rank of 20th, 49th, 33rd, and 41st, respectively, on the eligibility list compiled therefrom. Respondents Rosenfelder, Coughlin, Mitchell, Ackerman, Dainer, Lichtman, Caruso, Wurm, Defino, Colaneri, Bigley, Shapiro, Seid, Martorana and Burns, who ranked in the first 15 places on said eligibility list (but not necessarily in the order named) intervene as individuals and as class representatives of the 47 teachers who names appear on the eligibility list in addition to those of the four petitioners.

Respondent Scuorzo, who placed 17th on the eligibility list, was given leave to intervene on his own behalf.

Testimony was heard by the Assistant Commissioner in charge of Controversies and Disputes at Newark on December 5, 1961, and January 23 and 24, 1962. Briefs and memoranda were filed by counsel.

The promotional examination which petitioners and intervening respondents took, consisted of two parts: one written and one oral. The written examination, which was administered to 106 candidates on December 30, 1958, was divided into two parts, a "common" examination designed to test the general educational background and capacity of the candidates; and a "specific" examination, in this case designed to test the candidate's knowledge in the particular areas of administration and supervision required for success in the position of vice-principal. The oral examination, which took the form of individual interviews by a Board of Examiners appointed for this purpose, was administered to 82 candidates over a period of 25 or more days before June of 1959. In the oral examination the candidates were given scores on 37 items in the categories of personal qualifications, professional preparation, professional experience, and promise of personal and professional growth.

The "Rules, By-Laws and Regulations for the Government of the Public Schools and the Newark Board of Education" contains the following statement of policy:

"It is the policy and purpose of the Board of Education that appointment and promotion to instructional positions [including vice-principalships] in the schools shall be made on the basis of merit determined by just, fair and impartial examination." (P-4, page 30)

To implement this policy, respondent Board has established examination procedures. These provide, *inter alia*, that the written examination, keyed to Newark Board of Education specifications and prepared and scored by an approved testing service, shall count 40% of the composite score. The oral examination is conducted by a Board of Examiners appointed by the Superintendent of Schools and approved by the Board of Education, and for promotional examinations consists of the Superintendent, as chairman, the Assistant Superintendent in Charge of Personnel, as secretary and Chief Examiner, a Newark administrator from the appropriate level, a Newark principal from the appropriate level, a principal on active duty outside of the city and from the appropriate level, and an administrator from outside the city and above the level of principal. Each member of the Board of Examiners scores each candidate separately and independently on an approved rating sheet. The oral examination counts for 60% of the composite score, and a minimum score of 335 points, of the possible 460, is required for passing the oral.

Prior to the examination here in question, respondent's procedure required that the superintendent certify, in advance of the written examination, the maximum number or maximum percentage of candidates to be listed as eligible for the oral examination. This determination was based on the number of applicants and the existing need for eligible candidates. It appeared in the testimony that this practice was a source of discontent among applicants. Consequently, after a conference between the Chief Examiner and the Educa-

tional Testing Service, which prepared and scored the written part of the test, the Superintendent recommended to the Instruction Committee of the Board a change in the procedure for the 1958-59 examination. On June 24, 1958, respondent adopted a resolution that for the written examinations to be held in December 1958,

“* * * the following grades qualify candidates for the oral examinations:

“1. Elementary and Secondary School Teachers 550 points in the general background or ‘common section’ of the examinations.

“2. Principals, Vice Principal, and Chairman of Department 600 points in the general background or ‘common section’ of the examination.” (R-1)

It was further agreed with Educational Testing Service (P-5) that after the written examination each candidate would be notified of his score on the “common” and would be further instructed that if his score was 600 or above, he qualified to take the oral examination. On receipt of the certification of the scores in the oral, Educational Testing Service would then score the “specific” part of the written examination of those who passed the oral with a score of 335 or more, and would compute the composite score for the three parts of the total examination, by assigning such statistically determined weights to each part that the “common” should count 15%, the “specific” 25%, and the oral 60% of the composite score. It would then rank the successful candidates on an eligibility list, and so notify them and the Board of Education.

Accordingly, 106 candidates took the written examination, and of these, 82 qualified for the oral with a “common” score of 600 or more. At the conclusion of the oral interviews, Educational Testing Service scored the “specific” part of the written examination of those who had achieved a score of 335 or more in the oral, computed the composite score, and ranked the 51 successful candidates on an eligibility list, which was promulgated in June 1959. Shortly thereafter a complaint was filed with the Division Against Discrimination (now Division on Civil Rights) of the State Department of Education, alleging racial discrimination in the examination procedures, but after investigation this complaint was dismissed for lack of probable cause. While two of the petitioners herein were parties to the complaint, it is stipulated that the issue of racial discrimination is not raised in the present controversy. Concurrently, a fact-finding committee of the Board of Education reviewed the examination procedures and submitted a report which was accepted by the Board on July 19, 1960. The present petition was filed on September 9, 1960, and is based upon alleged irregularities set forth in this fact-finding report. (Item 8 of the Petition of Appeal). Several appointments to vice-principalships have been made from the eligibility list, on a temporary or acting basis, pending the outcome of this litigation.

Petitioners complain that the examination was conducted and the gradings therein were made in a partial, discriminatory, unobjective, and arbitrary manner, and in violation of respondent’s own rules pertaining to competitive examinations. In support of their complaint, they allege that: (1) failure to assign a passing grade to the “specific” part of the written examination, which counted for 25% of the final composite score, when a “passing” grade of 600 was fixed for the “common” to qualify for the oral examination, which

had a passing grade of 335, did not assign true competitive significance to an important segment of the examination, (2) the comments of the Superintendent on the reference forms reviewed by the Board of Examiners, with regard to 22 of the candidates in the oral examination, unduly and unfairly influenced that Board in its judgment, (3) the subjective nature of many of the judgments required of the Board of Examiners on the rating forms used in the oral examination unfavorably affected the competitive nature of the examination required by Board of Education policy, especially since the oral examination counted for 60% of the composite score, (4) two standards in grading candidates in the oral examination resulted from the fact that 5 examiners were present and rated 8 candidates, while 4 examiners were present and rated the remaining successful candidates. Respondents deny these allegations.

The issues thus placed before the Commissioner are these:

(1) Were the procedures designed by respondent Board for selecting candidates for promotion within the legal authority of the Board to enact, and if so, were they reasonable procedures?

(2) If question #1 can be answered affirmatively, were the examination procedures properly and fairly employed?

There is no statute requiring boards of education to employ competitive procedures in the selection and promotion of their employees. However, pursuant to *R. S. 18:13-5*,

“A board of education may make rules and regulations not inconsistent with the provisions of this title governing the engagement and employment of teachers and principals, the terms and tenure of the employment, the promotion and dismissal of teachers and principals, and the salaries and the time and mode of payment thereof. A board may from time to time change, amend, or repeal such rules and regulations.

“The employment of any teacher by a board, and the rights and duties of the teacher with respect to his employment, shall be dependent upon and governed by the rules and regulations in force with reference thereto.” The statutes further provide (*R. S. 18:13-2*) that boards of education may establish boards of examiners for the purpose of granting certificates to teach in the schools of the district. However, the Newark Board of Examiners for the purposes herein were concerned not with the granting of certificates but with the establishment of an eligibility list for promotions to the vice-principalship.

Additional rule-making authority is granted to boards of education in the terms of *R. S. 18:6-19*, which reads as follows:

“The board shall make, amend, and repeal rules, regulations, and by-laws not inconsistent with this title or with the rules and regulations of the state board of education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in the district, and also for the employment and discharge of principals and teachers.”

It is clear, and the Commissioner so finds, that there is ample authority in the statutes for respondent Board of Education, in its discretion, to adopt

not only the statement of policy for the selection and promotion of instructional personnel, but also such rules of procedure as it may deem necessary to implement the policy and protect that degree of competitiveness which it considers necessary. That respondent may also, from time to time, amend and repeal its rules and regulations is likewise clear. Thus, in particular, respondent acted rationally and within its discretionary authority when, for the purpose of this particular examination series, it amended its previous rule on this point to establish a definite minimum score on a part of the written examination as the qualifying score for admission to the oral examination. The amendment had been studied and recommended, in turn, by the Chief Examiner, the Superintendent, and the Instruction Committee before it was adopted by respondent Board. The testimony, particularly that of the Chief Examiner, makes it clear that the score of 600 on the "common" was selected because it approximated the national median score for teachers generally, and was regarded as the minimum cut-off point on a general knowledge test for those teachers who sought promotion to a vice-principalship. The testimony also revealed that it was statistically impossible to establish a comparable norm for the "specific" because of the very limited use of this test.

As to the question of the fundamental fairness of the examination procedures and the grading thereon, the Commissioner will not intervene unless there is affirmative evidence that such procedures and grading have been "manifestly corrupt, arbitrary, capricious, or conspicuously unreasonable." *Artaserse v. Department of Civil Service*, 37 N. J. Super. 98 (App. Div. 1955). There has been no such showing in this case. Bad faith and corruption are not charged. All the candidates, including petitioners, competed on the same basis. None of the petitioners could show any way in which he individually suffered any disadvantage. Specifically, (1) the 600 point qualifying score on the "common" was established on a reasonable basis and was known, or could have been known, by all candidates prior to the examination; (2) the score on the "specific" was given its proper 25% weight in the final composite score; (3) the comments of the Superintendent were not shown to be prejudicial to any of the candidates, nor was it shown that the Board of Examiners failed to heed the Superintendent's admonition that his comments should "carry the same weight, no less and no more, than reference forms submitted by other administrative and supervisory officers." (R-3); (4) the use of items in the oral rating which plainly called for subjective judgment was not shown to have operated prejudicially to petitioners' rights, since all candidates were rated separately and independently by each examiner according to the same criteria, and the maximum and minimum point scores for each item were limited by the rating form itself; and (5) the prescribed method using the middle or position score of 5 examiners, or the average of the two middle scores of 4 examiners, as the score for the oral examinations protected all candidates alike from the effects of unusually high or unusually low ratings by one or two examiners.

Petitioners make much of their contention that the oral examination, which counted for 60% of the final score, was not "competitive," as contemplated in respondent's policy statement, *supra*, (1) because no tape recording was made of the oral interview so that the record could be reviewed and challenged, and (2) because of the large number of items requiring subjective evaluation.

With regard to the first objection, the Commissioner notes that the Board of Education in its own rules of procedure for the oral examination makes no requirement for a tape recording. These rules, as has been already pointed out, were made within the Board's discretionary authority, and the Commissioner has consistently held that in the absence of evidence of bad faith or corruption, or manifest unreasonableness, he will not substitute his judgment for that of the board of education. Cf. *Boult and Harris v. Board of Education of Passaic*, 1939-49 S. L. D. 7, affirmed State Board of Education 15, 135 N. J. L. 329 (Sup. Ct. 1947), 136 N. J. L. 521 (E. & A. 1948). As to the second objection, petitioners have here attempted to make *competitive* synonymous with *objective*. While objective measures are useful in certain aspects of competition, they are not exclusively required. In the case of *Kelly v. Civil Service Commissioner*, 37 N. J. 450 (1962), the Court observed that

“* * * subjective elements would appear to be inherent in all oral examinations seeking supervisory and personality traits, and their presence may not reasonably be viewed as fatal.”

The Court further sustained the view that competitiveness requires that all candidates be examined under similar conditions and their performance measured by the same standards and criteria. The record before the Commissioner indicates that such conditions prevailed in the instant examination.

The Commissioner finds and determines that the rules and procedures of respondent Board of Education for the conduct of the 1958-59 promotional examination for vice-principalships were adopted within the legal discretionary authority of the Board, and that neither the rules nor the examination conducted thereunder were partial, discriminatory, arbitrary, or unfair.

The petition of appeal is dismissed.

COMMISSIONER OF EDUCATION.

January 22, 1963.

VI.

SOLICITATION OF APPLICANTS NOT REQUIRED BEFORE
APPOINTMENT OF PRINCIPAL

STEVEN PLUCINSKY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WALLINGTON,
BERGEN COUNTY,

Respondent.

For the Petitioner, Alfred A. Porro, Jr., Esq.

For the Respondent, Joseph A. Banas, Jr., Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, a member of respondent Board of Education, asks the Commissioner to set aside the appointment of Francis J. Smola to the high school

principalship, contending that the appointment was made in an arbitrary and illegal manner. An additional complaint in the petition of appeal, having to do with the circumstances of the resignation of the previous high school principal, was dismissed on motion of counsel for petitioner, with the consent of counsel for respondent.

A hearing in the matter was held before the Assistant Commissioner in charge of Controversies and Disputes at the Court House in Hackensack on November 28, 1962. Memoranda of closing arguments were submitted by counsel for both parties.

From the testimony and exhibits, the following facts appear. Respondent Board, at an adjourned meeting on March 19, 1962, received and accepted by a 5-4 vote the resignation of the high school principal. Shortly thereafter, on the recommendation of the chairman of the administrative committee, the Board, again by the same 5-4 vote, elected Francis J. Smola to the vacancy created by Mr. Helstoski's resignation. The resignation and appointment created general public discussion. Petitioner claimed that the March 19 meeting was illegal because of a procedural defect in opening the meeting. On April 3 a "work session" of the Board was held, attended by four members of the so-called "majority" and one of the "minority." Other minority members testified that they had not received, or could not recall having received notice of this work session, although the Secretary of the Board testified that he had mailed notices to all members. At this work session an agenda was planned for a special meeting on April 6, including the following two items:

"6. Act upon the resignation submitted by Henry Helstoski as High School Principal, at a meeting held March 19, 1962.

"7. To appoint a high school principal."

The testimony indicated that at the work session there was at least "casual" discussion of the appointment of Mr. Smola.

At the April 6 special meeting, attended by all members of the Board, resolutions were adopted, each by the same 5-4 division of votes, to accept Mr. Helstoski's resignation effective immediately, and to appoint Mr. Smola to the position, also effective immediately.

Petitioner protests that Mr. Smola's appointment is arbitrary and illegal because (1) no applications to fill this vacancy were received, even from Mr. Smola, (2) there was no evaluation and comparison of Mr. Smola's qualifications with those of any other candidates or nominees for the position, (3) the recommendation for the appointment of Mr. Smola at the March 19 meeting was made by a resolution allegedly prepared before the meeting began and before Mr. Helstoski's resignation had been received.

Respondent denies that it acted either illegally or arbitrarily. At its regular meeting on March 13, petitioner had insisted, according to testimony, that the majority indicate by March 19 whether they intended to reappoint Mr. Helstoski for the coming school year. The chairman of the Administrative Committee testified that she and her committee had discussed between March 13 and 19 other possible appointments to the principalship, including that of Mr. Smola. She denied that a resolution had been prepared in advance of the March 19 meeting, asserting that the recommendation for the appointment

came only from her, because of her committee responsibility, after the unexpected resignation had been received. She asserted further that she had prepared a typed resolution for the appointment of Mr. Smola at the April 6 meeting, and the minutes of the meeting record this resolution as signed by her and two other Board members. It is uncontested that applications were neither sought nor received for this vacancy at this time. However, it was testified that Mr. Smola had applied for the high school principalship at the time Mr. Helstoski was first appointed in January 1961, that he had served as a teacher in the school system for four years, and that at the time of this contested appointment he had been serving as vice-principal for seven or more months. In fact, petitioner himself testified that Mr. Smola had been his second choice at the time that Mr. Helstoski was elected in 1961. His 1961 application was still on file at the time the vacancy occurred in 1962.

Petitioner relies heavily on the decision of the Supreme Court in *Cullum v. Board of Education of North Bergen*, 15 N. J. 285, 104 A. 2d 641 (1954). In that case the Court affirmed the decisions of the tribunals below, setting aside the appointment of a superintendent of schools, *Id.*, 52-53 S. L. D. 62, affirmed State Board of Education 67, affirmed Superior Court, 27 N. J. Super. 243 (*App. Div.* 1953). The Court found that a majority had prepared a resolution appointing Cullum at a caucus to which the minority had not been invited, and then at a subsequent special meeting called to "consider" the appointment of a superintendent had adopted the appointment resolution without any deliberations whatever, and without giving the public "timely opportunity to be heard on the matter."

The elements which the Court found reprehensible in *Cullum* are not present in the instant situation. There is no evidence that the appointment of Smola had been pre-determined by the majority prior to the March 19 meeting, and then presented as a *fait accompli*, or that the Board refused to consider other candidates known to be interested. The testimony indicates that there was discussion *pro* and *con* the appointment at the March 19 meeting, and widespread community discussion between March 19 and April 6. The Commissioner does not find here "a lack of exercise of discretion and an arbitrary determination" such as existed in *Cullum* or in *Grogan v. DeSapio*, 11 N. J. 308 (1953). While there is conflicting testimony on whether all members received notice of the April 3 work session, one minority member was present, and there was no challenge of the sufficiency of the notice for the special meeting of April 6, which listed as one of its purposes the appointment of a high school principal. Thus, assuming but not deciding that the action of March 19 was precipitous and arbitrary, the Commissioner must find that the defects were cured by the subsequent ratification of the actions by the resolutions of April 6.

The Commissioner finds and determines that Francis J. Smola was legally appointed as principal of Wallington High School.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

January 30, 1963.

Affirmed by State Board of Education without written opinion June 5, 1963.

Appeal to Superior Court, Appellate Division, withdrawn October 16, 1963.

VII.

BOARD MAY CHANGE PLANS FOR SCHOOLHOUSE TO KEEP
COSTS WITHIN APPROVED BOND ISSUE

KENNETH KEARBY,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF WATCHUNG,
SOMERSET COUNTY,

Respondent.

For the Petitioner, *Pro Se.*

For the Respondent, Robert J. T. Mooney, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, a citizen of the Borough of Watchung, contends that the Watchung Board of Education is proceeding with the construction of a new school building which differs so widely from the proposal approved by the voters at a referendum as to constitute a new purpose and is therefore unauthorized. He prays for an order directing the respondent to cease expenditures for the construction under way and to resubmit the project as now planned to the voters at a new referendum.

The facts in this matter were made known at a hearing before the Assistant Commissioner of Education in charge of Controversies and Disputes at the office of the Somerset County Superintendent of Schools on November 1, 1962. Briefs of petitioner and counsel for respondent were also submitted, and the Commissioner has taken judicial notice of the records relevant to this appeal in the files of the Bureau of Business Services and the Bureau of School Building Services within the State Department of Education.

On October 24, 1960, the Commissioner of Education gave permission to respondent to exceed its debt limit and to ask voter approval of a bond issue of \$1,070,000. The proposal consisted of two projects: (1) a new school approximating 42,000 square feet at a construction cost of \$14.59 a square foot and an overall cost of \$19.71 a square foot for a total of \$828,000, and (2) renovations amounting to \$242,000. The proposal was defeated at a referendum on December 21, 1960, by a vote of no—176 and yes—172.

On January 11, 1960, respondent Board submitted revised applications for the Commissioner's endorsement which reduced the bond issue to \$950,000. The revision eliminated a separate building for kindergarten classes and plans for expansion of the cafeteria but retained the same number of teaching facilities. This plan reduced estimated costs of the new school project to \$14.00 a square foot for construction, \$18.83 a square foot overall, totaling \$791,250, and \$158,750 for renovations. Approval to hold a referendum was given by the Commissioner on January 26, 1961. In preparation for the referendum the Board distributed a circular (Exhibit P-1) entitled "A Revised Program for School Expansion." The brochure included a state-

ment from the Board of Education, a schematic plan of the proposed new building, and a tabulation of estimated costs. On February 14, 1961, the electorate approved the bond issue of \$950,000 by a vote of yes—327, no—301.

Bids for construction received in the fall of 1961 were far in excess of the bond authorization, and the Board of Education rejected all bids. Subsequently, the Board decided to revise its plans to bring the cost within the appropriation approved at the referendum rather than request authorization of additional funds. To do this certain facilities were eliminated and the size of others was reduced. A new circular entitled "Public Hearing on Revised Bayberry School Plan" (Exhibit P-3) was distributed, setting forth the latest revisions in plans. The circular contained an explanatory statement by the Board of Education, a new schematic plan for construction, and announced a public hearing "to explain and discuss the plan with all interested citizens," which was held on January 25, 1962. The plans were submitted to and approved by the State Board of Education, after which bids were received and contracts let. Construction is currently under way.

Petitioner contends that voter approval of the referendum was based on expectation of a school largely different from that which the Board of Education is building. He argues that the Board, by circulating a brochure showing plans and costs aimed at obtaining voter approval, made this information an integral part of its proposal and it is thereby restricted to constructing the school substantially as proposed. He contends further that the revisions decided upon constitute major deviations which cannot be made unless they are submitted to the voters for approval. In his opinion, the Board is spending money for "a grossly inferior school than that promised the voters."

Respondent enters a general denial of any false representation, illegal expenditures or improper actions. Its position is that it prepared a brochure to give the voters information; that it included in the brochure a preliminary plan of a building which it hoped to build but which it subsequently determined could not be constructed within its cost estimates; that the information in the brochure was a general proposal and not a promise by the Board of Education of a particular and specific building; that the proposal which appeared on the ballot and to which the voters gave assent was a general authorization to construct a new schoolhouse without reference to any particular plan; that when bids disclosed that the building it contemplated could not be constructed within the authorization, it decided not to seek voter approval of supplementary funds but to revise its plans to fit the amount approved; that the revised plans were submitted to and approved by the State Board of Education; that although the plan revisions provided for reduction in costs there was no substantial change or reduction of the educational facilities proposed; that, in order to keep faith with the public, a new brochure was distributed illustrating the revisions, after which a public meeting for presentation and discussion of the new plan was held; and that this was a matter for the discretion and judgment of the Board which, absent any showing of abuse, should not be interfered with or overruled.

The first question to be decided is, did the information contained in the brochure constitute a promise to the voters to build a specific school, by which

the Board of Education was bound and from which it could not deviate? The answer must be in the negative. Every school district is obligated to provide school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein (R. S. 18:11-1). *Citizens to Protect Public Funds and Dudley Kimball v. Parsippany-Troy Hills Board of Education*. 13 N. J. 172 (1953). The "previous authority of a vote of the legal voters of the district" is an essential preliminary to acquiring a site, letting contracts for constructing school buildings, and incurring indebtedness therefore (R. S. 18:7-73 and 18:7-85). In preparing for such a referendum, a board of education has the power to make "reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon the proposal." *Citizens to Protect Public Funds and Dudley Kimball v. Parsippany-Troy Hills Board of Education*, *supra* at 179. "* * * it is not only the right but perhaps the duty of the body to endeavor to secure the assent of the voters thereto." *Ibid.*, at 181.

This obligation to acquaint the voters with the proposal does not contemplate commitment to a firm final plan. Such an expectation is unrealistic. A Board of Education is authorized to employ an architect for the preparation of preliminary plans and cost estimates and to charge this expenditure to current expenses. The preparation of final working drawings and specifications, however, is charged against the capital outlay for the project which must first be approved by the electorate. It should be obvious that preliminary plans, no matter how carefully prepared, must be amenable to revision in terms of site problems encountered once possession and legal entry upon the land is accomplished following voter approval. If a board were committed to construction of the exact school building illustrated in its pre-referendum brochure, it would have to obligate itself to expensive final plans which would be worthless if the voters rejected the proposal. The Commissioner believes that the information supplied in a variety of ways by boards of education to inform their constituents about contemplated school expansion programs is understood by all parties to represent the broad general aims, objectives, expectations, best estimates, or hopes in respect to the proposal, and not a detailed commitment to which the board is unalterably bound. It is clear that the legislative scheme in New Jersey is to give first to the voters the right to pass upon the general outline of a school building project and to set limits on the amount of money to be expended for it, and then, once approved by the electorate, to rely on the judgment of the board of education to decide and execute the specific details of the facilities, subject always to the standards for approval of the State Board of Education.

While not committed in particular to its plans as expressed in a preliminary way prior to referendum, a board of education obviously cannot substitute an entirely new project or depart from its original concept to such a degree as to constitute an attempt to evade public approval or commit a breach of faith with the taxpayers. Whether the deviations from its preliminary sketches constitute such an illegal act is a matter of fact to be determined in each case.

In the instant matter the Commissioner does not find evidence to support a charge of bad faith or illegality. Respondent's decision to effect economies in its project instead of asking for additional debt authorization was made

after consideration of both alternatives. In making its revisions, it sought consultation and advice from the Bureau of School Building Services, and State Board of Education approval of the final plans was obtained. Furthermore, before proceeding, the Board took two affirmative actions to keep the public informed: it distributed a new brochure describing the changes from its preliminary plan and it held a public meeting at which the revisions were explained. While no testimony was introduced to show the climate of public reaction to respondent's proposals at the public meeting, it is clear that the Board made efforts to assure itself that it was following a proper course, consonant with its responsibility to provide suitable school facilities and its obligation to keep faith with the taxpayers. Petitioner makes no charge that respondent wilfully sought to deceive the public, and certainly its actions demonstrate an intent to proceed openly.

Respondent argues that the proposal that the voters approved, which, after describing the site, authorized the Board "to construct thereon a new schoolhouse," amounted to a *carte blanche* as to the actual building to be erected. While admitting that the proposition is couched in very broad and general terms, the Commissioner cannot agree that the Board could employ such a device to depart so far from the project it had advertised as to constitute a new purpose. In this matter he does not find that the Board took such liberties. Although in its public utterances the Board characterized the alternatives as "drastic revisions" and the preliminary plans were radically changed, it points out that the educational facilities were not significantly changed or reduced. The Commissioner finds this to be a valid judgment and holds that the alterations made in its original plan were within the scope of respondent's discretionary authority.

Petitioner places great weight on the result of the annual school election which followed these actions. He finds support in the fact that two candidates were elected who he alleges had strongly maintained that the Board's action was illegal. In the light of the variety of issues in an election of this kind, such an argument is highly speculative and cannot be regarded as competent or material proof bearing on the issues *sub judice*.

The Commissioner finds and determines (1) that the Board of Education of the Borough of Watchung was properly authorized by the legal voters to construct a new schoolhouse; (2) that the revisions it caused to be made in its advertised preliminary plans were within the scope of its statutory discretionary authority; and (3) that there is no evidence of any illegal action or breach of good faith in the execution of its school building program.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

January 30, 1963.

VIII.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE SCHOOL ELECTION IN THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of a special meeting of the legal voters to authorize the issuance of bonds for school construction purposes in the school district of the Township of Randolph, Morris County, held January 24, 1963, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes	452		452
No	431	2	433
Void	21		21
Not Recorded	2		2
	<hr/> 906	<hr/> 2	<hr/> 908

Pursuant to a petition received by the Commissioner of Education on February 8, 1963, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount of the ballots at the office of the Morris County Superintendent of Schools on February 14, 1963.

At the conclusion of the recount the tally of uncontested ballots was:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes	443		443
No	431	2	433
	<hr/> 874	<hr/> 2	<hr/> 876

Examination of the 32 ballots set aside disclosed that 12 could not be counted either for or against the proposal and must be voided, 7 were properly voted in favor of the proposal, and 7 were properly voted against the proposal. The tally then stood:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes	450		450
No	438	2	440
Void	12		12
Reserved	6		6
	<hr/> 906	<hr/> 2	<hr/> 908

As the remaining 6 undecided ballots could not alter the results, there was no need to make a further determination.

The Commissioner finds and determines that the proposal to construct a new schoolhouse and to issue bonds of the school district therefor submitted by referendum on January 24, 1963, to the legal voters of the School District of the Township of Randolph, Morris County, was approved.

COMMISSIONER OF EDUCATION.

February 20, 1963.

IX.

BOARD MAY WITHHOLD FOR PROPER CAUSE SALARY
INCREMENTS PROVIDED UNDER MINIMUM SALARY LAW

LEO HASPEL,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN,
MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Abraham Miller, Esq.
(Michael Hockman, Esq., of Counsel)

For the Respondent, Ruttiger & Eichling
(William H. Eichling, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a teacher under tenure in respondent's schools. In the school years 1960-61 and 1961-62 respondent withheld prescribed salary increments. Petitioner here appeals each year's action in separate petitions, which by agreement of counsel are consolidated.

Testimony in this matter was heard by the Assistant Commissioner in charge of Controversies and Disputes at New Brunswick on June 25, July 12, and August 9, 1962. Exhibits were received in evidence.

The petition is brought pursuant to the provisions of the law prescribing minimum salaries for teachers, *R. S. 18:13-13.1 et seq.*, and in particular *R. S. 18:13-13.7*, which reads as follows:

"The schedule set forth in this act is intended to prescribe a minimum salary at each step, and any increment prescribed shall also be considered a minimum. Boards of education shall have the power to increase for any teacher or classification of teachers included in any schedule, the initial salary or the amount of any increment or the number of increments. Any board of education may withhold, for inefficiency or other good cause, the employment increment or the adjustment increment or both of any teacher in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the teacher concerned. The teacher may appeal from such action to the Commissioner of Education under rules prescribed by him. The Commissioner of Education shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

Petitioner's annual salary in the school year 1959-60 was \$6,000. It is admitted that in the school year 1960-61, by virtue of his teaching experience and allowance for military service, he reached the twelfth step of the minimum salary schedule. It is also uncontested that as the holder of a master's degree, he would, except for respondent's action in denying him an increment for that year and the succeeding year, be entitled to a minimum annual salary of \$6,200.

On or about June 15, 1960, petitioner received a letter from respondent notifying him that by majority vote of the members of the Board he would not receive an increment or adjustment for the coming school year, and stating six reasons for the Board's decision. On or about July 12, 1961, he received a similar letter notifying him that his increment for 1961-62 would be withheld, and again stating six reasons for the Board's action. Petitioner complains that the action of respondent was patently arbitrary, without rational basis or was induced by improper motives. He further contends that respondent and the principal or other persons who may have "rated" petitioner's teaching performance had no reasonable basis for concluding other than that appellant's teaching performance was completely satisfactory. He seeks an order from the Commissioner rescinding and revoking respondent's action and directing that he be granted the \$200 increment designated for the twelfth step of the minimum salary schedule provided in R. S. 18:13-13.2.

The boundaries of the Commissioner's responsibility in an action involving the withholding of an automatic increment were described in the case of *Kopera v. Board of Education of West Orange*, 1958-59 S. L. D. 96, affirmed State Board of Education 98, remanded to Commissioner of Education 60 N. J. Super. 288 (App. Div. 1960), decided by Commissioner on remand 1960-61 S. L. D. 57, affirmed Superior Court, Appellate Division, January 10, 1963, Docket No. A-632-58. Petitioner Kopera sought to have the Commissioner order that she be granted an automatic increment provided in the Board of Education's salary guide, which had been denied her because she had been rated "unsatisfactory" by the appropriate school officials. In ruling upon her appeal from the Commissioner's decision upholding the Board, the court remanded the matter to the Commissioner, saying:

"As the Attorney General's brief says, 'Under this view of the substantive law, the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion.' We hold that the quoted statement accurately defines the review required here." 60 N. J. Super., at 295.

The Court said further:

"However, since the proceeding before the Commissioner was the first 'hearing' afforded appellant * * * we think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the *mise en scene*; and that the burden of proving unreasonableness is upon the appellant." *Ibid.*, at 296.

In the instant matter, testimony was heard bearing upon the reasons given by respondent as required in the statute, in its letters of June 15, 1960, and July 12, 1961, for withholding petitioner's increment, as follows:

June 1960:

"1. Your failure to follow the directives of the school principal in carrying out certain routine functions.

"2. Your failure to keep an up-to-date plan book.

"3. Your failure to attend follow-up conferences with the school principal.

"4. Your persistence in using classroom teaching methods not conducive to stimulating your pupils in independent thought.

"5. Your failure to maintain adequate discipline at all times.

"6. Failure of your students to achieve a reasonable standard of performance as disclosed by independent tests."

July 1961:

"1. Your failure to keep an up-to-date plan book.

"2. Your failure to attend follow-up conferences with the school principal as a regular practice after his visitation.

"3. Your persistence in using classroom teaching methods not conducive to stimulating your pupils in independent thought.

"4. Your failure to maintain adequate discipline at all times.

"5. Failure of your students to achieve a reasonable standard of performance as disclosed by independent tests.

"6. Your failure to rectify the poor physical condition in which your students leave a classroom despite several conferences on the matter and requests by teachers sharing Room No. 209, Mrs. Minor and No. 203, Mrs. Angle."

The Commissioner will not here review in detail the testimony presented at the hearing. Petitioner's position is either denial of the charges, or, where the facts of the charge are admitted, refusal to accept the import placed upon them by the administrative officers of the school. The superintendent, principal, and assistant principal, on the other hand, established through their testimony that petitioner had

(1) failed on occasion to fulfill obligations to be present and available for duty other than classroom teaching.

(2) neglected to maintain and have available a plan book which accurately reflected the classwork in progress.

(3) failed or neglected regularly to attend conferences with the principal after classroom visits, when not specifically notified that no conference would be required.

(4) continued to employ classroom teaching methods which his supervisors told him were unsatisfactory.

(5) did not take appropriate measures to maintain suitable classroom discipline.

(6) did not, after requests by other teachers, and administrative conference, take adequate steps to keep his classrooms in suitable physical condition.

The Commissioner finds and determines that all charges except #6 in 1960 and #5 in 1961 are sustained by the weight of evidence. As to the charges made each year that petitioner's pupils did not achieve a suitable standard of performance as disclosed by independent tests, sufficient doubt was raised by the testimony as to the validity of certain of the tests and the method of administering them that the Commissioner finds that these charges are not sustained. In so finding as to these two charges, the Commissioner will not set aside respondent's determination to withhold petitioner's increment. The remaining charges are adequate to support such a determination. The minimum salary schedule is not designed to protect inefficiency and neglect; by its terms, *R. S. 18:13-13.7, supra*, provides for withholding increments "for inefficiency or other good cause." The Commissioner finds in the charges sustained sufficient justification for respondent's action. In the decision on remand in *Kopera, supra*, 1960-61 *S. L. D.* at 62, the Commissioner said:

"To withhold an increment on such a salary schedule, it is not necessary to show shortcomings on the part of the teacher sufficient to justify dismissal under the Teachers' Tenure Act. It seems to the Commissioner, from the evidence adduced, that appellant's shortcomings in Classroom Management, Teaching Procedures, and Pupil Results were such as to make it reasonable for those who made the evaluation to conclude that her teaching did not meet the standard of excellence required for an increment under the requirements of the salary guide."

It is the determination of the Commissioner that, except as specifically noted with regard to one charge, the underlying facts are as those who made the evaluation of petitioner claimed, that it was reasonable for respondent and its administrative officers to conclude as they did upon those facts, and that respondent's action was not induced by improper motives.

The action of the Metuchen Board of Education in withholding petitioner's increment is affirmed and the petition is dismissed.

COMMISSIONER OF EDUCATION.

February 20, 1963.

Pending before State Board of Education.

X.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL
ELECTION IN THE BOROUGH OF RED BANK, MONMOUTH COUNTY.

For Petitioner, Donald D. Devine, Francis X. Kennelly, Esq.

For Petitioners, Samuel Carotenuto, Herman O. Wiley and James B. Ilch,
Milton A. Mausner, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three members of the Board of Education for full three-year terms at the annual school election in the School District of the Borough of Red Bank on February 13, 1963, were as follows:

Donald D. Devine	234
James B. Ilch	235
Samuel Carotenuto	257
Herman O. Wiley	253

A recount of the votes cast was conducted by the Assistant Commissioner in Charge of Controversies and Disputes at the Office of the Monmouth County Superintendent of Schools on March 1, 1963. At the conclusion of the recount, with 69 ballots reserved for further consideration, the tally of the uncontested ballots was:

Donald D. Devine	207
James B. Ilch	193
Samuel Carotenuto	216
Herman O. Wiley	218

Further consideration of the 69 reserved ballots produced the following results:

5 ballots voided because a cross, plus, or check mark appeared in the square before the names of all four candidates.

6 ballots voided because no mark of any kind was made in the square before the name of any candidate.

39 ballots agreed to have been properly marked and to be added to the tally.

19 ballots in dispute.

The tally then stood:

	<i>Uncontested</i>	<i>Counted by Agreement</i>	<i>Total</i>
Donald D. Devine	207	16	223
James B. Ilch	193	25	218
Samuel Carotenuto	216	23	239
Herman O. Wiley	218	21	239
Voided		11	
Contested		19	

No agreement could be reached in respect to the disputed 19 ballots remaining and they were accordingly referred to the Commissioner for determination.

While the General Election Law (Title 19) is not binding at a school election, the Commissioner of Education in counting and voiding ballots in school election disputes has looked to this law for guidance. The referred ballots have been grouped into categories, have been examined with reference to the General Election Law, and are determined as follows:

Exhibit A — 10 ballots on which the proper marks in the appropriate square before the names of candidates have been made in blue ink. These ballots will be counted.

“Although R. S. 18:7-32 refers to the use of black ink or black pencil in making the required kind of mark, the Commissioner in his determination of election contests has always held that this is directory and not mandatory legislation. Support for this holding is found in Title 19, which, while not binding in school elections, has been looked to for guidance by the Commissioner in deciding disputed elections. The relevant excerpt of R. S. 19:16-4 states: ‘No ballot shall be declared invalid by reason of the fact that the mark made with ink or the mark made with lead pencil appears other than black.’ *In re Recount of Ballots Cast at the Annual School Election in the Borough of Stratford*, 1955-56 S. L. D. 119. *In re Clementon Annual School Election*, 1938 S. L. D. 180.” *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Watchung, Somerset County*, 1960-61 S. L. D. at 171.

Exhibit B — 4 ballots on which marks appear in the proper square before the name of candidates. These ballots are challenged because the crosses or check marks are somewhat roughly or imperfectly made but, in the Commissioner’s judgment, the imperfection is extremely slight and the marks unquestionably meet the standard required by R. S. 19:16-3g:

“If the mark made for any candidate *** is substantially a cross X, plus +, or check √ and is substantially within the square, it shall be counted for the candidate ***.”

There appears to be no basis on which the marks on these ballots could be considered as attempts to identify the ballot. These four ballots will, therefore, be counted. *In re Recount of Ballots Cast at the Annual School Election in the Township of Monroe, Gloucester County*, 1957-58 S. L. D. 79.

Exhibit C — 2 ballots properly marked for three candidates with an erasure having been made in the square before the name of the fourth candidate. The Commissioner has held consistently in many cases that a ballot should be counted if properly marked in the squares provided, even if other marks or erasures appear on the ballot, unless the other markings are extremely irregular with the apparent design of making it identifiable or other than a secret ballot. R. S. 19:16-4 states in part that:

“No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots,

or the county board, judge of the Superior Court or other judge or officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot.”

The Commissioner finds no basis for holding that these erasures were intended as identifying marks and these two ballots will be counted. *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Morris, Morris County, 1959-60 S. L. D. 134. In the Matter of the Recount of the Ballots Cast at the Annual School Election in the Borough of Sayreville, Middlesex County, 1951-52 S. L. D. 47.*

Exhibit D — 1 ballot with proper marks in the square before the name of three candidates. The square at the left of the fourth candidate contains a cross which has been marked out with black pencil. The Commissioner considers this to be a form of erasure and sees in it no intention to identify the ballot. This ballot will be counted. *In re Recount of Ballots Cast at the Annual School Election in the Borough of Jamesburg, Middlesex County, 1955-56 S. L. D. 111.*

Exhibit E — 1 ballot in which a cross appears in the square at the left of the names of three candidates with an additional cross at the right of the name of the same three candidates. R. S. 19:16-3b provides:

“In canvassing the ballots the district board shall count the votes as follows: * * *

“b. If proper marks are made in the squares to the left of any names of any candidates in any column and in addition thereto, proper marks are made to the right of said names, a vote shall be counted for each candidate so marked; but if the district board canvassing the ballots or the county board, judge of the Superior Court or other judge or officer conducting a recount thereof, shall be satisfied that the placing of such marks to the left and right of the names was intended to identify or distinguish the ballot, then the ballot shall not be counted and shall be declared null and void.”

The Commissioner finds that this ballot was properly voted and that the additional marks do not constitute an attempt to distinguish the ballot. This ballot will be counted. *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Delaware, Camden County, 1957-58 S. L. D. 92.*

Exhibit F — 1 ballot on which the number “2” appears in the square to the left of one candidate, the number “3” in the square to the left of another candidate, and a cross in the square to the left of a third candidate. R. S. 19:16-3g provides in part that:

“No vote shall be counted for any candidate *** unless the mark made is substantially a cross ×, plus + or check √ and is substantially within the square.”

No proper mark having been made in the square to the left of two of the candidates, the ballot will be voided as to them, but will be counted for the candidate before whose name a cross appears. *In the Matter of the Recount*

of Ballots Cast in the Annual School Election in the Township of Union, Union County, 1939-49 S. L. D. 92.

The final tabulation of the ballots counted at the recount and of those referred to the Commissioner is as follows:

		<i>Exhibits</i>						<i>Total</i>
	<i>End of Recount</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	<i>F</i>	
Donald D. Devine	223	2	2	0	0	0	0	227
James B. Ilch	218	8	2	2	1	1	0	232
Samuel Carotenuto	239	8	3	2	1	1	0	254
Herman O. Wiley	239	8	2	2	1	1	1	254

The Commissioner finds and determines that Samuel Carotenuto, Herman O. Wiley, and James B. Ilch were elected at the annual school election on February 13, 1963, to membership on the Board of Education of the School District of the Borough of Red Bank, Monmouth County, for full terms of three years.

COMMISSIONER OF EDUCATION.

March 12, 1963.

XI.

BOARD OF EDUCATION MAY NOT SET SCHOOL ENTRANCE
REQUIREMENTS ENTAILING PAYMENT OF TESTING FEE

VIOLA F. GUTCH AND JOAN LEE FUGGER,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF DEMAREST,

BERGEN COUNTY,

Respondent.

For the Petitioners, *Pro Se.*

For the Respondent, Christian Bollerman, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners herein, Viola F. Gutch and Joan Lee Fugger, are the parents respectively of David Gutch, born October 4, 1957, and Susan Fugger and Kathleen Fugger, twin girls, born November 1, 1957. They protest a resolution of respondent requiring that children seeking admission to school and not yet 5 years of age within 10 days after the opening of school or prior to October 1, pay a fee of \$25.00 for a psychological test on the basis of which their admission is to be determined.

On August 27, 1962, after hearing oral argument, the Commissioner denied respondent's motion to dismiss the petition. Thereupon it was agreed by both parties that the arguments advanced at the hearing on the motion to dismiss, together with the stipulation of facts and documents submitted as exhibits, should constitute the record before the Commissioner.

There are three statutes relevant to the enrollment of children in the public schools which must be read *in pari materia*. R. S. 18:14-1 reads in part as follows:

“Public schools shall be free to the following persons over 5 and under 20 years of age:

“a. Any person who is domiciled within the school district; * * *”

R. S. 18:14-3 states:

“Children who have never attended any public or private school may be admitted to the public school during the ten days immediately following the opening of the school for the fall term and at no other time except by a majority vote of all the members of the board of education of the school district in which the school is situated.”

R. S. 18:15-1 provides:

“The board of education of any school district may establish a kindergarten school or a kindergarten department in any school under its control, and may admit to such kindergarten school or department any child over the age of four and under the age of five and shall admit to such kindergarten school or department any child over the age of five and under the age of six years who is a resident of the district. No child under the age of five years shall be admitted to any public school unless such school is a regularly organized kindergarten school or has a kindergarten department.”

In a resolution dated July 1, 1957 (Exhibit A), respondent determined that effective September 1, 1958,

“no child may be admitted to Kindergarten unless he is five years old before October 1st in the year he proposes to enter school.”

and that

“chronological age be the sole determining factor for admittance to kindergarten and first grade.”

A year later, on July 7, 1958, respondent unanimously adopted a program providing for admission of children who reach their fifth birthday between October 1 and December 31 (Exhibit C), conditioned on the results of a “pre-testing program,” and issued to the parents of all children concerned a statement of policy, which reads in part as follows:

“It may be that there are children within the present three month cut-off period who may very well possess the talents to profit by an early entrance to school. With this in mind, the Board has decided on a pre-testing program for those children born between October 1st and December 31st.

“Dr. George Cohen of Cresskill, New Jersey has been selected as the psychological examiner. The certification of school readiness rests solely with him. The parents and the school must abide by his decision. He will submit a written psychological report to the school certifying the child’s readiness.

"In addition to the psychological examination, Dr. Ross, school physician, will certify whether or not the child has attained a normal physical development. He will also note any physical defects that may limit a child's readiness.

"Parents interested in having their child tested to determine school entrance may apply through the school principal. The cost of the psychological examination will be twenty-five dollars. The cost of the physical examination will be five dollars, both fees payable at time of examination. The parents will bear the cost of these examinations. However, the Board will give consideration in any hardship cases."

It is not against the tests but against the imposition of the fee therefor that the petitioners protest. Having made application for admission of their aforementioned children to respondent's kindergarten class in September 1962, they were notified that it would be necessary for the children to be tested by the school psychologist, after prepayment of the \$25.00 fee. Petitioners assert that not only does respondent have no statutory authority to require payment of such a fee, but also that requiring such payment as a condition of admission to public school is contrary to the right of free education in this State.

It is clear that a board of education is not required to admit to its kindergarten a pupil who has not attained the age of five years within 10 days after the opening of school. In its use of "may admit," *R. S. 18:15-1 supra* is explicit as to the discretion of the board in admitting children four years of age but under five, by contrast with "shall admit" with regard to children over five. Nor is it unreasonable that a board may require evidence of a less-than-five-year-old child's readiness for schooling as a guide to the proper exercise of its discretion. The issue raised in this petition is whether the Board may require a child to undergo psychological testing by a particular examiner, in this case a member of the staff of the school system, for a prescribed fee to be paid by the child's parents.

The Commissioner can find no authority in law for such a practice. New Jersey, through its Constitution (Article VIII, Section IV, Paragraph 1) and its statutes (*R. S. 18:14-1 supra*), is committed to free public education. While a local district is not required to admit children under the age of five years, if it elects to do so such children have the same right to free education as those over five years of age. Respondent's counsel describes the program as "voluntary psychological testing," emphasizing thereby only the free choice of a parent of a child under five to seek his early admission to school by means of psychological testing. But freedom stops there; the test must be administered by a member of the school staff, who alone has power to certify to the child's preparedness for school, and the cost must be borne by the parent. An amending resolution adopted September 12, 1962, subsequent to the filing of the petition herein, serves only to compound rather than to cure the evil. The resolution amends the resolution of July 7, 1958, as follows (Exhibit D):

"Any child who shall attain age 5 between October 1 and December 31 of any school year and who is otherwise qualified shall be eligible for admission to kindergarten at the commencement of said school year, provided such child shall prior to the commencement of said school year be examined by the school psychologist and school physician and shall be

certified by them to be psychologically and physically prepared for admission to kindergarten.

“Applications for said examinations shall be made through the superintendent’s office in accordance with procedure to be established by the superintendent. *The cost of said examinations, if any, shall not be borne by the Board.*”

“The decision of the school psychologist and school physician upon such applications *shall be final and shall not be subject to review by the board.*” (Emphasis added)

Thus, even assuming that an examination fee can be charged, the determination of the amount of the fee is delegated to the examiner. In addition, even more pointedly than in its 1958 resolution, this amendment improperly delegates to an employee a discretionary responsibility which by the language of *R. S. 18:15-1* can be exercised only by the Board. *Cf. Spencer v. Atlantic City Board of Education*, 1938 S. L. D. 692, at 696; *Nixon v. Board of Education of Pleasantville*, 1938 S. L. D. 56.

Respondent argues extensively on the point that it has no authority under the law to conduct a psychological testing program for pre-school pupils at public expense. It cites the statutes which provide for the employment of psychological examiners, to wit: *R. S. 18:14-71.3*, *R. S. 18:14-71.36 et seq.*, and *R. S. 18:14-115 et seq.*; and refers to a well known principal of statutory construction that where the Legislature has dealt with various specific matters and has failed to mention others equally specific, there is a presumption that the omission was deliberate. On this point of respondent’s argument the Commissioner reiterates that respondent is not obliged to enroll pupils under the age of five, and states with equal emphasis that respondent is under no obligation to obtain the results of psychological testing as evidence of readiness for schooling of a child under the age of five years. Thus there is no real legal question raised by respondent’s argument which the Commissioner is called upon to decide. If, on the other hand, respondent desires such guidance in the exercise of the discretion given it by *R. S. 18:15-1*, *supra*, the Commissioner is convinced that there is implied power for respondent to employ such professional assistance or advice as it may reasonably require. When a board of education must make a decision, it has implied power to seek expert information to assist it in making a proper judgment. In *Sleight v. Board of Education of Paterson*, 112 N. J. L. 422 (*E. & A.* 1933), in which the employment of a school architect was challenged for lack of clear statutory authority for such employment, the Court said, at 425:

“Assuming that there is no *express* power conferred upon the board of education to engage the services of an architect without first obtaining an appropriation for that purpose, we think there may be an *implied* power * * *.”

and at 426:

“It clearly appears by section 76 of the School law (*supra*), that the *decision* whether a new school is to be built rests primarily with the board of education. It has to decide whether such school house is needed, what size it is to be, the kind of building best suited for the purpose etc. * * *.”

"It would seem to follow then that the board of education had implied power to incur reasonable expense for obtaining such expert information as might be necessary to furnish a basis for an accurate estimate of the cost of the proposed school building and that this justifies the engagement by the board of education of an architect * * *."

See also *Houston v. Board of Education of North Haledon*, 1959-60 S. L. D. 73, 76.

While petitioners do not specifically protest the physical examinations by the school physician at a fee of \$5.00 which was required in respondent's resolution of July 1958, *supra*, the Commissioner can find no more justification for the requirement that petitioners pay such a fee than he can find for the payment of a fee for psychological examination. The Commissioner therefore finds that respondent's rule, as respects the payment by the parent of a fee for either the psychological examination or the physical examination or both, is without authority in law, and will not be sustained.

Petitioners' prayer sought an order from the Commissioner directing respondent to enroll their children in kindergarten. Since the respondent Board was under no obligation to admit children under the age of five at the opening of school, and since the admission of children under the age of five is wholly within the discretion of the Board, the Commissioner's finding herein with regard to the psychological and physical examinations does not convey to petitioners' children any right of admission which they would have enjoyed if the illegal resolution had never existed. There being no complaint that petitioners' children were treated in any way differently from other children similarly situated, this part of petitioners' prayer is denied.

The Commissioner finds and determines that respondent is without authority to require the parent or any other person to pay a fee for either a psychological examination administered by its school psychologist or a physical examination conducted by its school physician as a prerequisite for admission to kindergarten of children under the age of five years, and that respondent's resolutions creating such requirements are void and of no effect.

COMMISSIONER OF EDUCATION.

March 13, 1963.

DECISION OF THE STATE BOARD OF EDUCATION

The decision of the Commissioner is affirmed for the reasons stated below.

This Board further expresses the conviction that the program of using psychological and physical examinations, to determine whether a child who reaches his or her fifth birthday between October 1 and December 3 should be admitted to Kindergarten of his school year, is commendable. However, the fees for such examination should be paid by the school district and should not be imposed upon the parents of the child.

Since this decision is dispositive, Respondent-Appellants petition for stay is moot.

May 1, 1963.

XII.

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE BOROUGH OF BELLMAWR, CAMDEN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

An inquiry into the conduct of the annual school election held February 13, 1963, in the School District of the Borough of Bellmawr, Camden County, was held by the Assistant Commissioner of Education in Charge of Controversies and Disputes on March 4, 1963, at the Camden County Court House pursuant to a petition filed by Charles J. Schoener, Jr., one of the candidates for membership on the Board of Education. The petition alleged a number of irregularities, including the assignment of election board officials, the appointment and identification of candidates as challengers, the presence of unauthorized persons in the polling place, participation of unauthorized persons in the counting of ballots, and confusion in regard to the location of the polling place. He requests that the ballots cast at the Ethel M. Burke School be declared null and void and a new election be ordered.

After hearing the testimony of petitioner and others who participated in this election, the Commissioner does not find irregularities sufficient to have suppressed a fair determination of the will of the people expressed at the polls and the election cannot, therefore, be voided. The Commissioner does find, however, that the election was not conducted in all respects with the kind of careful attention and adherence to all requirements of law which should be the standard for every school election.

The testimony reveals that the member of the election board who served as chairman had been appointed by the board of education as a teller and the person appointed chairman served as teller. No evidence was presented to show that the election was affected in any way by this exchange and the secretary of the board assumed responsibility for the confusion of assignment which occurred. The Commissioner directs the Secretary of the Board to take appropriate steps to eliminate such confusion in future elections.

The appointment and identification of challengers should also conform in every detail to the requirements of the law. *R. S. 18:7-35* provides that each candidate may serve as his own challenger and the Secretary of the Board is required to furnish him with a mark of identification as a challenger.

The testimony is in conflict as to the extent to which unauthorized persons were permitted to remain in the polling place. No evidence was adduced that any electioneering or other improper activity was engaged in by incumbent board members who were present from time to time. The insinuation remains, however, when unauthorized loitering is permitted, that improper activities could have occurred. The Commissioner points out that it is the responsibility of the election board in charge to see that unauthorized persons do not loiter in the polling place during either the voting or the tallying of the ballots.

The Commissioner finds no error with regard to the use of the Ethel M. Burke School as the polling place for the legal voters of General Election

Districts Nos. 1, 2 and 3 of the Borough. The legal notice of the election published in the *Civic Press* set forth the polling places properly and the secretary testified that the posted public notices contained the same information. He testified further that it has been regular practice to hold school elections at this polling place. A departure from custom had occurred in the Triton Regional High School District election held a week prior but this was, of course, not in the control of the Bellmawr Board of Education.

Because of the allegations made in respect to this election and because of a tie vote for two candidates for membership on the Board of Education, a recount of the ballots was conducted following the inquiry.

The announced results of the election for 3 members to the Board of Education for full terms of 3 years were as follows:

James S. Fuhrmeister	203
Charles J. Schoener, Jr.	183
Shirley Beller	171
Charles T. Lezenby	198
Mary Brattan	239
Roland J. Landis, Jr.	198

At the conclusion of the recount, 4 ballots were reserved for determination by the Commissioner. The tally of uncontested ballots stood:

James S. Fuhrmeister	201
Charles J. Schoener, Jr.	183
Shirley Beller	170
Charles T. Lezenby	198
Mary Brattan	239
Roland J. Landis, Jr.	196

The Commissioner determines that none of the four ballots reserved can be counted. One ballot was voted for all six candidates. Two of the ballots have check marks to the right and following the names of the candidates, but no mark of any kind appears in the square to the left in front of any candidate. The Commissioner has consistently held in numerous election decisions that such a ballot cannot be counted because the statutory requirement that a cross, plus, or check mark must be made in the square before the name of the candidate has not been met. *Cf. R. S. 19:16-3c*, and *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Borough of Stratford, Camden County, 1955-56 S. L. D. 119*. The fourth ballot has the word "yes" written in the squares to the left and in front of three candidates. It is also well established that a vote cannot be counted unless the mark made in the square is substantially a cross, plus or check mark. *Cf. R. S. 19:16-3g. In the Matter of the Petition of the Board of Education of the Town of Morristown for a Recount of the Ballots Cast at the Annual School Election Held on February 8, 1955, 1954-55 S. L. D. 107*.

The final tally of the votes is, therefore, as appears above.

The Commissioner finds and determines that Mary Brattan, James S. Fuhrmeister, and Charles T. Lezenby were elected to membership on the Bellmawr Borough Board of Education for full terms of three years.

COMMISSIONER OF EDUCATION.

March 14, 1963.

XIII.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE BOROUGH OF SOUTH BOUND BROOK, SOMERSET COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the voting on a resubmission of the appropriation for Current Expenses at a special school election held pursuant to *R. S. 18:7-81* on February 27, 1963, in the School District of South Bound Brook, Somerset County, were as follows:

Yes	141
No	149

A recount of the ballots cast was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes on March 6, 1963, at the office of the Somerset County Superintendent of Schools, pursuant to a request received by the Commissioner of Education dated February 28, 1963. At the conclusion of the recount, with 25 ballots reserved for determination, the tally stood:

Yes	141
No	146

The questioned ballots fall into two categories and are determined as follows:

Exhibit A—24 votes on which a cross, plus or check mark appears in the same square as the word "Yes" or "No," but no mark of any kind has been made in the blank square to the left of "Yes" or "No." These ballots cannot be counted either in favor of or against the proposal. The pertinent section of the General Election Law, to which the Commissioner looks for guidance, is *R. S. 19:16-3e*, which states in part as follows:

"* * * If no mark is made in the square to the left of either the word "Yes," or "No," it shall not be counted as a vote either in favor of or against said public question."

Exhibit B—I ballot on which the word "No" has been written in the blank square to the left and a check mark superimposed on it. As this ballot cannot affect the final result of the election, there is no need to make a determination with regard to it.

The final tally of ballots cast is as follows:

Yes	141
No	146
Not decided	1

The Commissioner finds and determines that the Current Expense appropriation resubmitted at a special school election on February 27, 1963, failed of approval by the voters in the School District of the Borough of South Bound Brook, Somerset County.

COMMISSIONER OF EDUCATION.

March 14, 1963.

XIV.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the voting at the annual school election in the Black Horse Pike Regional School District held February 5, 1963, on Proposal No. 3, a special question submitting an authorization to appropriate \$18,000 for additional transportation costs, were as follows:

Yes	1067
No	1068

Pursuant to a petition received February 11, 1963, the Assistant Commissioner of Education in Charge of Controversies and Disputes conducted a recount of the ballots cast on this proposal at the Camden County Court House on March 4, 1963. At the conclusion of the recount, with 33 ballots reserved for determination, the tally was:

<i>Polls</i>	<i>Yes</i>	<i>No</i>	<i>Not Voted</i>	<i>Reserved</i>	<i>Total</i>
Glendora School	232	184	18	7	441
Chews School	108	58	8	1	175
Blenheim School	90	37	8	1	136
Gloucester Township Jr.	265	266	103	12	646
Erial School	38	41	16	2	97
Volz School	68	290	3	7	368
Public School No. 1	179	125	12	3	319
Bellmawr Park School	96	84	12	0	192
Totals	1076	1085	180	33	2374

The Commissioner has always looked to Title 19, the General Election Law, although it is not binding in school elections, for guidance in determining questioned ballots. The reserved ballots herein have been grouped in categories, have been examined in the light of Title 19, and are decided as follows:

Exhibit A—6 ballots with two marks in the appropriate square. These marks are combinations of a cross and a check, a cross and a plus, or a plus and a check. These ballots will be counted as all of the marks are those permitted by statute, they appear in the proper square, and are not believed to be intended to identify the ballot. *R. S. 19:16-3e* provides as follows:

“e. In the case of any public question printed on the ballot where a proper mark is made in the square to the left of the word ‘Yes,’ it shall be counted as a vote in favor of such public question. If a proper mark is made in the square to the left of the word ‘No,’ it shall be counted as a vote against same. If no mark is made in the square to the left of either the word ‘Yes,’ or ‘No,’ it shall not be counted as a vote either in favor of or against said public question. * * *”

Exhibit B—1 ballot on which the mark in the appropriate square appears to be an imperfectly made check. In the Commissioner's opinion, the mark approximates a check mark sufficiently to be counted.

Exhibit C—2 ballots with a roughly made cross in the appropriate square with extra lines also in the square. The Commissioner determines that these ballots are to be counted as there is no indication that the extra marks served to distinguish the vote. *R. S. 19:16-4* provides in part:

“* * * No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots, or the county board, judge of the Superior Court or other judge or officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot. * * *”

Exhibit D—2 ballots which are properly marked but on which erasures have been made. The Commissioner finds no intent to distinguish the ballots and these votes will, therefore, be counted. *Cf. R. S. 19:16-4 supra*.

Exhibit E—1 ballot with a diagonal line drawn below the word “Yes,” in addition to a cross in the appropriate square. This ballot will be counted for the reasons stated in Exhibit D above.

Exhibit F—1 ballot on which proper crosses appear in appropriate squares and in addition the blank squares have been scribbled over with pencil. This ballot will be counted for the reason stated in Exhibit D above.

Exhibit G—9 ballots on which marks have been made in the square in which the word “Yes” or “No” is printed but no mark of any kind has been made in the square to the left and in front of “Yes” or “No.” These votes cannot be counted as the statutory requirement has not been met. *Cf. R. S. 19:16-3e, supra*, and *R. S. 19:16-3g* as follows:

“g. If the mark made for any candidate or public question is substantially a cross \times , plus $+$ or check \checkmark and is substantially within the square, it shall be counted for the candidate or for or against the public question, as the case may be. No vote shall be counted for any candidate in any column or for or against any public question unless the mark made is substantially a cross \times , plus $+$ or check \checkmark and is substantially within the square.”

Exhibit H—10 ballots on which no cross, plus, or check mark appears but either the word “Yes” or “No” has been written in the square. These ballots cannot be counted for the reason stated in Exhibit G above.

Exhibit I—1 ballot on which the statement “recommend *addition* to Triton *soon*” has been written. This is determined to be an identifiable ballot and it will not be counted, therefore. *Cf. R. S. 19:16-4, supra*.

While the Commissioner has had in mind the complete series of disputed elections decided heretofore, he will cite only a representative few which have guided his determination of the questioned ballots herein: *Meyer v. East Rutherford Annual School Election*, 1938 S. L. D. 185; *In the Matter of*

the Recount of Ballots Cast in the Annual School Election in the Township of Union, 1939-49 S. L. D. 92; In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Jamesburg, 1955-56 S. L. D. 111; In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Delaware, 1957-58 S. L. D. 92.

The final tally of votes cast is as follows:

		<i>Exhibits</i>										
	<i>Uncontested</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	<i>F</i>	<i>G</i>	<i>H</i>	<i>I</i>	<i>Total</i>	
Yes -----	1076	4	0	1	1	1	0	0	0	0	1083	
No -----	1085	2	1	1	1	0	1	0	0	0	1091	

The Commissioner finds and determines that Proposal No. 3 failed to be approved by the voters on February 5, 1963, at the annual school election in the Black Horse Pike Regional School District.

COMMISSIONER OF EDUCATION.

March 18, 1963.

XV.

BOARD OF EDUCATION MAY NOT RETROACTIVELY DENY ACCRUED SALARY INCREMENTS

MARY BELL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON,
PASSAIC COUNTY,

Respondent.

For the Petitioner, Friend and Friend (Fred J. Friend, Esq., of Counsel)

For the Respondent, John Koribanics, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a school nurse under tenure in the Clifton school system. She was first employed there in 1950, and in the school year 1961-62 reached the twelfth step on respondent's salary schedule. She contends that she was wrongfully deprived of a double increment provided by said schedule, which would have increased her salary from \$6,300 in 1960-61 to \$6,900 in 1961-62, and seeks an order from the Commissioner that she be granted the \$600 increment for the 1961-62 school year.

The case comes before the Commissioner in a Stipulation of Facts and in briefs of counsel.

Petitioner is a properly certificated school nurse who does not have a bachelor's degree. Until 1961-62, her salary had advanced under respondent's salary schedule, adopted May 14, 1958, and effective July 1, 1958, which pro-

vided a schedule of increments for "Teachers and Nurses," and provided for non-degree personnel under "regular contract" a minimum salary of \$4,000, increasing by steps to a maximum of \$7,200, to be accomplished by three annual increments of \$200, then eight increments of \$300, and a final increment to the thirteenth step of \$200.

On January 18, 1961, respondent Board of Education, at a regular meeting, accepted a report of a meeting of the committee-of-the-whole, held on January 3, which contained the following statement:

"Commissioner Hollander raised a question concerning the payment of an increment to Mrs. Mary Belli, a nurse. The general matter of nurses' salary schedule was also discussed. The Board then decided to refer the matter to the Board Counsel for an opinion."

The minutes of the January 18 meeting contain also the following statements:

"Commissioner Hollander pointed out that he thought the remarks about the nursing corps should have not contained a personal reference [sic.]. He also noted that the questions on the nurses' salary schedule referred strictly to non-degree nurses."

and

"As the next order of business the Board discussed again the proposed 1961-62 school budget. After this discussion, it was decided that the salary of Mrs. Mary Belli be frozen * * *."

On February 15, 1961, following the organization of the new board of education on February 1, as provided by law for districts organized under Chapter 6 of Title 18 (R. S. 18:6-12), respondent "approved" the minutes of the meeting of January 18.

There is no record provided for any further event in this matter until petitioner received her first salary payment on September 18, 1961, in an amount based on an annual salary of \$6,300, the same as she had received during the preceding school year. Through her attorney she protested in writing to respondent on September 21, 1961, and demanded her increment as provided in the schedule. On November 15, 1961, respondent adopted the following resolution amending its salary schedule to provide only for "teachers" in its category of professional personnel, as follows:

"It is hereby resolved that the category, Nurses, be eliminated from Salary Guide and Schedule adopted May 14, 1958, effective July 1, 1958, and

"The Salary Guide and Schedule be amended to read as follows and not as heretofore:

PROFESSIONAL CORPS

Schedule A

Section I

Teachers

* * * *

Dated: November 15, 1961"

Petitioner contends that depriving her of the increments provided in the salary schedule was an arbitrary and discriminatory act, in violation of her rights, and contrary to respondent's own rules and regulations. Respondent, on the other hand, argues that it was within its rights in amending its salary schedule, and that a salary schedule confers no contractual rights by which increments become vested rights of petitioner.

Both petitioner and respondent attach a great deal of significance to the actions of the Board of Education in January 1961. It is readily apparent that the deliberations and purported decisions were in relation to the preparation of the annual budget which was required to be submitted to the Board of School Estimate not later than February 1 (*R. S.* 18:6-49). Whatever may have been "decided"—and there is no evidence of a formal vote—has no binding effect upon the Board that came into being on February 1, unless it can be shown that the new Board adopted as its own the acts of its predecessor. Boards of education are not continuous bodies; each board may exercise all the powers granted it by the Legislature, and one board may not preclude its successor from the exercise of such powers. *Skladzien v. Bayonne*, 1938 *S. L. D.* 120, affirmed State Board of Education 123, affirmed 12 *Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N. J. L.* 203 (*E. & A.* 1935). But in any event, it is a specific statutory requirement (*R. S.* 18:6-20) that

"No principal or teacher shall be appointed, transferred, *nor the amount of his salary fixed*, * * * except by a majority vote of the whole number of members of the board." (Emphasis added)

and the record is barren of any resolution properly adopted by the 1961 Board of Education that fixed petitioner's salary other than as provided in the salary schedule. *Cf. Minihan v. Board of Education of Bayonne*, 1938 *S. L. D.* 459. Certainly the mere act of *approval* of the minutes of January 18 by the new Board on February 15 cannot be regarded as ratification. Approval of minutes is nothing more than a parliamentary device to confirm the accuracy of the record. It has no legislative effect. The Commissioner therefore finds, in the first instance, that the actions of the Board of Education on January 18 are invalid and of no effect in fixing petitioner's salary for the school year 1961-62.

There remains the question whether the amendment of the salary schedule adopted on November 15, 1961, provides a valid and legal basis for fixing petitioner's salary.

Both the Commissioner and the Courts have had frequent occasion in the past to consider the nature of salary schedules. See, for example, *Morgenweck et al. v. Board of Education of Gloucester City*, 1938 *S. L. D.* 412, reversed State Board of Education 419; *Regan et al. v. Board of Education of Elizabeth*, 1938 *S. L. D.* 444, reversed in part State Board of Education 449, affirmed 109 *N. J. L.* 1 (*Sup. Ct.* 1932), affirmed 112 *N. J. L.* 196 (*E. & A.* 1934); *Offhouse et al. v. Board of Education of Paterson*, 1939-49 *S. L. D.* 81, affirmed State Board of Education 85, *certiorari* denied 131 *N. J. L.* 391 (*Sup. Ct.* 1944); *Biddle v. Board of Education of Jersey City*, 1939-49 *S. L. D.* 49, reversed in part State Board of Education 51; *Liva v. Board of Education of Lyndhurst*, 1939-49 *S. L. D.* 69, affirmed State Board of Education 71, affirmed 126 *N. J. L.* 221 (*Sup. Ct.* 1941); *Fraser et al. v. Board of Education of Jersey*

City, 1939-49 S. L. D. 73, affirmed State Board of Education 80, *certiorari* allowed 132 N. J. L. 248 (*Sup. Ct.* 1944), affirmed 33 N. J. L. 15 (*Sup. Ct.* 1945), 133 N. J. L. 597 (*E. & A.* 1946); *Greenway v. Board of Education of Camden*, 1939-49 S. L. D. 151, affirmed State Board of Education 155, affirmed 129 N. J. L. 46, (*Sup. Ct.* 1942), affirmed 129 N. J. L. 461 (*E. & A.* 1943); *Kopera v. Board of Education of West Orange*, 1958-59 S. L. D. 96, affirmed State Board of Education 98, remanded to Commissioner 60 N. J. *Super* 288 (*App. Div.* 1960), decided by Commissioner on remand 1960-61 S. L. D. 57, affirmed Superior Court, Appellate Division January 10, 1963; *Weber v. Board of Education of Trenton*, 127 N. J. L. 279 (*E. & A.* 1941). In the first place, it has been held that a board of education is under no obligation to adopt a schedule. In *Greenway v. Board of Education of Camden*, *supra*, the Court of Errors and Appeals said:

"The local boards are not under a statutory duty to lay down a schedule of salary increments. Indeed, increments as such have no statutory recognition."

It has also been established that a salary schedule, when adopted, confers no contractual rights. Again in *Greenway*, *supra*, the Court said:

"* * * The legislature has not invested the local boards with contractual power of such sweep. * * * A rule providing for increments is a mere declaration of legislative policy that is at all times subject to abrogation by the board in public interest. * * *"

On the other hand, when increments in a salary schedule are granted automatically on completion of a period of employment, then they may not be denied except for cause, or as clearly prescribed in the schedule itself. *Kopera v. Board of Education of West Orange*, *supra*. Moreover, when the salary schedule is automatic, its benefits accrue to the teachers as "integral parts of the salaries, effective when the designated year of service had been attained." *Weber v. Board of Education of Trenton*, *supra*, at 286.

In the instant matter, no effective action to amend the salary schedule was taken by respondent prior to the beginning of petitioner's twelfth year of employment in September 1961. The resolution embodying respondent's salary schedule contains, among other matters, these statements:

"7(b) — In respect to annual and periodic increments for the school years 1959-60 and thereafter, this Board reiterates its policy as set forth in Paragraph 1. The schedules mentioned as a guide and goal provide for all increments and increases contemplated under this resolution and in the event, after this resolution takes effect, that no action to the contrary is taken by this Board, the annual increments, as the same become due under the applicable schedules, will become a part of the salary, subject, however, to the provisions and limitations set forth in this resolution and the accompanying schedules."

and

"14. — Any part or parts, or all of this resolution and the schedules hereto annexed with the terms and conditions pertaining thereto, may in the discretion of this Board be amended, altered, revised, deleted or rescinded."

Thus the Board provided in its own resolution that unless action to amend, alter, revise, delete, or rescind was taken by the Board, "increments, as the same become due under the applicable schedules, will become a part of the salary." Formal action to amend the schedule as to nurses was not taken until the purported resolution of November 15, 1961, after petitioner's twelfth year of employment had begun. Moreover, Exhibit B, stipulated by counsel for both parties, shows that of six nurses employed on a non-fixed salary basis by respondent, all except petitioner received increments for the school year 1961-62, including one nurse who, although she possessed a bachelor's degree, was classified like petitioner as a "non-teaching, clinic nurse." Respondent cannot invoke its November 15 amendatory resolution in defense of its action with regard to petitioner when the granting of scheduled increments to other nurses appears in no way to have been affected by such resolution. The Commissioner can only be led to the conclusion, and he so finds, that the refusal of scheduled increments to petitioner was arbitrary and discriminatory, and in violation of respondent's salary schedule.

The Commissioner finds and determines that petitioner became entitled to two increments of \$300 each at the beginning of her employment in the school year 1961-62 and that she is entitled to a salary of \$6,900 per year from that date. He directs respondent so to compensate her.

COMMISSIONER OF EDUCATION.

March 20, 1963.

XVI.

IN THE MATTER OF THE CONDUCT OF THE ANNUAL SCHOOL ELECTION IN THE BOROUGH OF PALISADES PARK, BERGEN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

Pursuant to a petition filed by Michael Pollotta, alleging irregularities in the conduct of the annual school election held on February 13, 1963, in the School District of the Borough of Palisades Park, the Assistant Commissioner of Education in Charge of Controversies and Disputes conducted a recheck of the voting machines used and an inquiry into the election procedures at the office of the Bergen County Superintendent of Schools on February 28, 1963.

The announced results of the balloting were in agreement with the recheck. An error was found in the tabulation of the absentee ballots as certified by the Bergen County Board of Elections which resulted in one additional vote each for Joseph G. Sisti and Michael Pollotta. The final tally of votes was, therefore, determined to be:

Vincent Marinello	1119
William Lenz	1229
George Ya Deau	1138
Joseph Sisti	1270
Harold Morris	1113
Michael Pollotta	1117

The irregularities alleged to have occurred and the facts as disclosed by the inquiry were as follows:

1. Erasures appeared on the Report of Proceedings for certain of the polling places.

This was determined to be true but there was no evidence that the erasures affected the validity of the documents.

2. The election workers failed to sign and certify the Report of Proceedings in Districts #1 and #5.

The Report from District #1 was not signed by the chairman or the secretary of the election board. The signatures were also missing for District #5.

3. District #3 was missing one Teller on the election board.

The Report from District #3 records the name of only one Teller.

4. The election officials in District #1 recorded an incorrect number of names on the poll list on the Report of Proceedings.

The Report from District #1 shows an erasure on the line following "Number of names on poll list was _____" with the following inserted "259 J. G. 778 original number as recorded by workers." The testimony discloses that Mr. Jac Gnirrep, former Secretary of the Board, discovered the error and made the correction. Examination of the poll list revealed the number of names to be 258.

5. Write-overs appear on some Reports of Proceedings.

The Reports for Districts #1, #2, and #5 disclosed corrections of various kinds. There was no evidence of attempted falsification.

6. The Reports of Proceedings in Districts #6 and #7 were not complete.

The Report from each of these districts and the testimony show that the data for "Number of names on poll list was _____," "Number of ballots cast was _____," "Number of ballots counted _____," and "Number of ballots voided _____" were omitted and inserted later by Jac Gnirrep.

7. The election officials in District #5 recorded the names of candidates out of the order listed on the voting machines. Erasures were made in the count beside one of the names of the candidates.

On the Report of Proceedings from District #5, Joseph Sisti, the fourth candidate on the ballot, is listed sixth. No erasures were found opposite any candidate's name.

8. The tally for the proposals on the ballot was not recorded in the proper places on the Reports of Proceedings from Districts #6 and #7.

The tally of these questions was recorded in spaces provided for votes received by candidates. The tally has also been recorded in the proper place followed by the initials "J. G.," indicating the correction was made by Mr. Gnirrep.

9. The envelopes containing poll lists, voting authority stubs, etc., were not sealed.

The envelopes were not sealed as required by statute. *Cf. R. S. 18:7-44.*

10. In order to complete the Report of Proceedings, resort had to be made by the Board's Secretary to counting the names on the poll lists from the unsealed envelopes. Possible discrepancies in the actual count of names on the poll lists indicate that persons may have voted more than once.

The inquiry disclosed that it was necessary to open the envelopes and check the materials therein in order to complete the Report of Proceedings.

A check of a sampling of names on poll lists failed to disclose any evidence of more than one vote by any person.

A tally of the voting authority stubs as issued at each polling place was also made and produced no evidence of illegal votes cast.

Petitioner's prayer is that the election be declared invalid and its results set aside. Before taking such a step, the Commissioner must be satisfied that the irregularities were of such nature and degree that the will of the people was suppressed and cannot be fairly determined. Unless it can be clearly shown that the irregularities affected the result, the Commissioner will give effect to the election and will decline to invalidate it.

"It is well established that irregularities which are not shown to affect the results of an election will not vitiate the election. The following is quoted from 15 *Cyc.* 372, in a decision of the Commissioner in the case of *Mundy v. Board of Education of the Borough of Metuchen*, 1938 S. L. D., at p. 194:

'Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election.'

"The following is quoted from *Hackett v. Mayhew*, 62 N. J. L. 481, similarly quoted *In re Canvasser's Returns*, 25 N. J. L. J. 115, excerpts from which are found on pages 148 and 149, respectively, of N. J. S. A. Title 19:

'It was never the legislative intent, nor is it the proper statutory construction, to defeat the vote of the citizen by an act for which he was neither directly nor indirectly responsible, nor for a negligent or willful act of a municipal official, nor for the misconception of any legal duty or form required in the preparation of ballots issued by such an official for distribution to the voters.'

"In the decision of the Supreme Court *In re Clee*, 119 N. J. L. 310, at page 330, it was said:

'It is the duty of the court to uphold an election unless it clearly appears that it was illegal. *Love v. Freeholders*, 35 N. J. L. 269, 277; public policy so ordains. *Cleary v. Kendall*, *supra*.'

"The following is quoted from *In re Smock*, 68 A. 2d 508:

'Obviously not every infraction of the election laws will invalidate the contest.'

"At page 322 of *In re Clee, supra*, it is said:

"There are cases where the judges of elections have been guilty of acts which render them liable to indictment, and yet (in the absence of fraud by the party who claimed the benefit from the result) the election will be held valid. If this be so, surely the will of the people is to be given effect, if only irregularly expressed. Negligence or mistake in the performance of duty by election officers will not be allowed to stand in the way so as to defeat the expression of the popular will."

In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Ocean, Monmouth County, 1949-50 S. L. D. 53, 55.

In this case there is no evidence of fraud, misconduct or illegality in the election nor does the testimony support the possibility that had the irregularities not occurred the results would have been different. The Commissioner will not, therefore, set the election aside, and he determines that the results as announced represent the will of the voters.

The Commissioner points out, however, that in giving effect to this election he does not condone the careless and slipshod manner in which it was conducted by some of the election officials. That the irregularities did not more seriously affect the results is fortunate.

"The Commissioner takes the position that school elections conducted by local boards of education are no less important than other elections and they are to be conducted with careful regard and strict compliance to every requirement of the law. That this was not done in the instant matter is evident, and is to be deplored." *In the Matter of the Special School Election in the Borough of Clayton, Gloucester County, on February 28, 1961, 1960-61 S. L. D. 157, 161.*

Informal, loose procedures and the ignoring of statutory provisions have no place and cannot be countenanced in the holding of any school election.

The Commissioner finds and determines that Joseph Sisti, William Lenz, and George Ya Deau have been elected to membership on the Palisades Park Board of Education for full terms of three years. The Commissioner directs the Board of Education to take the necessary and appropriate steps to insure that all subsequent school elections shall be conducted properly in strict compliance with every requirement of statute and rule.

COMMISSIONER OF EDUCATION.

March 21, 1963.

XVII.

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the annual school election held February 13, 1963, for the election of three members to the Board of Education of the Township of East Brunswick, Middlesex County, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Edward Gobbo	1189	2	1191
Richard J. Bensco	1053	2	1055
Edwin B. Spalding	1106	5	1111
Aleck Borman	1229	5	1234
Harry T. Fenton	1217	5	1222
Everett W. Page, Jr.	635	1	636
Arthur J. Kahn	1294	3	1297

On March 14, pursuant to a request for a recount of the votes dated February 18, 1963, filed by Edward Gobbo, the Assistant Commissioner in Charge of Controversies and Disputes conducted a recheck of the voting machines used in this election. The recount affirmed the announced results listed above.

Petitioner alleges that the voting machine at the Hammarskjold School was out of order for approximately a half hour. This assertion was denied by the custodian of the voting machines who found it to be in good working order.

Petitioner also refers to delay of up to 35 minutes at this polling place. While such delays are to be deplored, absent a charge of fraud, misconduct, or intent to affect the election improperly, delay *per se* does not constitute sufficient grounds for voiding an election. *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Ocean, Monmouth County*, 1949-50 S. L. D. 53; *Application of Wene*, 26 N. J. Super. 363 (App. Div. 1958); *Sharrock v. Keansburg*, 15 N. J. Super. 11 (App. Div. 1951); *Love v. Freeholders of Hudson County*, 35 N. J. L. 269 (Sup. Ct. 1871); *In re Contest of Annual School Election in Brick Township, Ocean County*, 1959-60 S. L. D. 124; *In the Matter of the School Election Held in the Borough of Lincoln Park, Morris County*, 1960-61 S. L. D. 204; *Hackett v. Mayhew*, 62 N. J. L. 481 (Sup. Ct. 1898).

The Commissioner finds and determines that Arthur J. Kahn, Aleck Borman, and Harry T. Fenton were elected to membership on the Board of Education of the Township of East Brunswick for full terms of 3 years. The Board of Education, in planning for future elections, is directed to consider the elimination of any delays to voters which may have occurred at this election.

COMMISSIONER OF EDUCATION.

March 27, 1963.

XVIII.

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE
BOROUGH OF WHARTON, MORRIS COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting at the annual school election held February 13, 1963, in the School District of the Borough of Wharton, Morris County, for a member of the Board of Education for an unexpired term of two years were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Curtis E. Brewington	442	0	442
Martelle E. Jones	438	4	442

Pursuant to a petition for a recount of the ballots cast filed by Curtis E. Brewington and Augustine E. Magistro, the Assistant Commissioner of Education in Charge of Controversies and Disputes examined and rechecked the tallies recorded on the voting machines used in this election at the storage depot of the Morris County Board of Elections on March 26, 1963.

The Report of the Proceedings indicated 922 names on the poll list and 922 ballots cast. Inspection of the protective counters and of the public counters showed that 467 votes were cast on Machine #21818 and 455 votes on Machine #21819, a total of 922 as reported.

The recheck of the tallies confirmed the announced results, *supra*.

Petitioners contend that there was no opportunity to challenge the absentee ballots and indicate a wish to contest the counting of the absentee ballots as certified by the Morris County Board of Elections.

It is well established that the Commissioner of Education will not rule upon a canvass of absentee ballots.

"It is not within the authority of the Commissioner of Education to rule upon the canvass of the absentee ballots. Section 18:3-14 of the Revised Statutes states in part that:

'The commissioner shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the state board of education or of the commissioner. * * *'

"The procedures for the canvass, for announcement of the results of the canvass, and for contesting of military service and civilian absentee ballots are provided for in sections 19:57-24 and 19:57-31 of the Revised Statutes. Specifically, section 19:57-24 provides that:

'Disputes as to the qualifications of military service or civilian absentee voters to vote or as to whether or not or how any such military or civilian absentee ballots shall be counted in such election shall be referred to the County Court of the county for determination.'

"The results of the canvass of the absentee ballots do not, therefore, constitute a controversy under the School Law, and the Commissioner must

accept the certification of the * * * County Board of Elections." *In re Recount of Ballots Cast at the Annual School Election in the Township of Monroe, Gloucester County, 1957-58 S. L. D. 79, 80.*

The Commissioner, therefore, will accept the certification of the Morris County Board of Elections in this matter without prejudice to the right of petitioners to seek relief in the proper tribunal.

The Commissioner finds and determines that there was a failure to elect a member to the Wharton Borough Board of Education for the unexpired term of two years. The Morris County Superintendent of Schools, acting under the authority of R. S. 18:4-7d, is hereby authorized to appoint a qualified person to membership on the Wharton Borough Board of Education to serve until the organization meeting following the next annual school election in that district.

COMMISSIONER OF EDUCATION.

March 29, 1963.

XIX.

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE BOROUGH OF ROSELLE PARK, UNION COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting at the annual school election on February 13, 1963, for three members of the Board of Education of the Borough of Roselle Park, Union County, for the full term of three years were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
William H. McChesney	1157	3	1160
Frank E. Kohlenberger, Jr. ...	1111	4	1115
John C. Gasorek	1115	1	1116
David L. Keenan	1285	5	1290

Pursuant to a request dated February 22, 1963, by Frank E. Kohlenberger, Jr., the Assistant Commissioner of Education in Charge of Controversies and Disputes examined and re-checked the tallies on the voting machines used in this election at the storage depot of the Union County Board of Elections on March 26, 1963. The re-check confirmed the announced results, *supra*, in all particulars.

The Commissioner finds and determines that David L. Keenan, William H. McChesney and John C. Gasorek were elected to membership on the Roselle Park Board of Education for full terms of three years.

COMMISSIONER OF EDUCATION.

March 29, 1963.

XX.

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE
BOROUGH OF GARWOOD, UNION COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three candidates for a full term of three years for membership on the Board of Education of the School District of Garwood, Union County, held February 13, 1963, were as follows:

David T. Williams	112
Joseph S. Bonaccorso	89
Joseph Fuentes	113
Yhale H. Snow	104
Shirley Seelig	104
Beatrice C. Silverman	95

In response to a request received from Mr. Yhale H. Snow for a recount of the votes cast, the Assistant Commissioner of Education in Charge of Controversies and Disputes inspected the voting machines used in this election and checked their tallies at the storage depot of the Union County Board of Elections on March 26, 1963. The check of the tallies confirmed the announced results, *supra*, in all particulars.

The Commissioner finds and determines that Joseph Fuentes and David T. Williams were elected to membership on the Board of Education of the Borough of Garwood for full terms of three years and that there was a failure to elect a member to fill the third vacant seat on the Board. The Union County Superintendent of Schools, acting under the authority of R. S. 18:4-7d, is hereby authorized to appoint a qualified person to serve as a member of the Garwood Board of Education until the organization meeting following the next annual school election in the district.

COMMISSIONER OF EDUCATION.

March 29, 1963.

XXI.

EMPLOYMENT CONTRACT MADE IN ABUSE OF DISCRETIONARY
AUTHORITY MAY BE INVALID

GEORGE I. THOMAS,

Petitioner,

v.

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

Respondent.

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Bertram Polow, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner seeks reinstatement in the position of superintendent of respondent's schools claiming that he has a valid contract entitling him to continue in that office. No essential facts being in issue, the matter is submitted by stipulation and briefs of counsel.

On December 15, 1960, George I. Thomas was employed by the Morris Township Board of Education as superintendent of schools. The agreement was for a two-year period from February 1, 1961, to January 31, 1963, at a salary of \$14,000 for the first year and \$15,000 for the second year. The contract also permitted either party to terminate the agreement upon 90 days' written notice.

On October 18, 1961, before the end of the first year of employment, the Board of Education adopted a resolution, as follows:

"WHEREAS, this Board of Education on December 15, 1960, entered into an Employment Contract with Dr. George Isaiah Thomas, as Superintendent of Schools, and

"WHEREAS, it now appears desirable by mutual consent of the parties that the contract of December 15, 1960 be voided and that a new contract be entered into between the parties;

"NOW THEREFORE, be it hereby resolved by this Board of Education that with the consent and approval of Dr. George I. Thomas, the Contract of Employment, dated December 15, 1960 be and the same is hereby voided and that a new contract be entered into, with Dr. George I. Thomas, for a period of three years as Superintendent of the School System, at an annual salary of \$14,000.00 from the date thereof to February 1, 1962, and thereafter at an annual salary of \$15,000.00 per year, in the form attached to this resolution and that the President and Secretary of this Board be and they are hereby authorized and directed to execute said contract, on behalf of this Board."

The resolution was adopted by a vote of 5 to 2, and a new contract was signed the same day. The new contract provided for petitioner's employment from October 18, 1961, to October 18, 1964, and contained no provision for termination by either party.

At the annual school election on February 13, 1962, three incumbent members were replaced by new board members and at the subsequent organization meeting, two other incumbents resigned from the Board.

On March 21, 1962, the new Board of Education by unanimous vote adopted the following resolution:

"WHEREAS, it is the firmly established public policy of this state that 'the members of a Board of Education hold positions of public trust, and must at all times faithfully discharge their functions with the public interest as their polestar'; and

"WHEREAS, among their most vital and responsible duties is the proper selection of personnel, particularly the School Superintendent; and

“WHEREAS, the selection and permanent appointment of a School Superintendent must be conducted openly, in good faith and with a fair opportunity for all members of the School Board to be heard and to participate; and

“WHEREAS, our predecessor Board of Education of the Township of Morris on October 18, 1961, introduced and adopted a resolution purporting to rescind the original two-year contract of employment with the Superintendent of Schools, on a date which was more than fifteen months prior to the expiration of the original contract, which did not provide the employee with tenure of office; and

“WHEREAS, the said resolution further purported to grant a new three-year contract of employment from the date of the said meeting, thereby seeking to deprive the successor Board or Boards of Education of the discretion to offer or withhold tenure to the Superintendent of Schools, and seeking to usurp unto the five-member majority of the then Board of Education a duty and obligation properly and legally residing in such a future Board of Education; and

“WHEREAS, the said resolution was introduced and adopted, by a 5-2 vote, without advance notice to four of the members of the then Board of Education, and at a time when two of those members were absent from the meeting; and

“WHEREAS, the public at large had no opportunity whatever to be heard in connection with this sudden, arbitrary, unannounced change in the contractual relationship of the Board of Education with its Superintendent of Schools, purporting to bind successor boards; and

“WHEREAS, there was no adequate or justifiable basis for such an arbitrary change in policy, but, on the other hand, the obvious and sole purpose of the resolution was to deprive successor boards of the right to determine their future relationship with the Superintendent of Schools by five members of the Board of Education, three of whose terms were shortly to expire and none of whom are still serving on the Board at this time; and

“WHEREAS, such an act clearly violates the public policy of this State in depriving the citizens of Morris Township of the probationary period made available by statute and incorporated in the original two-year contract, without hearing or notice, and is arbitrary and illegal for all the reasons set forth in this resolution;

“NOW, THEREFORE, BE IT RESOLVED, that the said resolution adopted by the Morris Township Board of Education on October 18, 1961, purporting to rescind the original contract of employment with Dr. George I. Thomas, dated December 15, 1960, for a period of two years, and purporting to authorize a new three-year contract with the said Superintendent of Schools, as well as the purported written contract which was signed pursuant thereto, are against public policy, invalid and of no force or effect; and it is

“FURTHER RESOLVED, that this Board recognizes only the original two-year contract with Dr. George I. Thomas as Superintendent of Schools, dated December 15, 1960, which contract expires February 1, 1963, as the only valid and subsisting contract between the said parties.”

At the same meeting, the petitioner read a statement as follows:

"In October 1961, the Morris Township Board of Education offered me a new contract. Despite the fact that the vote was a five to two vote I felt that the contract was being offered in good faith. I accepted the offer of the three-year contract because it would be a measure of protection for myself, my family, and for those teachers who were honestly trying to support the educational program. I felt that there was a need for protection of the efforts being made on behalf of the boys and girls in Morris Township and with the election of another group of Board members this past February, I feel the need for that protection still exists.

"The contract I now hold supercedes the first contract. It is a contract which gives me tenure. I cannot see a sound reason for turning it in. I accepted it in good faith and expect to live up to it. I shall expect the Board of Education to do the same.

"I would not want to work with an illegal contract. Therefore I want to know where I stand and shall plan to take appropriate steps to clarify the issues involved."

Thereafter, on June 21, 1962, the Board of Education adopted a resolution recognizing the original contract of December 15, 1960, as the only valid agreement with petitioner and invoking the 90-day termination clause therein. Written notice of termination was served upon petitioner who was paid his salary for 90 days although relieved of his duties on July 1, 1962. Both parties subsequently agreed that petitioner's compliance with the action of the Board would not militate against him nor waive any rights he might have.

The two questions to be decided are:

1. Is the contract of October 18, 1961, a valid contract, validly entered into?
2. Is the Board of Education estopped from attacking the October 18 resolution and contract by reason of unusual delay in taking formal action?

Petitioner contends that the rescinding of his original contract of employment and replacing it with one for a longer term was a valid act within the exercise of the Board's discretionary authority. He argues that the general issue of binding future boards is not here involved because the statutes permit appointment of a superintendent for a period as long as 5 years. He sees no realistic similarity between the facts in this case and those in *Cullum v. North Bergen Board of Education*, 1952-53 S. L. D. 62, affirmed State Board of Education 67, affirmed 27 N. J. Super. 243 (App. Div. 1953), 15 N. J. 285 (1954), and cites a number of distinguishing factors.

Respondent's position is that no reason existed for a change in petitioner's contractual status and the action taken was a deliberate attempt to insure that petitioner would eventually acquire tenure of position as superintendent without fear of interdiction by subsequent boards of education; that the agreement was arrived at surreptitiously by five members of the board and was consummated without notice, proper discussion or opportunity for adequate consideration by other members of the board and the public in general; and that the essential factors which were determined to be reprehensible in *Cullum*, *supra*, are also present here.

Unlike teachers and other employees, the employment of a superintendent for a term longer than one year is specifically granted by statute, *R. S. 18:7-70*, the pertinent excerpt of which is:

“A board may, under rules and regulations prescribed by the State Board, appoint a superintendent of schools by a majority vote of all of the members of the board, for a term not to exceed five years * * *.”

Under the provisions of this statute, petitioner's initial appointment for a term of two years was unquestionably valid.

Neither can it be denied that the appointing board could have appointed petitioner for one, three, four, or even five years. That it chose two years would seem to indicate its wish at the time of the original contract that petitioner be given more than one year to demonstrate his capacity to lead the school system, with decision as to further employment to be made on the basis of two years' experience. However, it is basic in the law of contracts that “a contract may be discharged by agreement between the parties that it shall no longer bind them.” *Anson on Contracts*, 503. See also 5 *Corbin on Contracts* § 1236; 17 *C. J. S.* § 386, 387, 394. Thus, there would be no fundamental legal impediment to the right which petitioner and the Board of Education exercised on October 18, 1961, to discharge the original two-year contract by mutual consent, and to enter into a new contract for a period of three years from that date.

However, it was clearly established in *Cullum, supra*, that actions of a board of education which might otherwise be legal may be set aside if there were such evidences of bad faith or “a lack of exercise of discretion and an arbitrary determination” (15 *N. J.* at 292) as would warrant such action. In *Cullum* a vacancy in the superintendency had occurred as a result of the death of the incumbent. A 30-day “mourning period” had been agreed upon, during which the position would not be filled. Then, just over two weeks later, the majority of the Board, one of whose terms was about to expire, met in caucus and without receiving any other applications, prepared a resolution naming Mr. Cullum as superintendent. At a special meeting held immediately thereafter, “the resolution was adopted without any discussion and above objection from the floor that the appointment was being made without its ‘consideration’ as provided in the notice” (*Ibid.*, at 289). In setting the resolution aside, the Supreme Court said:

“* * * there still remains for determination the controlling legal issue as to whether the manner in which the board majority exercised the power of appointing a superintendent constituted official action which was taken arbitrarily or in bad faith and should, therefore, be set aside under the wholesome principles recently restated by this Court in *Grogan v. De Sapio*, 11 *N. J.* 308, 325 (1953). * * *

“The members of the respondent board of education hold positions of public trust and must at all times faithfully discharge their functions with the public interest as their polestar.” (*Ibid.*, 292)

The Court continues, at page 293:

“* * * When the 8 o'clock meeting was called to order, the resolution appointing Mr. Cullum was immediately presented as a *fait accompli*.

Although the meeting was called to *consider* the appointment of a superintendent, there were no deliberations whatever and the public had no timely opportunity to be heard on the matter. And although the minority members, if they had attended, would presumably have had opportunity to speak before the vote was taken publicly, they likewise would have been faced with the fact that the majority had, in advance, agreed upon the appointee and signed the resolution of appointment.

“* * * The open meeting they held was nothing more than a sham and as Judge Hartshorne suggested in *Grogan v. De Sapio*, 15 N. J. Super. 604, 611 (*Law Div.* 1951), it ought to be dealt with ‘as if it had never occurred.’”

While there are differences of *circumstances* between *Cullum* and the instant matter, the areas of similarity of action are so significant that careful consideration must be afforded respondent’s contention that the principles enunciated in *Cullum* must control here. Petitioner anticipated respondent’s contentions, and described the differences between *Cullum* and the instant matter as “much more than superficial.” The differences—or similarities—cannot be so readily dismissed. While the record herein discloses no private caucus preceding the meeting, it is apparent that the majority group on the Board, or some part of it, had made prior preparation for the events which took place at the meeting of October 18, 1961. The minutes of that meeting disclose that after conducting ordinary business at the beginning of the meeting,

“Mr. Hensley asked Dr. Thomas to leave the meeting room at this time.

“The President then read the following statement: [Here follows a memorandum of Dr. Thomas’ selection as superintendent, a list of 7 items of his accomplishments in his office, and a concluding recommendation that Dr. Thomas be given the wholehearted support of the Board.]

“*Mr. Hayward* reminded the Board that of some forty applicants who had applied for the position of Superintendent, open in 1960, eight had been selected for interviews and Dr. Thomas was finally selected. He, as Chairman of the Education Committee, had worked closely with Dr. Thomas for many months now and has come to know him well and to recognize that he is a most diligent worker.

“‘On December 14, 1960,’ he continued, ‘I moved that Dr. Thomas be employed as Superintendent for two years and a contract was subsequently drawn. I have now seen enough of his work and what he can do that I have asked that Mr. Mills prepare the following resolution which I wish to move.’ [Here follows the resolution recited above]

“Mr. vom Eigen seconded the motion.

“*Mr. Gilligan* stated: ‘This action is premature. We are not well enough acquainted with Dr. Thomas, with his attitudes or abilities in relation to this community. We should not jump to conclusions. Every employee should have a full trial period.’

“*Mr. Samuelson* stated: ‘This is a high-handed way to tie us up. It is most premature. It should have been discussed prior to this with all

Board members. I certainly have some unanswered questions regarding Dr. Thomas. This gives him automatic tenure.'

"Mr. Hayward called for the question.

"The motion was passed by the following roll call vote: Mrs. Sisler, Messrs. Hayward, Hensley, Veader and vom Eigen, YES, Mr. Gilligan and Mr. Samuelsen voted NO.

"At 8:50 P. M. Mr. Hensley called for a short recess while Dr. Thomas was invited to return to the meeting.

"At 8:55 P. M. the President reconvened the meeting with Dr. Thomas present.

"Mr. Hensley read the resolution and reported the Board's action concerning it to Dr. Thomas. He then asked, 'Do you consent and do you approve; if so, please execute it.'

"To give Dr. Thomas time to read and consider the resolution the Board turned to the reports of the Superintendent.

"After due consideration, Dr. Thomas thanked the Board for the opportunity to extend his current contract. After noting that his home address, as it appeared on the contract, was in error which he had corrected, he accepted the new contract and signed it.

"It was then signed by the President, the Secretary and the Board Attorney.

* * * *

"Mrs. Osha, who arrived late, noted that she had subsequently been advised of the new three-year contract entered into between this Board and Dr. Thomas early in the evening. She stated: 'It would have been a courtesy for the Board to have had an opportunity to discuss this matter in a conference session, as I was not aware it was coming. I believe it was wrong to do it at this time and I am absolutely opposed to it.'"

There is, in the reporting of the actions and comments at this meeting, clear indication of the kind of private, final action, without full and open consideration and discussion, with timely opportunity for all members of the board and the public to be heard, which the Court condemned in *Cullum*.

But, petitioner points out, the *Cullum* action took place on the eve of the expiration of the existence of the Board, and before the organization meeting of the new Board, when the same majority would not exist; whereas here the action in question occurred in October, four months before the election of new members and the organization of a new Board. Except for the difference in time, the statement of the Superintendent, *supra*, at the March 21, 1962, meeting gives clear indication that he, at least, regarded the October action as having been taken in full anticipation of a possible change in the majority control of the Board and to forestall the possibility that a new and different Board might not renew his contract at the expiration of the original two-year term. In his statement he said:

"* * * I accepted the offer of the three-year contract because it would be a measure of protection for myself, my family, and for those teachers

who were honestly trying to support the educational program. I felt that there was a need for protection of the efforts being made on behalf of the boys and girls in Morris Township and with the election of another group of Board members this past February, I feel the need for that protection still exists."

The Commissioner finds that the resolution terminating petitioner's original contract and the execution of a new contract that would, before its expiration, confer tenure upon petitioner were acts within the legal discretionary authority of the board of education. He reaffirms his own and the Courts' oft-stated position that the Commissioner will not substitute his judgment for that of a board of education unless there is such clear evidence of arbitrary or discriminatory action, or bad faith, as to constitute abuse of discretion. *Boult and Harris v. Board of Education of Passaic*, 1939-49 S. L. D. 7, affirmed State Board of Education 15, 135 N. J. L. 329 (Sup. Ct. 1947), 136 N. J. L. 521 (E. & A. 1948); *Palmer v. Board of Education of Audubon*, 1939-49 S. L. D. 183, affirmed State Board of Education 189; *Mackler v. Board of Education of Camden*, 1953-54 S. L. D. 53, affirmed State Board of Education 66; *Silvestris v. Board of Education of Bayonne*, 1960-61 S. L. D. 68, 72; *Murphy v. Bayonne*, 130 N. J. L. 336 (Sup. Ct. 1943). In the words of Judge Lloyd, in *Cullum, supra*, 27 N. J. Super. at 248,

"The members of the board of education of a municipality are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been elected or appointed to serve.

'As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty, and integrity.' *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N. J. 433, 474 (1952)."

The Commissioner herein determines that the majority acted upon a secretly conceived plan to decide a matter of major significance to the school district, without discussing it with the minority members, and executed this plan at the public meeting over the declared protests of minority members that the resolution, at the very least, was premature and deserved further consideration before being presented for final action. The abuse of discretion is so palpable as to require that the resolution of October 18, 1961, and the contract executed pursuant thereto, be declared a nullity.

There remains then the question of estoppel by alleged failure of respondent to take prompt action. The Commissioner finds no such defect. Respondent Board took office on February 19 and one month later notified petitioner that it recognized only the original contract. It continued to pay petitioner his salary and to recognize him as superintendent of schools until June 21 when it exercised its right under the two-year agreement to give 90 days' notice of intent to terminate.

That the minority members of the first board made no effective protest at the time of the contract substitution does not estop the new board from taking

the action it did. That the minority members did protest is not disputed. Even were it to be held that they should have acted to test the legality of the second contract immediately, their failure cannot serve as a bar to the right of the new board to act to reinstate a right of which they were deprived by a former board. Nor are there any rights under an illegal contract, 16 *McQuillin, Municipal Corporations, 3rd edition* § 46.07, 46.13; 78 *C. J. S.* § 299; *Fletcher v. Board of Education of Closter*, 85 *N. J. L.* 1 (*Sup. Ct.* 1913); *Jeckel v. Board of Education of Chatham Township*, decided by Commissioner of Education July 11, 1962. The Commissioner has already found the second contract invalid.

The Commissioner finds and determines (1) that the agreement of October 18, 1961, between petitioner and the then Board of Education of Morris Township was illegally entered into; (2) that on June 21, 1962, George I. Thomas was serving his second year as superintendent of Morris Township Schools under a two-year contract commencing on February 1, 1961, and ending January 31, 1963; and (3) that in giving petitioner 90 days' notice of termination of his employment, the Morris Township Board of Education was within the proper exercise of its discretionary authority and petitioner's dismissal was valid.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

April 1, 1963.

Pending before State Board of Education.

XXII.

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE BOROUGH OF HELMETTA, MIDDLESEX COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

A complaint filed by Clarence E. Blair, a citizen and taxpayer of the Borough of Helmetta, Middlesex County, alleges certain irregularities in connection with the annual school election in the district held February 13, 1963, and requests that a new election be held. An inquiry into the matter was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the office of the Middlesex County Superintendent of Schools on March 18, 1963.

Petitioner's request rests on two charges: (1) that, contrary to law, the ballot box was unlocked during the voting, and (2) the public notices of the election stated the polling place incorrectly to be "the same place as the last General Election" which would have been the Fire House, when, in fact, the polls were located in the public school building.

That the ballot box was unlocked during the election is not disputed. The secretary of the board testified that when he last checked the box there was a proper lock on it which disappeared sometime before the polls were opened. A search failed to produce the lock and none was then obtainable. A suggestion that the box be tied shut was rejected by the chairman of the

election who expressed the opinion that the box should not be disturbed in any way and directed all members of the election board to keep it under constant surveillance. It was further testified that when one voter started to lift the ballot box lid in order to place her vote within, she was restrained and directed to insert her ballot through the slot. Two members of the election board testified that no other attempt was made to lift the lid of the box, that it was under constant surveillance, and no illegal voting occurred by reason of the absence of a lock on the ballot box.

With respect to the second contention, an inspection of one of the public notices placed in evidence shows that the polling place was properly indicated at the public school. It appears that the petitioner may have misunderstood that portion of the printed statement which states:

"The polling places for said meeting and their respective polling districts (described by reference to the election districts used at the last

General Election) have been designated below * * *".
and may not have read the handwritten insert designating the polling place at the public school. In any event, after hearing the testimony and examining the exhibit, petitioner did not press this contention further.

The inquiry further disclosed that only four public notices were posted instead of the seven required by law. *Cf. R. S. 18:7-15*. While it may be argued that the Borough of Helmetta is small and four notices would seem to be sufficient, the statute reposes no exercise of discretion in the board of education or its agents in regard to this requirement, which is mandatory. The secretary of the board is, therefore, directed to post the minimum number of notices required by the above-cited statute.

No evidence was advanced to indicate that fraudulent voting occurred as a result of the unlocked ballot box. While not condoning the use of an unlocked ballot box, the Commissioner finds that the election officials took proper cognizance of the omission and employed measures which, in their judgment, would prevent its affecting the results of the balloting. In the absence of a clear showing that the will of the electorate was thwarted or could not be fairly determined by reason of irregularities, the election results will stand.

As the Court said in *Burrough v. Branning*, 9 N. J. L. J. 110 (1886):

"* * * The omission by election officers to discharge some duty merely directory will not set aside the return. * * * Negligence or mistake in the performance of duty by election officers will not be allowed to stand in the way so as to defeat the expression of the popular will."

See also *Petition of Clee*, 119 N. J. L. 310 (*Sup. Ct.* 1938); *Application of Wene*, 26 N. J. Super. 363 (*Law Div.* 1953), affirmed 13 N. J. 185 (1953); *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Lumberton, Burlington County*, 1959-60 S. L. D. 130.

The Commissioner finds and determines that the results of the annual school election held in the Borough of Helmetta, Middlesex County, will stand as announced.

COMMISSIONER OF EDUCATION.

April 5, 1963.

XXIII.

BOARD OF EDUCATION MUST GIVE PROPER CONSIDERATION
TO CHARGES PREFERRED AGAINST TENURE TEACHER

ROGER SHEFFMAKER AND AIDA SHEFFMAKER, HIS WIFE,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF RUNNEMEDE,
CAMDEN COUNTY,

Respondent.

For the Petitioners, Bryan B. Mc Kernan, Esq.

For the Respondent, S. Lewis Davis, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners in this case complain that respondent has failed to take proper action upon an appeal which they served upon the respondent, alleging that the principal of one of respondent's schools had inflicted corporal punishment upon their son in violation of a New Jersey statute prohibiting such punishment.

It is stipulated that respondent's answer to the petition before the Commissioner is the minutes of a special meeting of respondent Board held on July 24, 1962, at which the Board determined, "pursuant to R. S. 18:3-25, that the charges and evidence in support of such charges, are not sufficient to warrant dismissal or a reduction in the salary of Catherine Levick."

A hearing in the matter was conducted by the Assistant Commissioner in Charge of Controversies and Disputes on February 26, 1963, at the Court House in Camden.

The Commissioner is not required, nor is it his intention at this point, to evaluate any evidence in support of petitioners' allegations against respondent's employee, Catherine Levick. Sufficient testimony by petitioners and their son was permitted at the hearing before the Assistant Commissioner to determine the substantive nature of the allegations upon which petitioners assert that respondent has failed to take proper action. Unless and until the Commissioner is called upon, pursuant to the Tenure Hearing Act (R. S. 18:3-24, *et seq.*) to hear full testimony bearing upon such allegations, he will make no comments on the merits thereof.

The sole question before the Commissioner herein is whether the determination made by respondent on July 24, 1962, was an abuse of its discretionary authority.

Petitioners allege, and so testified, that Catherine Levick, principal of the Bingham School, on divers dates and occasions in the 1961-62 school year struck their son, Willard McKennon, on the face with her hand, and on and about his back with a wooden yardstick. After complaining to several Board members individually, and to Robert D. Goodwin, superintendent of schools, petitioners filed a complaint in the Municipal Court of Runnemede, charging

Miss Levick with simple assault. Respondent's minutes reveal that she was summoned before the Magistrate for hearing on June 6, 1962, and was found "not guilty" on the petitioners' complaint.

Thereupon, on or about June 18, petitioners served a "petition of appeal" upon respondent Board of Education, making the aforesaid allegations and praying that the "Board take proper action under the circumstances."

On July 24, 1962, without notification or invitation to petitioners herein, respondent held a special meeting in connection with the petitions of appeal filed by petitioners in the instant matter and by two other persons who are not parties to the petition before the Commissioner. The minutes of that meeting report that the Board reviewed the assault complaints heard in Municipal Court and the Court's finding therein. The minutes conclude:

"* * * Robert D. Goodwin, Administrative Principal was also present at the meeting and advised the Board that it has been brought to his attention that on more than one occasion one or more of the parents here involved have made statements that it was their purpose to get rid of him as well as Catherine Levick from the school system of the Borough of Runnemede.

"Catherine Levick has been in our school system for a period of 34 years and at no time in the past has any complaints been made against her for conduct unbecoming a teacher, or, on any other grounds.

"It is the Board's considered opinion that the three complainants here have had their day in Court, that these matters were heard by a Court of competent jurisdiction, that witnesses testified on behalf of the complainants as well as Catherine Levick and that all the parties were represented by Counsel.

"The Board determines, pursuant to R. S. 18:3-25 that the charges and evidence in support of such charges, are not sufficient to warrant dismissal or a reduction in the salary of Catherine Levick. * * *"

Seven members of the Board were present and concurred in this determination.

R. S. 18:3-25, to which the Board minutes, *supra*, refer, reads as follows:

"If a written charge is made in accordance with any provision of Title 18 of the Revised Statutes or chapter 181, P. L. 1957 against any employee under tenure, the board of education, by a majority vote of all of its members, may determine that such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant dismissal or a reduction in salary, in which event it shall forward such written charge to the Commissioner of Education, together with a certificate of such determination. The board of education forthwith shall serve a copy of the written charge and its certification upon the employee against whom said charge has been made, personally or by certified mail direct to his last known address."

Petitioners complain that following the serving of their "petition of appeal" upon the respondent on June 18, "the said Board of Education has taken no action whatever in the way of a hearing, or any other action in the matter, and has ignored the situation entirely." While the action reported in respondent's minutes, *supra*, demonstrates that respondent did not "ignore

the situation entirely," it is amply clear that such action as the Board did take was unsatisfactory to petitioners, at least in the respect that they were never properly notified in advance of the Board's special meeting, nor informed as to its outcome. Nor are the requirements of R. S. 18:3-25 satisfied by the procedures employed by respondent in its special meeting. No opportunity whatever was given to petitioners, who had made a written charge against a tenure employee, to endeavor to demonstrate that the evidence in support of their charge would be sufficient, if true in fact, to warrant dismissal or reduction in salary. Complete reliance was placed upon an oral review—for there is no evidence or offer of a transcript—of the proceedings in the Municipal Court. In actions involving disciplinary proceedings against a teacher, the determinations of the courts on criminal complaints are not definitive of the authority of a board of education. The Commissioner considered this question at length in *DeBellis v. Board of Education of Orange*, 1960-61 S. L. D. 148. It will suffice to quote briefly from that decision at page 150:

"1. This question has been answered in court decisions in this State. It has been held that acquittal in a criminal case does not prevent a departmental trial. In *Borough of Park Ridge v. Salimone*, 36 N. J. Super. 485, affirmed by Supreme Court, 21 N. J. 28, the Court said:

'The second charge arises from substantially the same factual matter as the indictment. But the acquittal in the criminal case does not stand in the way of the departmental trial. The proceedings are entirely independent of each other.'

"Proceedings under R. S. 18:5-67 are disciplinary in nature. 'Such proceedings are civil in nature and not criminal.' *Kravis v. Hock*, 137 N. J. L. 252, at 254. In *Schwarzrock v. Board of Education of Bayonne*, 90 N. J. L. 370 at 371, the Supreme Court said:

'The proceeding could only result in either affirming or reversing the removal. It could not result in any binding judgment as to his guilt or innocence of the charge of attempting bribery; the finding that he was guilty or innocent could only be a finding for the purpose of action by the board, not for the purpose of criminal law. Whether in such case the board should act before action is taken by the criminal courts is a matter resting in the discretion of the board.'

"The Commissioner holds that the Board of Education was not precluded from finding appellant guilty because of the failure of the Grand Jury to indict him."

R. S. 18:3-25, *supra*, does not require that a board of education afford a formal hearing on charges filed with it—indeed the Tenure Hearing Act clearly precludes such a hearing—but it does require that the board examine the evidence which the person preferring the charges has to offer. The function of the board in such cases has been likened to that of a grand jury. The failure of respondent herein to examine the petitioners' evidence has denied them a right to be heard, and it has also denied the accused principal a right to have her situation determined with respect to petitioners' complaint and evidence against her.

The Commissioner finds and determines that respondent Board of Education, by its failure to afford petitioners an opportunity to present their evidence for the Board's consideration of its substantive nature and by its sole reliance upon an oral review of the proceedings before the Municipal Court, has denied to petitioners their right to be heard. He, therefore, remands the matter to the Board of Education for a determination consistent with the procedural requirements herein described.

COMMISSIONER OF EDUCATION.

April 8, 1963.

XXIV.

TENURE EMPLOYEE HOLDING SENIORITY RIGHTS TO ABOLISHED
POSITION NOT ENTITLED TO REINSTATEMENT WHEN DUTIES
OF POSITION ARE ASSIGNED TO SUPERINTENDENT

CHARLES R. LAUTEN,

Petitioner,

v.

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

Respondent.

For the Petitioner, Francis X. Hayes, Esq.

For the Respondent, John J. Witkowski, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case complains that he has been deprived of his seniority rights by certain appointments made by respondent, and prays for an order reinstating him in the position of Director of Industrial Education in respondent's schools.

A hearing in this matter was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes in Jersey City on November 19, 1962. Briefs and memoranda were submitted by counsel.

Petitioner was first employed as a teacher in the Jersey City schools in September, 1931. In 1951, he was appointed Assistant Director of Industrial Education, and in 1955 he became Director. On July 1, 1959, the Board of Education abolished the position of Director of Industrial Education, and petitioner was assigned as a teacher of pre-vocational shop work. Pursuant to an order of the Commissioner in *Lautenschlager, et al. v. Board of Education of Jersey City*, decided December 14, 1961, respondent placed petitioner on a preferred eligible list in accordance with R. S. 18:13-19 and the seniority standards established by the Commissioner pursuant thereto. The resolution abolishing the position of Director of Industrial Education transferred his duties to the Superintendent of Schools. A similar resolution abolished the position of Assistant Director of Industrial Education and assigned those duties as well to the Superintendent. The incumbent Assistant Director, John J. Barry, was also reassigned to a teaching position.

In January, 1962, respondent adopted a resolution appointing John J. Barry to the position of Supervisor of Technical and Industrial Education in the High Schools at an annual salary of \$8,800.00, and a similar resolution appointing Frank J. Cioffi to the position of Supervisor of Manual and Industrial Training in the Elementary Schools at an annual salary of \$7,225.00, both appointments to become effective February 1, 1962.

Petitioner asserts that these appointments violate his rights under *R. S. 18:13-19*, and contravene his rights under the seniority standards pursuant thereto, in that the duties assigned to or performed by Mr. Barry and Mr. Cioffi are those of the Director of Industrial Education.

On or about April 23, 1962, petitioner filed his complaint before the Commissioner. At a meeting held on July 2, 1962, respondent abolished the positions of Supervisor of Technical and Industrial Education in the High Schools and Supervisor of Manual and Industrial Training in the Elementary Schools, effective July 1, 1962, and reassigned Messrs. Barry and Cioffi to other positions, which, according to testimony, are entirely unrelated to the positions in question in this matter. Thus, the issue presently before the Commissioner narrows itself to two questions:

1. Did the appointments of Mr. Barry and Mr. Cioffi to positions of Supervisor circumvent petitioner's rights?
2. If so, to what extra compensation, if any, is he entitled for the period from February 1 to July 1, 1962?

R. S. 18:13-19, as it existed on February 1, 1962, reads in part as follows:

"Nothing contained in sections 18:13-16 to 18:13-18 of this Title or any other provision of law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of superintendents of schools, assistant superintendents, principals or teachers employed in the school district whenever, in the judgment of the board of education it is advisable to abolish any office, position or employment for reasons of a reduction in the number of pupils, economy, a change in the administrative or supervisory organization of the district, or other good cause. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion or political affiliation. Any dismissals occurring because of the reduction of the number of persons under the terms of this section shall be made on the basis of seniority according to standards to be established by the Commissioner of Education with the approval of the State Board of Education. In establishing such standards, the Commissioner shall classify, in so far as practicable, the fields or categories of administrative, supervisory, teaching or other educational services which are being performed in the school districts of this State and may, at his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole. Whenever it is necessary to reduce the number of persons covered by this section, the board of education shall determine the seniority of such persons according to the standards established by the Commissioner of Education with the approval of the State Board of Education and shall notify each person as

to his seniority status. * * * All persons dismissed shall be placed on a preferred eligible list to be prepared by the board of education of the school district and shall be re-employed by the board of education of the school district in order of seniority as determined by said board of education. * * * Should any superintendent of schools, assistant superintendent, principal or teacher under tenure 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 re-employment whenever vacancies occur and shall be re-employed by the body causing dismissal in such order when and if a vacancy in a position for which such superintendent, assistant superintendent, principal or teacher shall be qualified. Such re-employment shall give full recognition to previous years of service. * * *

The relevant portions of the "Standards Established to Determine Seniority," pursuant to R. S. 18:13-19, *supra*, are found in part 7, as follows:

"* * * Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him.

"If he shall have insufficient seniority in the category to which he shall revert, he shall, in like manner, revert to the next category in which he held employment immediately prior to his employment in the category to which he shall have reverted, and shall be placed and remain upon the preferred eligible list of the next preceding category, and so forth, until he shall have been employed or placed upon all the preferred eligible lists of the categories in which he formerly held employment in the school district.

"In the event of his employment in some category to which he shall revert, he shall remain upon all the preferred eligible lists of the categories from which he shall have reverted, and shall be entitled to employment in any one or more such categories whenever a vacancy occurs to which his seniority entitles him. * * *

Petitioner's testimony as to his duties as Director of Industrial Education establishes that he was responsible for the organization of the industrial education program, for the requisition and allocation of supplies used in the program, for approval of requests for repairs to equipment and for preparing specifications for non-listed items of equipment and supplies for the program. His general responsibility for the program involved such administrative duties as preparation of budgets, and such supervisory duties as curriculum development and classroom supervision. Additionally, he was required to perform such other duties connected with the schools as the Superintendent might direct.

Supervisors, it was shown, are required to act as educational consultants to administrative and teaching personnel, to carry on classroom supervision and encourage improvement of instruction, to assist their superiors, and

perform other professional duties as required by the Superintendent. Petitioner introduced exhibits purporting to show that Mr. Cioffi, as Supervisor, had issued bulletins covering such areas as teacher recruitment, requisitioning of supplies and equipment, and financial accounting for receipts from pupil projects—all similar to duties which petitioner had performed as Director and which were not properly assigned as duties of a Supervisor.

Respondent, on the other hand, in cross-examination, established that both petitioner, as Director, and the Superintendent possessed and exercised broad latitude in the delegation of duties to subordinates. The abolition of many administrative positions which was effected in 1959, when petitioner's position as Director was abolished, placed directly upon the Superintendent much of the burden of administrative detail which previously had been carried by directors and assistant directors.

It is clear that the statute, *R. S. 18:13-19, supra*, gives to the local board of education the right to abolish positions in order to effect a "change in the administrative or supervisory organization of the district," provided the incumbents are placed on preferred eligible lists in accordance with the seniority standards. Petitioner was never employed in the category of "Supervisor" in respondent's schools, and he makes no claim of eligibility to be assigned to a position in that category. His sole claim is that if, as he alleges, the duties of Director were assigned to two Supervisors, he is entitled to the salary which he was paid as Director.

The Commissioner finds this claim without merit. The testimony shows that the Supervisors performed the duties prescribed under respondent's rules for that position, which included certain duties properly delegated to them by the Superintendent. Responsibility for the performance of these delegated duties still reposed in the Superintendent of Schools, to whom respondent had assigned them when it abolished the position of Director in 1959. No testimony was advanced to show that the Superintendent was relieved of his assignment when the appointments of Messrs. Barry and Cioffi were made on February 1, 1962, or that he did not still possess the assignment when the supervisorships were abolished on July 1 following.

The Commissioner finds and determines that the appointments of Supervisor of Manual and Industrial Training in the Elementary Schools and Supervisory of Technical and Industrial Education in the High Schools were made within the authority of respondent, that no rights of petitioner were circumvented thereby, and that petitioner has no claim to any additional compensation arising from said appointments.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

April 23, 1963.

XXV.

WHERE REASONABLE MEANS EXIST, BOARD MUST DEVELOP
PLAN TO REDUCE EXTREME RACIAL IMBALANCE IN
SCHOOL ENROLLMENTS

CRAIG FISHER, DEBORAH FISHER, KIM FISHER, DIANE FISHER AND LINDA
FISHER, MINORS, BY MRS. GLORIA FISHER, THEIR PARENT AND NEXT FRIEND;
CRAIG FRAZIER, KAREN FRAZIER, WAYNE FRAZIER AND CHERYL FRAZIER,
MINORS, BY MRS. HELLEN FRAZIER, THEIR PARENT AND NEXT FRIEND;
ALETHIA SMITH, HORACE SMITH, JR., AND BRUCE SMITH, MINORS
BY MR. AND MRS. HORACE W. SMITH, THEIR PARENTS AND NEXT
FRIEND,

Petitioners,

v.

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

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

For Petitioners, Herbert H. Tate, Esq., William Wright, Jr., Esq., Robert
L. Carter, Esq., Maria L. Marcus, Esq., Barbara A. Morris, Esq.

For Respondent, Lee A. Holley, Esq., Walter D. Van Riper, Esq., Special
Counsel.

This appeal, brought in the name of several children of school age by
their parents, alleges the maintenance of a racially segregated school system
in the City of Orange and protests the refusal of the Board of Education to
formulate and execute plans and procedures designed to eliminate the existing
pattern of racial segregation. The relief sought is an order requiring the
respondent Board to take steps to eliminate all aspects of racial segregation
in the Orange Public School System. Respondents enter a general denial of
these allegations.

A hearing on the issues was conducted by the Assistant Commissioner in
charge of Controversies and Disputes in Newark on November 20, 21,
December 3, 5, 6, and 14, 1962.

The facts underlying this controversy are relatively few and are undisputed
to any material degree.

The charge of segregation herein is leveled against the assignment of
pupils to the eight elementary schools in the City of Orange. The single high
school in the district, which receives all of the pupils of secondary grade, is
not involved.

The eight public elementary schools of the City of Orange have an enroll-
ment of 50 percent white and 50 percent Negro pupils distributed by schools
as follows:

<i>School</i>	<i>Grades</i>		<i>% Negro Pupils</i>	
	<i>1961-62</i>	<i>1962-63</i>	<i>1961-62</i>	<i>1962-63</i>
Oakwood School	K-5	K-4	99	99
Central School	5-8	7-8	99	66
Park School	K-8	K-6	44	50
Lincoln School	K-8	K-6	42	60
Forest School	K-8	K-8	41	43
Cleveland School	K-8	K-8	25	19
Heywood School	} K-8	K-5	} 20	19
Tremont School		5-8		24
Total			48	50

Some controversy has existed for a number of years with regard to the Oakwood School which has an enrollment of 99 percent Negroes. In 1958, in the process of investigating a complaint of pupil assignments, the Division Against Discrimination of the New Jersey State Department of Education entered into discussions with the Orange Board of Education which resulted in the modification and establishment of new attendance area boundaries for the Heywood-Tremont, Oakwood, Park, and Cleveland Schools. Subsequently, at a meeting on December 6, 1961, the Board received from a group of citizens four proposals designed to relieve the concentration of Negro pupils in the Oakwood School and Central School. After taking the four proposals under consideration, the Board at a meeting on February 13, 1962, adopted a resolution embodying a different plan than any of those submitted. The group submitting the four proposals found this plan to be unacceptable and voiced objection to it. Its primary feature was a change in the use of Central School which reduced its range of grades to 7-8 instead of 5-8. The consequent reassignment of pupils affected in slight degree each of the other schools except Forest, Heywood, and Tremont. This plan became effective in September 1962. As a result the concentration of Negro pupils in Central School was reduced from 99 percent to 66 percent. While there was some shifting of racial ratios in the other schools, Oakwood remained almost entirely Negro. That the pupil population of this school continues to be racially homogeneous is the primary basis of petitioners' attack on the policies of the Board of Education.

While petitioners maintain that the actions of respondent Board of Education have been such as would keep as many Negro children as possible in schools separate and apart from those attended by white pupils, thus practicing deliberate and purposeful segregation, the main thrust of their petition is that the fact of racial segregation, by design or not, violates their legal and constitutional rights. They assert that the Courts have established that segregated education is unequal education and whether such segregation exists as a result of deliberate efforts or whether it is caused by socio-economic or adventitious forces is immaterial; the results are one and the same and disadvantage the Negro child. They contend that no matter how caused, the existence of racially imbalanced schools requires action by the Board of Education which will result in the elimination of racially homogeneous school enrollments.

Respondent denies that there has been any attempt to segregate pupils by race in its schools and asserts that it has at all times administered its schools

upon sound educational and legal principles. It contends that the utilization of race as a factor in the determination of school policies is as improper as discriminatory practices based on racial considerations. It finds no legal necessity or desirability for the adoption of the proposals advanced to mitigate the present racial concentration in preference to those already in effect.

In their brief, petitioners frame the issues herein as follows:

“* * * whether a requirement, rule, regulation or policy of the respondent School Board that compels the appellants and other Negro children to attend a school to which only or virtually only Negro children are required to attend constitutes a violation of the constitutional rights of appellants and of the class they represent and is in derogation of the fundamental obligation of the School Board, thereby necessitating remedial action * * *.”

In respondent's words the issues are:

“* * * (1) have the various Orange school officials been derelict in their legal and constitutional responsibilities in failing to administer a school system, upon prime racial distinctions and standards, without discriminatory racial quotas, and upon necessary and important educational considerations? and, (2) assuming for the purposes of argument, some duty or desirability to utilize some 'benign' racial discrimination in school assignments, has the Board of Education utilized its facilities with proper judgment and with legal authority, considering the numerous matters of local concern, regarding Oakwood Avenue School, *vis-a-vis*, other Orange elementary schools?”

It has been argued by the respondent that the issue in this matter presents novel questions of constitutional law which are beyond the scope of the Commissioner's quasi-judicial function. The Commissioner, while applying constitutional principles to the determination of school controversies, has consistently refused to attempt to decide constitutional questions, and to the extent that such issues are present herein, he will not presume upon the function of the Courts. He is aware, however, that in dismissing a similar complaint brought by other parents in the United States District Court for New Jersey, saying that it should be subject first to the exhaustion of administrative remedies, Judge Augelli said:

“Plaintiffs have not satisfied this Court that the Commissioner lacks authority to grant the specific relief requested herein. There is ample power in the Commissioner to hear all disputes and controversies arising under the school laws and to make binding decisions with respect thereto. * * *

“* * * a determination of the manner in which the 'neighborhood school policy' operates in any particular community requires a consideration and evaluation of a multitude of factors. This Court feels that the Commissioner is especially well qualified, by reason of his knowledge and experience in the specialized field of education, to make these factual determinations. There is no reason to assume that the Commissioner, in the performance of his duty, will not be guided by the applicable legal principles. Under all of the circumstances, the Commissioner should be given

the opportunity, at least in the first instance, to pass upon the matters set forth in plaintiffs' complaint. Until such time as plaintiffs have exhausted the state administrative remedies provided by N. J. S. A. 18:3-14 and 15, this Court should not entertain the action." *Shepard v. The Board of Education of the City of Englewood*, 207 F. Supp. 341 (U. S. D. C. N. J. 1962); *Allen v. The Board of Education of the City of Orange*, *Ibid.*

Under this mandate from the Court and confronted with a controversy obviously involving the proper administration of a public school district, the Commissioner has taken cognizance of this dispute and will make his determination of the issues herein in accordance with the application of educational principles and the school laws of New Jersey.

The pertinent New Jersey law is found in the New Jersey Constitution, Article I, section 5:

"No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."

and R. S. 18:11-1:

"Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. * * *"

The first question to be answered is: Have the Orange school authorities, by intent or design, segregated or attempted to segregate the Negro pupils?

No evidence has been presented to establish such a charge. Although petitioners make this general allegation they advance no proof of deliberate and purposeful action to maintain racially segregated schools or to discriminate between pupils on the basis of race.

The pivotal question in this case is: Does the existence of the Oakwood School as virtually an all Negro school, constitute such an educational handicap to the pupils assigned to it, that the board of education is duty bound to eliminate its racial imbalance or reduce it within the limits of reasonableness and practicability consistent with sound educational practice?

The area adjacent to the Oakwood School is densely populated by Negro families almost exclusively. A large part of the enrollment comes from a Federal housing project close to the Oakwood School whose occupants are practically all Negro. The school attendance boundaries, roughly rectangular, approximate equidistant points between Lincoln, Central, and Park Schools and include almost all of this highly congested Negro population area. The boundary lines are regular and the Commissioner finds no evidence that they have been drawn with deliberate intent to make Oakwood an all Negro school. That its enrollment is 99 percent Negro results obviously from the housing pattern.

It is clear that the ultimate solution lies in the free choice of residence and the elimination of segregated housing which lie beyond the control of the board of education or the Commissioner. Nevertheless, the Commissioner is of the opinion that in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils.

The Orange City Board of Education took steps at the beginning of this school year which effectively reduced the concentration of Negro pupils in the Central School. From his study of this problem, the Commissioner concludes that the Board of Education can also eliminate the extreme concentration of Negro pupils in the Oakwood School. He is further convinced that this can be done without doing violence to logical attendance areas or at the sacrifice of sound educational considerations. The practice of assigning pupils to schools near their homes, particularly with regard to children of elementary school age, is well established and is attended by educational values that are widely accepted, not only by educators, but by the public generally. Consideration of such factors as distance to be traveled, safety, economy of time, establishment of rapport between school and home, and knowledge by the school staff of the child's environment have operated to establish convenience of access as the controlling criterion of pupil assignment, and the importance of these values cannot be denied. It is the Commissioner's conviction, nonetheless, that one or more solutions to the present problem can be developed which will mitigate the existing undesirable concentration of Negro enrollment in the Oakwood School and which can at the same time preserve and protect in great part the values of the time-tested pattern of pupil assignment.

The Commissioner does not mean to suggest that the solution to this problem is necessarily simple. He notes also that petitioners recognize the difficulties confronting the Board when they say in their brief:

"Obviously, however, logic makes its demands. The School Board cannot be required to do the impossible, but if there are reasonable and administratively feasible alternatives available which would reduce or eliminate the school segregation complained of, the respondent is under constitutional obligation to put those alternatives into effect."

He points out, however, that a number of plans have already been proposed, some by civic organizations and others in a report of a committee of the New Jersey State Department of Education. For instance, it has been suggested that the Oakwood and Park Schools be combined into one attendance area. Under this proposal all pupils in this district would attend one school for grades 1-3 and the other school for grades 4-6. Such a plan would reduce the ratio of Negro children in Oakwood as indicated in the report of the Department of Education. (See appendix.)

The above plan is cited not to imply that it is favored or that it necessarily offers the best solution, but only for purposes of illustration and to indicate

that the problem is not incapable of solution. Doubtless there are other plans than those already offered which the Board may want and need to consider. Because the Board has had this matter under study for a long time, the Commissioner is certain that a satisfactory plan can be formulated and approved without delay in order that the beginning of the next school year will see the elimination of this problem.

The Commissioner finds and determines

(1) that the concentration of Negro pupils in the Oakwood School does not result from the employment of deliberate and purposeful segregation policies;

(2) that attendance at the Oakwood School engenders feelings and attitudes which tend to interfere with successful learning;

(3) that such extreme racial imbalance as obtains in the Oakwood School, at least where means exist to prevent it, constitutes under New Jersey law a deprivation of educational opportunity for the pupils compelled to attend the school; and

(4) that reasonable means consistent with sound educational and administrative practice do exist to avoid the extreme concentration of Negro pupils in the Oakwood School.

The Commissioner of Education directs the Orange Board of Education

(1) to formulate a plan consistent with the principles and findings enunciated in this decision to reduce the imbalance in the Oakwood School,

(2) to submit such plan or plans for approval on or before July 1, 1963; and

(3) to implement its plan as approved with the beginning of the 1963-64 school year.

Jurisdiction over this appeal is retained by the Commissioner pending the adoption by the Orange City Board of Education of a plan which meets with the approval of the Commissioner, and the Commissioner reserves the right to make such further order or orders in this cause as shall be necessary to effectuate a plan approved by the Commissioner for the 1963-64 school year.

COMMISSIONER OF EDUCATION.

May 15, 1963.

APPENDIX

COMBINE OAKWOOD AND PARK SCHOOLS INTO ONE (1) DISTRICT*

Under this proposal pupils of the combined district would be assigned to one school for the first, second and third grades and in the other school for grades four, five and six. Kindergarten children would attend the school nearest their homes.

* A Study concerning Alleged Segregation and Discrimination in the Orange Public Schools, New Jersey State Department of Education, October, 1962, p. 57.

Advantages seen were:

1. It would reduce the present racial concentration in the Oakwood School to an approximately 72% Negro – 28 white ratio in both schools.
2. It would require no transportation by the Board of Education.

Disadvantages seen were:

1. Increased walking distance for more children as well as increased over-all child travel distance.
2. Children from the extremes of the combined district would have to cross two heavy traffic arteries.

Pending before State Board of Education.

XXVI.

ASSIGNMENT OF PUPIL ATTENDANCE AREAS LIES WITHIN BOARD'S DISCRETIONARY AUTHORITY

LEONA RUTHERFORD AND EDITH GASPER,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD,
BERGEN COUNTY,

Respondent.

For the Petitioners, *Pro Se.*

For the Respondent, G. Tapley Taylor, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners in this case protest the assignment of their first grade children to a schoolhouse approximately nine-tenths of a mile away from their homes rather than to another schoolhouse in the district which is approximately five-tenths of a mile away. They contend that such an assignment is unlawful, unnecessary, unreasonable, and arbitrary.

A hearing in this matter was conducted by the Assistant Commissioner in charge of Controversies and Disputes at Hackensack on March 7, 1963. A Borough map, rules and regulations of respondent Board of Education, and relevant excerpts from its minutes were put into the record.

There are two elementary schools in the Borough of Maywood. The Memorial School lies near the eastern end of the Borough. Maywood Avenue School is located in the western half of the community. A line running north and south between the two schools establishes the basic boundary between the attendance areas for the two schools. However, this line is regarded as a "floating" boundary, to be moved eastward or westward with respect to attendance areas for particular grades as may be recommended by the superintendent and approved by the Board of Education. In accordance with this policy, on June 14, 1962, petitioners, who live near the "floating" boundary, were notified that their sons, who had attended Maywood Avenue School

kindergarten classes in the 1961-62 school year, would attend first grade at Memorial School in the current year. Petitioners' older children are still enrolled in other grades at Maywood Avenue School. Prompt protest was made by petitioners and other parents, and respondent met with them and had the entire matter studied by a committee of the Board. On August 31, 1962, after hearing the report of the committee, considering alternate proposals for the solution of the problem, and giving the public an opportunity to be heard, respondent adopted a motion "that the present assignment of first grade students heretofore made by the Superintendent of Schools not be altered." A further motion directed that the Mayor and Council be apprised of the Board's determination and be requested to review the assignment of public school crossing guards "in order that the maximum protection be provided for these young children."

Petitioners' argument rests primarily on the claim of personal hardship arising out of the attendance of their children at two different schools, their concern for the safety of their young children in traveling along and across a heavily trafficked street, and their contention that the equalization and limiting of class sizes which the transfer was designed to achieve has not come about. There is no contention of discrimination of any sort against their children.

Respondent defends the transfer solely on the basis of limiting and equalizing class sizes within the schools. Figures were submitted by respondent showing class enrollments at the beginning of the school year, supplemented with the Superintendent's comments relative to the experience and capabilities of the several teachers of first grade classes, to demonstrate that there was a reasonable basis for the establishment of the school attendance areas for this grade. Moreover, the additional distance to be traveled by these children is not an unreasonable distance, nor is it shown to be greater than the distance traveled by any other children attending Memorial School. As to the traffic hazards, the testimony indicates that respondent, through its letter to the Mayor and Council, has done as much as it can legally do to provide protection for pupils on the public highways. The Commissioner finds that the transfer of petitioners' children was not an arbitrary, unnecessary, or unreasonable use of respondent's discretionary authority.

Petitioners' claim of personal hardship, however sincere, does not raise a sufficient consideration to outweigh the educational values which respondent considers will emerge from classes limited in size and equalized with respect to the teachers' skills and experience. The Commissioner will not substitute his judgment for that of a board of education when it has acted legally and reasonably. The statutes (*R. S. 18:11-1*) impose upon a board of education the duty to

"* * * provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. * * *"

The Commissioner finds no evidence in the present case that the respondent's action is not consistent with its responsibility under the law.

The Commissioner finds and determines that respondent's establishment of attendance areas for first grade is a proper exercise of its discretionary authority, and is not arbitrary, unreasonable or unlawful.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

May 24, 1963.

XXVII.

BOARD NOT REQUIRED TO ADMIT CHILD AS TRANSFER
FROM NURSERY SCHOOL

ANTHONY DITLOW,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF OCEANPORT,
MONMOUTH COUNTY,

Respondent.

For the Petitioner, *Pro Se.*

For the Respondent, Sidney Alpern, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner's daughter, Michele Ann Ditlow, born October 21, 1957, was denied admission to respondent's school on January 4, 1963. Petitioner alleges that his daughter was entitled to be admitted as a transfer pupil from private kindergarten, and the denial of admission was not only arbitrary and discriminatory, but also deprived her of a right to education in the public schools of her community.

A hearing in the matter was conducted by the Assistant Commissioner in charge of Controversies and Disputes at Freehold on March 12, 1963.

It is stipulated that Michele Ann Ditlow has been enrolled since September 1962 in Happy Hours School, located in Little Silver, New Jersey. This school has been approved by the State Board of Education as a child care center pursuant to *R. S. 18:20A-1 et seq.* After she had attained the age of five years, petitioner sought to have her admitted to respondent's school, and on January 4, 1963, received the following letter from the principal of the Oceanport School:

"With reference to your application toward the registration of your daughter, Michele Ditlow, in the Oceanport School, may I call your attention to the policy of the Oceanport Board of Education:

"A child entering the Oceanport School must be five years of age within ten days of the opening of school.

"Our school opened this year on Wednesday, September 5. Therefore, any child in order to be properly entered in our school had to be five years of age by September 15. Your daughter was not five until October 21, 1962.

"I regret that this action is necessary, but I must act in compliance with the policy established by the Board of Education."

Thereafter, petitioner appealed to the Commissioner from the refusal of respondent to enroll his daughter.

Petitioner bases his appeal upon that part of R. S. 18:14-1 which reads:

"Public schools shall be free to the following persons over 5 and under 20 years of age:

"a. Any person who is domiciled within the school district;"

and upon his contention that Happy Hours School is a private school within the meaning of R. S. 18:14-3, as follows:

"Children who have never attended any public or private school may be admitted to a public school during the ten days immediately following the opening of the school for the fall term, and at no other time except by a majority vote of all the members of the board of education of the school district in which the school is situated."

In addition, he alleges that respondent has discriminated against his daughter because it had admitted his son as a transfer from Red Bank Manor Nursery School during the school year 1960-61.

In support of his contention, he presented as a witness the Assistant Director of Happy Hours School, and through her testimony elicited a characterization of the program provided for children over five years of age as a "kindergarten program," as distinguished from the nursery school program offered to the children three and four years of age. The distinguishing mark of this program, and the only part which separated the older children from the younger, was a "work period" during which the children engaged in such activities as writing the alphabet and printing numbers from 1 to 10 or 12. All the children are together for their story hour and the music and play period. Differences in ages are recognized in the difficulty of some activities. The only special equipment provided for the 5-year-old group, different from that used by the younger children, was testified to be the materials used in writing.

Petitioner argues further that respondent has acknowledged that so-called nursery schools maintain kindergarten programs equivalent to its own by having admitted to its first grade certain pupils who had completed the program at Happy Hours or other nursery schools and entered respondent's school in September at approximately six years of age. The Commissioner finds the testimony elicited on this point not relevant, since all such instances occurred prior to the 1962-63 school year for which the respondent Board of Education has responsibility. A board of education is not bound by the policies of previous boards, unless by formal adoption or acquiescence it has made such policies its own. *Skladzien v. Bayonne*, 12 Misc. 602 (Sup. Ct. 1934), affirmed 115 N. J. L. 203 (E. & A. 1935); *Greenway v. Camden*, 1939-49 S. L. D. 151, affirmed State Board of Education 155, affirmed 129 N. J. L. 46 (Sup. Ct. 1942), 129 N. J. L. 461 (E. & A. 1943). But even assuming, *arguendo*, that respondent has followed such a policy as petitioner contends, it is clear that the pupils referred to in the testimony had completed the program at Happy Hours School or elsewhere, were admitted to respondent's school at the beginning of the next school year and were placed in first

grade only after a period of observation and trial, whereas Michele Ann Ditlow had been enrolled in the purported kindergarten program not more than four months when her transfer was sought. As to the admission of Timothy Peter Ditlow as a "transfer" pupil in January 1961, on the advice or direction of the County Superintendent, the Commissioner reiterates that the action of a previous Board of Education is not binding on respondent Board, for the reasons already stated.

Petitioner urges that the Commissioner's decision in *Wernick v. Board of Education of Glassboro*, decided May 29, 1962, required respondent to take affirmative action to determine whether Happy Hours School provided an equivalent kindergarten program to qualify admission of his daughter as a "transfer" pupil. The Commissioner finds no such requirement, even implicitly given, in his decision in the *Wernick* matter. There the respondent Board of Education had stated a policy to accept transfers from other public school kindergartens and from private kindergartens operated by religious organizations, but not to accept pupils on transfer from nursery schools. Apropos of this statement of policy, the Commissioner said:

"The right of a board of education to determine equivalency of educational programs, while not applied specifically to kindergarten programs, is implicit in the compulsory education statutes * * *."

The record in the instant matter gives no evidence that respondent was ever asked by petitioner to make any determination that Happy Hours School maintained a program for kindergarten age pupils equivalent to that provided in its own school.

The Commissioner restates the belief he expressed in *Wernick, supra*, that *R. S. 18:14-3*

"* * * was enacted in order to insure the continuity of a pupil's education once he was enrolled in school and to prevent his being barred from school attendance in the case of a *bona fide* transfer from one district to another because of a variation in admission ages and regulations. In the Commissioner's judgment, the statute was never intended to provide a means to circumvent local school district admission requirements by enrollment at a nursery school with subsequent transfer to public school after attaining age five."

The Commissioner finds that petitioner has been a resident of Oceanport throughout the life of Michele Ann Ditlow. She did not meet the age requirement of respondent Board of Education for admission to its kindergarten class when school opened in September 1962 or within ten days thereafter. Petitioner's subsequent effort to enroll her as a transfer four months later does not constitute a *bona fide* transfer designed to insure the continuity of the child's education within the intent of *R. S. 18:14-3*, but rather seeks to secure her admission to public school at an age below that defined by respondent's admissions policy. The Commissioner further finds that respondent's policy with regard to the admission age for kindergarten enrollment lies within the Board's discretionary authority, and that the operation of such policy in respect to petitioner's daughter is not arbitrary or discriminatory and does not contravene her rights to public education under New Jersey Statutes.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

May 24, 1963.

XXVIII
IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE
SPECIAL SCHOOL ELECTION HELD IN THE BOROUGH OF
HIGH BRIDGE, HUNTERDON COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of a referendum on a proposal to issue bonds for construction of a school building submitted to the voters of the School District of the Borough of High Bridge on May 7, 1963, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes	394	3	397
No	395	3	398
Void	5	---	5
	<hr/> 794	<hr/> 6	<hr/> 800

The Assistant Commissioner of Education in charge of Controversies and Disputes, pursuant to a request received on May 10, 1963, conducted a recount of the ballots at the Hunterdon County Court House on May 22, 1963. At the conclusion of the recount, with 53 ballots reserved for decision, the tally stood:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes	371	3	374
No	363	3	366
Void	7	---	7
Reserved	53	---	53
	<hr/> 794	<hr/> 6	<hr/> 800

The ballots reserved for the Commissioner's decision fall into categories as follows:

Exhibit A—42 ballots on which the cross, plus, or check mark is somewhat less than perfectly executed. On most of these the mark has been retraced one or more times so that the lines are heavier than in the case of a mark made with a single stroke. Several check marks appear to have been made by a person writing with the left hand, the long line of the check extending to the left instead of the right as is more commonly the case.

These ballots will be counted. The Commissioner sees no reason to reject them. The mark on each of the ballots is easily identifiable as a cross, a plus, or a check and is in the proper blank space to the left and in front of either the word Yes or No. The Commissioner knows of no instance in which ballots marked as plainly and properly as these have been rejected. Seventeen votes favoring and 25 votes opposing the proposal will, therefore, be added to the tally.

Exhibit B—5 ballots on which the cross or check mark appearing in the square to the left and in front of either the word Yes or No has been made in blue ink.

These ballots will be counted. The Commissioner has consistently held that the instruction to voters provided in *R. S. 18:7-32*, referring to the use of black ink or black pencil, is directory and not mandatory legislation. While Title 19 is not binding on school elections, the Commissioner has looked to it for guidance in deciding election disputes, and he finds support on this question in *R. S. 19:16-4*, which states in part:

“No ballot shall be declared invalid by reason of the fact that the mark made with ink or the mark made with lead pencil appears other than black.”

As these ballots are properly marked in all other respects, they will be counted, adding 3 Yes votes and 2 No votes to the tally. See *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Watchung, Somerset County, 1960-61 S. L. D. 170*; *In re Recount of Ballots Cast at the Annual School Election in the Township of South Brunswick, Middlesex County, 1957-58 S. L. D. 75*.

Exhibit C—1 ballot on which two crosses appear in the space to the left and before the word NO.

This ballot will be counted. Such additional markings are frequently observed in counting ballots and do not void the vote unless, in the judgment of the Commissioner, the extra markings are intended to identify the ballot. *R. S. 19:16-4* also states:

“* * * No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots, or the county board, judge of the Superior Court or other judge or officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot.”

See *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of North Caldwell, Essex County, 1954-55 S. L. D. 110*; *In re East Rutherford Annual School Election, 1938 S. L. D. 186*.

The Commissioner finds that a proper mark was made in the appropriate space and that there is no reason to assume that the extra mark was made for purposes of identification. One vote against the proposal will, therefore, be added to the tally.

Exhibit D—1 ballot on which a cross has been made in the space to the left and in front of the word No and in addition the word No has been written in the same space above the cross.

The ballot will be counted for the same reasons as in *Exhibit C, supra*. The Commissioner finds no intent to invade the secrecy of the ballot by means of the extra marking. One vote against the proposal will be added to the tally.

Exhibit E—3 ballots on which the mark appearing in the appropriate space has been roughly made and is not clearly a cross, plus or check.

These ballots will be counted. In the Commissioner's judgment the marks sufficiently approximate a check mark to be considered in substantial com-

pliance with the statutory requirement. Two votes in favor and one vote against the proposal will be added to the tally.

Exhibit F—1 ballot with a cross in the space to the left and in front of the word No and with the words "I am in favor of a smaller school" written below in the margin.

It is not necessary to make a determination of this ballot as at this point the tally shows that the proposal has failed of approval by the voters. Whether this vote is added to the tally of those against the proposal is immaterial as it cannot alter the result. The Commissioner will, therefore, not rule on the validity of this ballot.

		<i>Exhibits</i>							
	<i>Recount</i>	<i>Absentee</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	<i>F</i>	<i>Total</i>
Yes	371	3	17	3	---	---	2	---	396
No	363	3	25	2	1	1	1	---	396
Void	7	---	---	---	---	---	---	---	7
Undetermined ..	---	---	---	---	---	---	---	1	1
	<hr/> 741	<hr/> 6	<hr/> 42	<hr/> 5	<hr/> 1	<hr/> 1	<hr/> 3	<hr/> 1	<hr/> 800

The Commissioner finds and determines that the proposal submitted to the electorate in the School District of the Borough of High Bridge on May 7, 1963, failed to be approved by the voters.

COMMISSIONER OF EDUCATION.

May 27, 1963.

XXIX.

WHERE ACCEPTABLE PROPOSALS HAVE BEEN MADE TO REDUCE
EXTREME CONCENTRATION OF NEGRO ENROLLMENT, BOARD
MUST ADOPT THE ONE WHICH IT DEEMS MOST SUITABLE

CHARLES B. BOOKER, ET AL.,

Petitioners,

v.

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

Respondent.

For Petitioners, Herbert H. Tate, Esq.

William Wright, Jr., Esq.
Robert L. Carter, Esq.

For Respondent, Victor King, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This petition of appeal is brought to the Commissioner of Education in the name of 54 elementary school children by their parents. They allege that the respondent Board of Education is maintaining a racially segregated public school system in the City of Plainfield, thus denying equal educational opportunity to pupils of the Negro race. They charge that the Board of Education

has failed to take effective action to correct the situation, despite the fact that a study caused to be made by the Board proposed several plans to eliminate the complained of segregation. They appeal to the Commissioner to order the Board to take immediate steps to eliminate all aspects of segregation in the Plainfield public school system. Respondent, in its answer, denies that it is maintaining a school system in which there is racial segregation or discrimination and asserts that it has taken steps and is continuing to study ways and means to reduce any undesirable racial imbalance which may have developed in its schools.

This matter is submitted to the Commissioner for his determination, following a series of conferences of counsel, by a Stipulation of Issues and Facts, which is accompanied by some 18 Exhibits.

The appeal herein is directed to the elementary schools and does not include the single high school or the two junior high schools whose racial integration is not questioned. The enrollment of the 12 elementary schools in the City of Plainfield and their racial ratios in April, 1963 were as follows:

Enrollment April 1, 1963

<i>School</i>	<i>Total</i>	<i>Negro</i>	<i>White or Other</i>	<i>Percent Negro April, 1963</i>
Washington	586	564	22	96.2
Emerson	535	386	149	72.1
Stillman	361	244	117	67.6
Bryant	200	131	69	65.5
Clinton	457	269	188	58.9
Jefferson	574	258	316	44.9
Barlow	328	101	227	30.8
Woodland	463	87	376	18.8
Evergreen	634	53	581	8.4
Cedarbrook	645	25	620	3.8
Cook	523	3	520	0.6
Lincoln	100	63	37	63.0
Total Elementary	5406	2184	3222	40.4

Prior to petitioners' filing of this appeal, respondent appointed a Lay Advisory Committee in November, 1961, to study the racial composition of the elementary schools and concomitant problems. At the request of the Committee, respondent provided funds for the employment of a consultant and assistants to make the study for the Committee, which functioned independently of respondent and the school staff.

The report of the consultant, containing findings and various proposals, hereinafter referred to as the Wolff report, was presented to the Lay Advisory Committee in June, 1962. The Lay Advisory Committee approved, in principle, the procedures and findings of fact of the consultant team but could reach no unanimity or even majority opinion with respect to the proposals suggested for the elimination of racial concentrations in various elementary schools. The Committee then made various proposals of its own, including a majority and a minority report, to the Board of Education.

Respondent did not implement the proposals made in the Wolff report nor those advanced by the Lay Advisory Committee to alter the racial composition of the elementary schools. That it gave consideration to them, however, is evident from the series of replies and comments it made to the various recommendations. Instead, in July, 1962, it announced the adoption of an Optional Registration Plan to become effective with the opening of the new school year in September. Under this plan, children above kindergarten grade, through their parents, could request and would be granted transfer to a school outside their zone of residence as long as acceptable class size in the selected school was not exceeded. Petitioners objected to the plan and on September 4, before it became operative, filed the petition of appeal herein.

Petitioners contend that in the Plainfield school system there are schools which have a preponderantly Negro enrollment; that attendance at such schools has adverse effects upon pupils and their learning; that despite objections, studies and reports which have disclosed that the problem can be eliminated or at least reduced, respondent has taken no action; that the Optional Pupil Registration Plan does not meet or relieve the problem; and that respondent has an affirmative constitutional duty to institute pupil assignment procedures which will not result in a concentration of Negro pupils to the disadvantage of their educational opportunities.

Respondent contends that its elementary school attendance areas are set up on sound educational principles and that there is no affirmative constitutional or legal duty to alter these areas for the sole purpose of maintaining any particular percentage of pupil distribution by color or race.

The issue to be decided is stated in the Stipulation as follows: Are there any elementary schools operated by the Plainfield Board of Education in which Negro pupils predominate, and if so, should the Plainfield Board of Education reduce the concentration of Negro pupils in such schools? There is no issue raised of intentional or deliberate segregation by race, it being agreed that whatever concentrations of Negro pupils exist result from socioeconomic factors and not by purposeful action of the Board of Education.

New Jersey law relevant to this issue is found in the New Jersey Constitution, Article I, section 5:

"No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."

and in R. S. 18:11-1:

"Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. * * *"

The Commissioner notes that both parties agree that there is no issue of deliberate segregation herein. It is apparent that the cause of whatever

concentration of Negro pupils in particular schools there may be, is to be found in patterns of housing resulting from a constellation of socio-economic factors. As the Commissioner observed in a similar case, *Fisher, et al. v. Board of Education of the City of Orange*, decided May 15, 1963:

"It is clear that the ultimate solution lies in the free choice of residence and in the elimination of segregated housing which lie beyond the control of the board of education or the Commissioner."

But even though the underlying cause and the final answer do not lie with the Board of Education, the school district is in no way thereby relieved of its responsibility to take whatever reasonable and practicable steps are available to it to eliminate, or at least mitigate, conditions which have an adverse effect upon its pupils. As the Commissioner said in *Fisher, supra*:

"* * * the Commissioner is of the opinion that in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils."

The enrollment table indicates that the racial ratio varies from school to school but that in only one, the Washington School, is the enrollment almost entirely Negro.

The Commissioner notes also that a number of plans designed to improve the racial balance in the Plainfield elementary schools have been put forward. On the one hand, petitioners, in the Stipulation, urge the approval of either Plan 2 or Plan 1 of the Wolff report. Plan 2, titled the "Sister-School or Paired School Plan," would set up three pairs of schools, combining the attendance areas of each pair of adjacent schools, with all the pupils in grades 1-3 attending one school and those in grades 4-6 the other. Plan 1, referred to as "Rezoning Plan," would realign the attendance area boundary for each school. On the other hand, respondent, in the Stipulation, urges the approval of a third plan, described as the "Sixth Grade Plan." Under this proposal, the Washington School would house the sixth grade pupils from the entire district, and children now enrolled there for grades K-5 would be distributed among the other elementary schools except that none would be assigned to a school in which already more than half of the pupils are Negro.

The Commissioner has given careful consideration to each of these plans. He notes that although there are variations in the effect which each will have on the racial composition of particular schools, there will be no "all or nearly all Negro" school under any of the three proposals. Each plan also has certain advantages and disadvantages but the favorable aspects do not so far outweigh the unfavorable in any one so as to make it the plan of choice. Finally, the Commissioner is of the opinion that each plan is reasonable, practicable, and consistent with sound educational practice.

The Commissioner believes that it is the responsibility and the prerogative of the Board of Education to determine which of the proposals is best suited to the needs of the school system which it is called upon to operate. He has confidence in the ability of the Plainfield Board of Education, as advised by its administrative staff, to make the best choice of the proposals in this case. That this confidence is well-founded is evidenced by the manner in which the Board of Education, its administrators and school staff have faced this problem and have attempted to deal with it since it came to the fore more than a year ago.

The Commissioner finds and determines

1. that the enrollment in the Washington School in the City of Plainfield is comprised almost exclusively of pupils of the Negro race;

2. that such an extreme concentration of Negro pupils in a school, enforced by compulsory assignment, engenders feelings and attitudes which tend to interfere with successful learning;

3. that reasonable and practicable means consistent with sound educational and administrative practice do exist to eliminate the extreme concentration of Negro pupils in the Washington School;

4. that, where means exist to prevent it, the extreme racial concentration in the Washington School constitutes a deprivation of educational opportunity under New Jersey law for the pupils compelled to attend it; and

5. that either Plan 1 or Plan 2 of the Wolff report urged by petitioners, or the Sixth Grade plan advanced by respondent, will effectively reduce the racial homogeneity of the Washington School enrollment; that all three plans appear to be educationally sound, reasonable and practicable; and that the Commissioner will approve whichever one of the three plans the Board of Education decides to put into operation.

The Commissioner notes that the respondent Board of Education, in its Stipulation, offers to put a plan into effect by Board action prior to July 1, 1963, to be effective in September, 1963.

The Commissioner therefore directs the Plainfield Board of Education

1. to decide which of the three plans submitted is best suited to the needs of the Plainfield School system;

2. to take such steps as are necessary to insure the implementation of the chosen plan for the 1963-64 school year; and

3. to notify the Commissioner of Education as soon as is reasonably possible of its choice of plans and the action to be taken to put it into effect.

COMMISSIONER OF EDUCATION.

June 26, 1963.

Pending before State Board of Education.

XXX.

WHERE REASONABLE MEANS EXIST, BOARD MUST DEVELOP
PLAN TO REDUCE EXTREME RACIAL IMBALANCE IN
SCHOOL ENROLLMENTS

DEBORAH SPRUILL, A MINOR, BY MR. AND MRS. JOHN T. SPRUILL, HER
PARENTS AND NEXT FRIENDS; KENNETH ANCRUM AND LESLIE ANCRUM,
MINORS, BY MORTIMER W. ANCRUM, THEIR PARENT, ET AL.; LAURA,
ROBERT AND JAY VOLPE, MINORS, BY MR. AND MRS. JERRY VOLPE,
THEIR PARENTS, ET AL.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,
BERGEN COUNTY,

Respondent.

For Petitioner Spruill; William K. Kunstler, Esq. of the New York Bar,
Robert G. Platoff, Esq.

For Petitioners Ancrum, et al.: Arnold E. Brown, Esq., Robert G.
Platoff, Esq., George B. Gelman, Esq., David S. Greenberg, Esq., Robert L.
Carter, Esq., Herbert H. Tate, Esq., Barbara Morris, Esq., Maria Marcus,
Esq.

For Petitioners Volpe, et al.: William V. Breslin, Esq.

For Respondent: Abraham A. Lebson, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Two of the petitions in this matter, the first brought in behalf of their child by Mr. and Mrs. John T. Spruill and the second filed in the name of a group of children by their parents and captioned Ancrum, et al., charge the respondent Board of Education with the maintenance of racially segregated public schools and with refusal to implement plans to eliminate patterns of racial segregation alleged to exist in the public schools. They seek an Order requiring respondent to take immediate steps to eliminate all aspects of racial segregation in the Englewood public school system. The Ancrum petitioners pray further that the Board of Education be directed to put into effect a particular proposal referred to as the "central intermediate school" plan described more fully hereinafter. Respondent denies both charges.

The third group of petitioners, Volpe, et al., in a Cross-Petition of Appeal directed against the Englewood Board of Education, protest any intentional deviation from the present composition of the elementary schools and seek to enjoin the establishment of the central intermediate school sought by the Ancrum petitioners. They pray for an Order restraining the Board of Education from violating the neighborhood school principle or from unnecessary expenditures of public funds. Respondent requests dismissal of all petitions on the grounds that the Board of Education is not discriminating against any children and that there is no basis in law or in fact for the petitions or the cross-petition.

After the joining of this action, the Volpe petitioners filed a Petition to Intervene in the Spruill matter. A motion to strike the Petition to Intervene, filed by counsel for Mrs. Spruill, was denied by the Commissioner and intervention was granted. Subsequently, leave was also given to the Volpe party to intervene in the Ancrum matter.

In addition to the Board of Education, the Ancrum petition also named the Board of School Estimate and the Mayor and Common Council of Englewood as respondents. A Motion made to dismiss the Board of School Estimate and the Mayor and Common Council from the complaint, on the ground that the Commissioner of Education lacks jurisdiction over these parties, was granted, leaving the Englewood City Board of Education as the sole respondent.

By consent of all parties, the separate Petitions of Appeal herein were consolidated and heard as one matter. Hearings were held by the Assistant Commissioner of Education in charge of Controversies and Disputes on April 1, 2, 3, 4, 5, 10, 15, 16, and 17 in the Bergen County Court House, Hackensack.

The School District of the City of Englewood is organized under the provisions of Chapter 6 of Title 18 of the Revised Statutes. Its Board of Education consists of 5 members appointed by the Mayor, and its funds for operation of the schools are subject to approval by the Board of School Estimate. There is one high school housing grades 10, 11, and 12 and one junior high school attended by grades 7, 8, and 9. As all the children in these grades attend these schools without regard to where they reside in the school district, the issues raised herein pertain only to the five elementary schools, to which pupils are assigned on the basis of residence in designated attendance areas. These schools, their enrollment and racial composition as of September 19, 1962, were as follows:

<i>School</i>	<i>No. of Pupils</i>	<i>% White</i>	<i>% Negro</i>
Cleveland	477	99.6	.4
Liberty	418	38.0	62.0
Lincoln	505	2.0	98.0
Quarles	343	96.8	3.2
Roosevelt	345	85.5	14.5
 Total	 2088	 60.9	 39.1

While this complaint is directed to the school system generally, its focus is on the Lincoln School, whose enrollment is comprised almost exclusively of Negro children.

The Lincoln School was also the center of an earlier controversy involving racial issues. In 1954, a complaint was brought before the Commissioner of Education under the Law Against Discrimination, R. S. 18:25-1, *et seq.*, claiming that the Board of Education had drawn its attendance area boundaries so as to unlawfully discriminate against certain Negro pupils. *Walker and Anderson v. Englewood Board of Education*, decided May 19, 1955. In May, 1955, the Commissioner directed the Board to redraw the boundary lines affecting the Lincoln and Liberty Schools and also ordered the elimination of a second junior high school housed in the Lincoln School.

The Board complied with the Commissioner's directive and its action was approved by him.

On April 10, 1961, respondent directed its Superintendent of Schools to make a study of school enrollment problems and future needs. Two months later the Board supplemented this directive by instructing the Superintendent to include in his survey the question of the racial composition of the elementary schools. The study was completed in February, 1962, and reported to the Board by the Superintendent in a publication entitled "Englewood, its People and its Schools," since commonly referred to as the "Stearns Report."

Before the Stearns Report was completed, an action was initiated in the United States District Court in Newark, New Jersey, on behalf of Ellen Shepard and others, naming the Englewood Board of Education, its Superintendent of Schools and the Commissioner of Education as defendants and raising issues similar to those herein. Judge Augelli dismissed the suit, saying:

"Until such time as plaintiffs have exhausted the state administrative remedies provided by *N. J. S. A.* 18:3-14 and 15, this Court should not entertain the action." *Shepard, et al., v. Board of Education of City of*

Englewood, et al., 207 *F. Supp.* 341.

Plaintiffs above have not brought the matter before the Commissioner of Education as of this date.

Following receipt of the Stearns Report, two plans aimed at relieving the concentration of Negro pupils in any of the elementary schools were proposed by the Board of Education. The first, announced in May, 1962, provided for enrollment on a voluntary basis in a "demonstration school" to be housed in the former Engle Street Junior High School building now used for administrative offices. This idea was abandoned when a poll of parents failed to produce a sufficient number of potential pupils to be enrolled. The second plan, announced in July, 1962, proposed rehabilitation of the former junior high school building at 11 Engle Street and the establishment there of a "central intermediate school." All 5th grade pupils, irrespective of residence, would have attended this building during the 1962-63 school year and all 5th and 6th grade pupils in subsequent years.

The Board of Education then made a request for an appropriation of \$35,000 to the Board of School Estimate, to be used with available surplus funds to accomplish the rehabilitation needed to put the central intermediate school plan into operation. This request was not approved by the Board of School Estimate, and the proposal to establish a central intermediate school was not carried out. There followed then the filing of the petitions of appeal herein.

Shortly after the filing of these appeals, six members of the staff of the State Department of Education conducted a survey of the Englewood Public Schools and presented their findings to the Commissioner of Education on October 5, 1962, in a report entitled "A Study of Racial Distribution in the Englewood, New Jersey, Public Schools," referred to hereinafter as the "Fact-Finding Report."

The New Jersey law applicable to the issues raised herein is found in the New Jersey State Constitution, Article I, section 5:

“No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.”

and in R. S. 18:11-1:

“Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. * * *”

These appeals require the Commissioner to determine the following questions:

1. Is the Englewood Board of Education maintaining a racially segregated school system by deliberate action and intent?
2. Does the fact that the enrollment in Lincoln School is comprised almost exclusively of Negro pupils, whether by design or not, require the Board of Education to take affirmative action to improve the racial balance in the school?

The answer to the first question must be in the negative. While petitioners in their pleadings and in some of the testimony imply that respondent may have been guilty of intentional racial segregation, they do not press the issue nor has evidence of any kind been produced to establish such a charge. Petitioner Spruill, in fact, very plainly states in her brief that “No accusation that respondent was or is guilty of *de jure* segregation has been made” and that she “is concerned only with *de facto* segregation.” All witnesses who were questioned on this issue were emphatic in their denial of any action aimed at deliberate segregation by race in the schools. The Commissioner finds no evidence to support a charge of intentional racial segregation by respondent.

This leads to the second question and the fact that the population of the Lincoln School is almost entirely Negro. That this concentration of pupils of one race results from patterns of housing and the operation of other socio-economic forces is apparent. The Commissioner agrees with respondent when it says in its brief, “However lamentable the housing and other non-school problems may be, it is not the responsibility of the Board, nor does it have any control over these housing and non-school problems.” The Commissioner has previously stated that in his opinion the ultimate solution to this problem lies in the free choice of residence and the elimination of segregated housing. *Fisher v. Orange City Board of Education*, decided May 15, 1963.

Respondent maintains that the educational opportunities afforded Englewood children are equal regardless of school attended. It argues that former Superintendent Harry Stearns so testified and points also to a statement to that effect in the Fact-Finding Report. The Commissioner finds no reason to dispute this claim in terms of measurable objective criteria such as similarity

of instructional materials, class size, teacher preparation and assignment, facilities and equipment, expenditure per pupil, etc. But as he has already said in *Fisher v. Orange*,¹ *supra*, he is of the opinion that

“* * * in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils.”

The Commissioner holds, therefore, that compulsory attendance at an all Negro school, such as the Lincoln School, at least where appropriate means can be found to avoid it, constitutes a denial of educational opportunity under New Jersey law which the school district is required to correct.

There remains the question of appropriate means for reducing the racial homogeneity in the Lincoln School. The evidence in this case discloses that a number of plans have been proposed to and considered by the Board. That there are still other plans which can be devised, effectively dealing with the problem, the Commissioner has no doubt. The formulation of the most suitable plan, however, is a function of the respondent Board of Education and the Commissioner reserves to it the right to prescribe the precise formula which will provide the best answer to this complex problem. As he said in the case of *Booker v. Plainfield Board of Education*, decided June 26, 1963:

“The Commissioner believes that it is the responsibility and the prerogative of the Board of Education to determine which of the proposals is best suited to the needs of the school system which it is called upon to operate.”

It is toward the adoption of a plan that would alter present pupil assignment policies that the main thrust of the Volpe petitions is directed. These petitioners argue that the “neighborhood school policy” is the law of New Jersey and any change in that policy on the basis of racial considerations is illegal. They contend that the Commissioner has no authority to set aside the “neighborhood school policy” but is required to uphold it and prevent its abuse. This group opposes the central intermediate school advocated by the Ancrum petitioners or any other plan that assigns pupils to a school other than the one nearest their place of residence.

It is well established that the assignment of pupils to the schools they are to attend is within the authority of the local board of education. *Pierce v. Union District School Trustees*, 46 N. J. L. 76 (Sup. Ct. 1884); *Edwards v. Atlantic City Board of Education*, 1938 S. L. D. 683 (1923); *Clausner, et al. v. Board of Education of Millburn*, 1938 S. L. D. 645 (1936). The assignment of pupils in terms of proximity of home and school is the most commonly employed method of establishing attendance areas not only in New Jersey but in the United States generally. Traditionally, school districts have erected schools in areas of most concentrated population with the purpose of

locating school buildings as close as possible to the homes of the children to be served. The logic and the inherent educational values of such a program are indisputable. The Commissioner has also made his position clear on this question in *Fisher v. Orange, supra*, when he said:

“The practice of assigning pupils to schools near their homes, particularly with regard to children of elementary school age, is well established and is attended by educational values that are widely accepted, not only by educators, but by the public generally. Consideration of such factors as distance to be traveled, safety, economy of time, establishment of rapport between school and home, and knowledge by the school staff of the child’s environment have operated to establish convenience of access as the controlling criterion of pupil assignment, and the importance of these values cannot be denied.”

Obviously, however, the assignment of pupils to nearby schools is a general principle and is not to be applied inflexibly when other considerations outweigh its values. The Commissioner believes that a plan for the reduction of the racial concentration at the Lincoln School can be formulated which will not do violence to reasonable attendance areas. Whatever plan is adopted must, of course, meet the tests of reasonableness, of practicability, and of consistency with sound educational practice. From his study of the evidence in this case, the Commissioner is convinced that the respondent Board of Education can choose from among the proposals already made to it, or from others that it has already devised or will formulate, the means best suited to reduce the present concentration of Negro pupils in the Lincoln School which will at the same time maintain long-recognized values.

It is entirely possible that there may be of necessity both a short-range and a long-range solution to this problem. The Commissioner is aware that any long-range solution will possibly require expenditures for capital construction, which cannot be accomplished by September, 1963.

Although the controversy which the Commissioner is asked to decide in this and similar cases is centered around the question of civil rights, it must be remembered that so far as the schools are concerned their fundamental purpose is the proper conduct of the educational process. Controversy must be resolved so that teachers and school leaders may go ahead with the task of improving educational opportunities for all pupils. Discussions which the Commissioner has had with teachers, principals, and superintendents throughout the State convince him that these persons to whom education is entrusted cannot perform their duties effectively when their work is carried on in a climate of continuous tension and controversy. It is for this reason as well as the others stated that the Commissioner concludes that the current and long-standing dispute involving the Lincoln School must be resolved without delay. Continuation will damage the pupils of not only that school but all others in the community. Hence, the entire community has a stake in a solution which will make it possible for the school staff to devote its undivided attention and effort to planning for better educational opportunities for all pupils.

The Commissioner finds and determines:

1. that there is no evidence in this case of any deliberate intent by the Englewood Board of Education to segregate its pupils by race in the public schools;

2. that the pupil assignment policies currently in force in the Englewood School District result in an extreme concentration of pupils of the Negro race in the Lincoln School;

3. that attendance at the almost exclusively Negro Lincoln School engenders feelings and attitudes in pupils which tend to interfere with learning;

4. that, where means exist to prevent it, such a concentration of Negro pupils as exists in the Lincoln School constitutes a deprivation of educational opportunity under New Jersey law for the pupils compelled to attend the school;

5. that reasonable and practicable means consistent with accepted educational and administrative practice can be devised to reduce the present racial concentration in the Lincoln School.

Having reached these conclusions, the Commissioner sees no need to determine other issues raised and argued in this matter.

The Commissioner of Education directs the Englewood Board of Education

1. to formulate a plan or plans to reduce the extreme concentration of pupils of the Negro race in the Lincoln School consistent with the principles and findings enunciated in this decision;

2. to submit such plan or plans to the Commissioner of Education for approval on or before August 1, 1963;

3. to put a plan, as approved, into effect at the beginning of the 1963-64 school year.

The Commissioner reserves the right to make such further order or orders in this matter as shall be necessary to effectuate a suitable pupil assignment plan, approved by him, for the 1963-64 school year.

COMMISSIONER OF EDUCATION.

July 1, 1963.

OPINION OF THE
STATE BOARD OF EDUCATION

James A. Major, Esq. argued the cause for Appellants Volpe.

William K. Kunstler, Esq. of the New York Bar argued the cause for Petitioner-Respondent, Spruill.

Robert L. Carter, Esq. argued the cause for Petitioners-Respondents Ancrum, et al.

Sidney Dincin, Esq. argued the cause for Respondent-Respondent, The Board of Education of the City of Englewood.

Joseph Hoffman, Deputy Attorney General, argued the cause for The Commissioner of Education.

This is an appeal by appellant-intervenors Laura, Robert and Jay Volpe, minor pupils at Roosevelt School in Englewood, by their parents (all of whom collectively are hereinafter called "Volpe") from a decision of the Commissioner of Education dated July 1, 1963. As of September, 1963, Laura will be entering the Sixth Grade, Robert, the Fifth Grade, and Jay, the First Grade.

By the said decision, the Commissioner directed the respondent Englewood Board of Education as follows:

1. To formulate a plan or plans to reduce the extreme concentration of pupils of the Negro race in the Lincoln School consistent with the principles and findings enunciated in the decision;
2. To submit such plan or plans to the Commissioner of Education for approval on or before August 1, 1963;
3. To put a plan, as approved, into effect at the beginning of the 1963-64 school year.

The appeal herein was taken by Volpe on July 16, 1963, before the August 1 date by which respondent Board was to submit, and did submit, the plan ordered by the Commissioner aforesaid.

After the filing of briefs before this Board but before oral argument respondent submitted a plan to the Commissioner and he approved the same.

At oral argument it was stipulated by counsel for all parties that this Board may and should consider the submitted plan as part of the record on this appeal. It has been so considered though respective contentions with respect to it were not briefed.

Englewood has had 5 elementary schools to which pupils have been assigned on the basis of residence in designated attendance areas. These schools, their enrollment and racial composition as of September 19, 1962, were as follows:

<i>School</i>	<i>No. of Pupils</i>	<i>% White</i>	<i>% Negro</i>
Cleveland	477	99.6	.4
Liberty	418	38.0	62.0
Lincoln	505	2.0	98.0
Quarles	343	96.8	3.2
Roosevelt	345	85.5	14.5
Total	2088	60.9	39.1

The plan submitted by the respondent Board on August 1 pursuant to the directions of the Commissioner's decision of July 1 may be summarized as follows:

1. To establish at the former Junior High School building at 11 Engle Street, a city-wide sixth-grade school to which the Board assigns all sixth grade pupils of the Englewood Public Schools,
2. To assign all pupils of grades one through five residing in the Lincoln School attendance district to the Cleveland, Quarles and Roosevelt Schools,

such assignment to be determined by the Superintendent on the basis of the following criteria:

- a) define attendance districts so that children of the Lincoln School district will be assigned as nearly as possible, to the school nearest their homes,
- b) provide for an even distribution of class loads,
- c) to permit the children whose parents wish them to remain at the Lincoln School to remain there provided that it is administratively and educationally practicable to do so.

3. As a prerequisite to the establishment of the city-wide 6th grade school referred to in Paragraph (1) above, either of the following two conditions must occur:

- 1) 125 or more present students of Lincoln School must NOT elect to remain for the 1963-64 term at Lincoln School

or

- 2) The number of transfers from Lincoln School will result in class loads in Quarles, Cleveland, or Roosevelt Schools which, in the opinion of the Board of Education, are educationally undesirable.

4. To assign to Lincoln School all children of Kindergarten age residing in the present Lincoln School district.

Since we were advised at the oral argument that prerequisite 3 (1) above had been complied with, the plan was effective.

The facts are sufficiently stated in the decision of the Commissioner. Appellant Volpe, in brief and in oral argument, expressly states his appeal is argued solely as a matter of law and eschews any discussion of facts. He therefore accepts the Findings of Fact made by the Commissioner. They were:

1. That there is no evidence in this case of any deliberate intent by the Englewood Board of Education to segregate its pupils by race in the public schools;

2. that the pupil assignment policies currently in force in the Englewood School District result in an extreme concentration of pupils of the Negro race in the Lincoln School;

3. that attendance at the almost exclusively Negro Lincoln School engenders feelings and attitudes in pupils which tend to interfere with learning;

4. that, where means exist to prevent it, such a concentration of Negro pupils as exists in the Lincoln School constitutes a deprivation of educational opportunity under New Jersey law for the pupils compelled to attend the school;

5. that reasonable and practicable means consistent with accepted educational and administrative practice can be devised to reduce the present racial concentration in the Lincoln School.

We too accept those findings. We therefore premise our affirmance upon the basic fact that the extreme concentration of Negro pupils in the Lincoln School (approximately 98%) constitutes "a deprivation of educational opportunity" for the pupils compelled to attend the school. As a body having supervision of the public school system in New Jersey, we hold that such "a deprivation of educational opportunity" calls for remedial action, at least where appropriate and reasonable means can be found to avoid it. We find that the plan submitted by the respondent Board (in the context of facts herein) is such an appropriate and reasonable means.

In affirming, we adopt the reasons set forth by the Commissioner in support of his decision of July 1. Those reasons we supplement by our opinion herein, in order to more completely meet the arguments presented to this Board.

The argument of Volpe is premised upon the assertion as stated in his brief that:

"* * * the State * * * may not adopt any plan which is based on children being shifted or refused entrance because of color. * * * the Constitution is color blind."

Any plan adopted to correct *de-facto* segregation in Lincoln School, says appellant, must involve shifting of pupils "because of color." He says that, if Negro pupils are transferred out of Lincoln School to other schools, White pupils must be transferred out of those schools to make room for the Negro children. This, it is argued, constitutes an invidious transfer based "on color or race." Further, it is said the White child is excluded from his accustomed school "on account of * * * his color." in violation of *N. J. S. A. 18:14-2*. The argument is fallacious. The transfer of the White child from his school is not "on account of * * * his color." He is transferred not because he is white, but because the evil of "unequal educational opportunity" inherent in the segregated Lincoln School must be remedied and to accomplish *that* result room must be made for the Negro pupils in the schools theretofore predominantly white. Thus there is effected the desired integration and the condemned segregation is eliminated. Because "color" is a *consideration* in eliminating the evil does not make it a *cause* of the transfers. But see: *Balaban v. Rubin*, N. Y. Sup. Ct., Kings County, decided September 6, 1963.

Appellant's position amounts to this: 1) He accepts the Finding that *de facto* segregation constitutes a "deprivation of equal educational opportunity." 2) Elimination of segregation must involve consideration of color and transfers of whites and Negroes. 3) "Color" is therefore the basis of transfers. But 4) such a basis is inadmissible because the "Constitution is color blind." 5) Therefore, though the evil is admitted and only invidious (in appellant's view) means exist to remedy it, nothing can be done. 6) Therefore, the evil must be permitted to go on.

We disagree. The use of the phrase "The Constitution is color blind" enunciated in an entirely different context has a rhetorical, but not a real, appeal. The phrase was uttered by Mr. Justice Harlan in his dissent in *Plessy v. Ferguson*, 163 U. S. 537, 559, 41 L. Ed. 256, 263 (1896), wherein

he differed with the "separate but equal" doctrine approved by the majority and subsequently repudiated in *Brown v. Board of Education*, 347 U. S. 483, 98 L. Ed. 873. He used it in the context of his conviction that where the State excluded persons of the colored race "solely upon the basis of race" such classification was inadmissible. Justice Harlan also said that "when the rights of others, * * * [a man's] * * * equals before the law, are not to be affected", every true man has a right and privilege to express his pride in race and "take such action based upon it as to him seems proper."

But here, whatever rights the white children may have to attend schools of their choice are subordinate to the condition expressed by Justice Harlan, i. e., "provided the rights of others are not affected." And to here permit those rights, such as they may be, to be exercised inevitably frustrates the rights of the Negro children to "equal educational opportunity." The attainment of that right is paramount where, as here, practical and reasonable means are available.

To say that, in this context, the State must be "color blind" really means that it must be "blind" to an admitted evil. Rather, we adopt argument of the Deputy Attorney General herein that, in the face of an evil wherein color is the necessary ingredient, the State must be "color conscious" rather than "color blind." See *Taylor v. Board of Education of New Rochelle*, 294 F. 2d 36, (2 Cir. 1961), Cert. denied, 368 U. S. 940, 7 L. Ed. 2d for application of this principle.

Appellant relies on the decision in *Goss v. Board of Education*, 10 L. Ed. 2d 632, decided June 3, 1963, for his proposition that no consideration of color may be used as a basis for transfer of pupils between public schools. We do not read the case as appellant argues it. What the case holds is this:

"* * * no official transfer plan or provision of which *racial segregation is the inevitable consequence* may stand under the Fourteenth Amendment." (Emphasis added.)

We would extend that holding to the instant situation by holding that no existing plan where racial segregation is present may stand, where practical and reasonable means exist to eliminate it. In *Goss* the Supreme Court had as its target the elimination of the evil of racial segregation. We do also. We find it difficult to understand how appellant may interpret *Goss* to preserve an evil (in the sense of unequal educational opportunity) when the decision was directed to elimination of another evil (intentional racial segregation) of related significance. In the absence of binding judicial precedent, we do not here hold that unintentional, or adventitious segregation as here exists, is constitutionally prohibited. *Brown v. Board of Education*, *supra*, did not so hold. We need not reach that question and leave its determination to the Courts. But see *Branche v. The Board of Education of Hempstead*, 204 F. Supp. 15 (E. D. N. Y. 1962) and *Jackson v. Pasadena City School District*, _____ Cal. _____, _____ P. 2d, decided June 27, 1963, suggesting that even unintentional segregation is constitutionally invalid. But see also *Evans v. Buchanan*, 207 F. Supp. 820 (U. S. D. C. D. Del. 1962) to the contrary. We await authoritative resolution of this question.

Appellant also argues that because the plan gives a choice to the Negro pupils in Lincoln School as to whether they will or will not remain there,

and no such choice is given to the White pupils in the remaining schools, such difference of treatment renders the plan unconstitutional. While appellant's brief does not couch this argument in terms of denial of equal protection of the laws, we assume that this is the concept upon which the argument is based. But mere difference of treatment, as between different groups, is not a denial of equal protection of the laws. The Equal Protection Clause prohibits discrimination only when the discrimination is arbitrary and not reasonably related to a lawful object to be accomplished. Vol. 16A *Corpus Juris*, Second, Par. 505, pg. 312, Par. 506, pg. 323; *Jamouneau v. Harner*, 16 N. J. 500, 520 (1954), *cert. den.* 349 U. S. 904, 75 S. Ct. 580, 99 L. Ed. 1241; *Guill v. Hoboken*, 21 N. J. 574, 582 (1956); *N. J. Restaurant Ass'n. v. Holderman*, 24 N. J. 295, 300 (1957); *Wilson v. Long Branch*, 27 N. J. 360, 377 (1958), *cert. den.* 79 S. Ct. 113, 358 U. S. 373, 3 L. Ed. 2d 104; *Fried v. Kervick*, 34 N. J. 68, 74 (1961).

In *McGowan v. Maryland* (1961), 366 U. S. 420, 6 L. Ed. 2d 393, the Supreme Court, speaking through Mr. Chief Justice Warren, said at page 425:

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Pilot Comrs.*, 330 U. S. 552, 91 L. Ed. 1093, 67 S. Ct. 910; *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580, 79 L. Ed. 1070, 55 S. Ct. 538; *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 51 L. Ed. 369, 31 S. Ct. 337, Ann. Cas. 1912 C 160; *Atchinson, T. & S. F. R. Co. v. Mathews*, 174 U. S. 96, 43 L. Ed. 909, 19 S. Ct. 609.

More recently we declared:

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Dental Examiners*, 294 U. S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L. v. American Sash Co.*, 35 U. S. 538. The prohibition of the Equal Protection Clause goes no further than the *invidious discrimination*.' *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 489, 99 L. Ed. 563; 75 S. Ct. 461." (Emphasis supplied).

In a separate opinion joined in by Justices Frankfurter and Harlan it was said, at page 535:

"The restricted scope of this court's review of state regulatory legislation under the Equal Protection Clause is the long standing *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 78, 79; 55 L. Ed. 369, 377, 378; 31 S. Ct. 337, Ann. Cas. 1912 C. 160. The applicable principles are that a state statute may not be struck down as offensive of equal protection in

its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality.”

In *Kotch v. Bd. of River Port Pilot Com'rs.* (1947), 330 U. S. 552; 67 S. Ct. 910, Reh. Den, 331 U. S. 864; 67 S. Ct. 1196, Mr. Justice Black, speaking for the Court, said:

“The constitutional command for a state to afford ‘equal protection of the laws’ sets a goal not attainable by the invention and application of a precise formula. This court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. See e.g., *Tigner v. State of Texas*, 310 U. S. 141, 147; 60 S. Ct. 879, 882, 84 L. Ed. 1124, 130 A. L. R. 1321. Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. *Atchison, T. & S. F. R. Co. v. Mathews*, 174 U. S. 96, 106; 19 S. Ct. 609, 613, 43 L. Ed. 909. This selective application of a regulation is discrimination in the broad sense but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation’s objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs or because of any other reason having no rational relation to the regulated activities. See *American Sugar Refining Co. v. State of Louisiana*, 179 U. S. 89, 92; 21 S. Ct. 43, 45; 45 L. Ed. 102.”

Clearly, the different treatment which exists in the plan as adopted is at least reasonably related to the lawful object of eliminating unequal educational opportunity inherent in the segregated school. Indeed it is a necessary factor in the elimination of such segregation. To say that White and Negro pupils may not be treated differently in this context is to say that nothing can be done about the admitted unequal educational opportunity. The Negro and White pupils are not similarly circumstanced. The former suffers under the burden of denial of equal educational opportunity. The latter have no such burden. The remedy here is reasonable and necessary for the accomplishment of the lawful object.

At oral argument appellant also contended that the Commissioner’s action in approving the plan as submitted was unlawful in that a public hearing was not afforded all interested parties to give them an opportunity to be heard concerning the plan. We feel that no such notice was necessary.

Lastly, appellant also contended orally that the plan itself constituted an unlawful delegation by the local Board in that the plan provides that a necessary condition before its effectiveness was that at least 125 Negro pupils should

exercise the choice to leave the Lincoln School. We see no merit in this contention.

For the foregoing reasons, the Decision of the Commissioner of Education of July 1, 1963 is affirmed and his action in approving the plan as submitted is likewise affirmed.

Dated: September 25, 1963.

Pending before Superior Court, Appellate Division.

XXXI.

WHERE THERE IS NO ILLEGAL DISCRIMINATION, COMMISSIONER
WILL NOT DISTURB BOARD'S PLAN FOR REASSIGNMENT
OF PUPILS OF CLOSED SCHOOL

DUDLEY R. MOREAN, III, ET AL.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR,
ESSEX COUNTY,

Respondent.

For the Petitioners, Kasen, Schnitzer and Kasen
(Morris M. Schnitzer, Esq., of Counsel)

For the Respondent, Charles R. L. Hemmersley, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners in this case are pupils in the Montclair school system, four of them in the junior high school grades and one at the elementary school level. They charge that a decision of respondent permitting the pupils of the closed Glenfield Junior High School to select which of the remaining three junior high schools in the district they would attend, and the reassignment of certain elementary school pupils as a part of this plan, deprives them of equal protection under the law as guaranteed by the Fourteenth Amendment of the United States Constitution. Respondent asserts that its plan was a proper exercise of its discretionary authority in the discharge of its duty to provide suitable school facilities for all children.

This matter is submitted to the Commissioner on briefs of counsel, supported by depositions, affidavits, and stipulated records and documents.

Petitioners have emphasized that they "assert only their rights under the Federal Constitution, disclaiming any reliance upon the state school laws." However, on November 26, 1962, in ruling upon petitioner's motion as to the Commissioner's jurisdiction to decide this matter, the Commissioner said:

"The Commissioner determines that a controversy arising under the school laws exists in this matter, and that it is within his authority pursuant to *R. S. 18:3-14* to decide such a controversy."

Elsewhere in this decision the Commissioner pointed out:

"It is well established that the Commissioner will not decide questions

of constitutionality. * * * On the other hand, the Commissioner will be governed by constitutional limitations in his decisions. * * * Moreover, he will seek to construe the statutes in a manner which will harmonize with constitutional limitations. * * * In his quasi-judicial function as an administrative tribunal pursuant to R. S. 18:3-14, he will take judicial notice not only of New Jersey statutes, but also of the Constitution of the United States and of New Jersey, and in addition, his own decisions. * * *

The essential facts, as enunciated in the depositions and affidavits, are these: For many years the Montclair Board of Education has operated four junior high schools, known as Hillside, George Inness, Mt. Hebron, and Glenfield. As long ago as 1948 a group of professional consultants pointed out that Montclair could provide a better educational program if it had fewer and larger junior high schools. Similar expressions were made to and by the Board in succeeding years. By 1961 the Board determined that a thorough study of the entire junior high school problem was needed, and appointed a citizens' committee, which became known as the Taylor Committee, to study the junior high school situation on a community-wide basis and offer its advice "with regard to a comprehensive plan to improve the junior high school educational system and make adjustments in the elementary system as it is affected by the changes at the junior high level." The Taylor Committee was asked to complete its report by the end of the school year in 1962. In September 1961 the Board indicated its intention to close the Glenfield School by the succeeding fall and directed its administrators to propose a temporary plan for the distribution of the Glenfield pupils to other junior high schools, pending the report of the Taylor Committee. On February 27, 1962, respondent formally determined to close Glenfield School in the following September, and announced a plan proposed by the Superintendent to re-district the Glenfield attendance area by using Bloomfield Avenue, a main east-west artery, as a dividing line, and assigning those in the southern portion to Hillside School and those in the northern portion to George Inness School. It is not denied that the Board considered alternative plans. One, proposed by representatives of the National Association for the Advancement of Colored People in 1961, called for the immediate closing of the Glenfield School and the assignment of all seventh and eighth grade pupils from all junior high schools to Hillside and Mt. Hebron Schools, and all ninth grade pupils to Inness School. Another plan, offered but not recommended by the Superintendent as an alternative to his original proposal, was "open enrollment," whereby pupils would have free choice of the school which they would attend so long as facilities were available. Nor is it denied that following respondent's announcement on February 27 there were objections voiced, not the least of which was that since most of the Glenfield pupils living south of Bloomfield Avenue were Negroes, assigning them to Hillside School would further increase the racial imbalance already existing there.

Then on March 27, 1962, the Taylor Committee made its report, recommending as a goal the establishment of a single junior high school for the entire district, as a part of a six-year junior-senior high school program, using the existing Inness School—Senior High School building complex as a nucleus. The report further proposed that in September 1962 all ninth-grade pupils be assigned to George Inness School, which in turn would become a part of a four-year high school program along with the existing Senior High School, and that all seventh and eighth grade pupils be assigned in

alternate years to Hillside and Mt. Hebron Schools. The deposition of the Board President indicates that the Taylor Report brought about a reappraisal by the Board of not only its immediate plans but also its projection for the future. It was determined that it was reasonable to set 1965 as a target date for the establishment of a single junior high school. It was further determined that the Superintendent's proposal, which he testified he had offered only as a one-year temporary expedient, would not be as suitable for a three-year plan as one which would not impinge at all upon the facilities and educational program of the senior high school. It was further determined that the plan offered by the Taylor Report for 1962 was not a satisfactory solution. Thereupon, respondent rescinded its proposal of February 27 and adopted a plan which would divide the 183 Glenfield pupils evenly among the other three junior high schools, insofar as possible on the basis of parents' preferences. The device of a lottery was adopted as the fairest and most practical way to recognize such preferences. The procedure called for the parents to state their first, second, and third choices. A lottery then assigned the pupils according to their first choice as long as space remained available, then to their second choice, and finally to their third choice. In answer to a question asking whether it would have been possible or feasible to divide the Glenfield pupils by drawing district lines within the Glenfield attendance area, the Board President replied:

"* * * I don't see how you could have drawn new district lines to accomplish that, and I think the Board would have felt that this was not warranted on the basis of a temporary arrangement. I just don't see how you could have done it." (D-Ha-106) *

The lottery was accordingly conducted on May 17, 1962. Shortly thereafter petitioners took their complaint, in substance the same as the petition herein, to the United States District Court for the District of New Jersey. In dismissing their complaint without prejudice on the grounds that plaintiffs had failed to exhaust their administrative remedies before the Commissioner and State Board of Education, Judge Augelli said:

"The plaintiffs herein allege they are deprived of their constitutional rights by reason of the action of the local school board in adopting a double standard in connection with the assignment of children to the various public schools in Montclair. This double standard is said to lie in the board's application of the 'neighborhood school policy' to plaintiffs, but not to others residing in a particular school zone in the Town. The Court perceives no reason why the exhaustion doctrine would not be applicable in the same way here as in *Shepard*. [*Shepard, et al. v. Board of Education of Englewood*, 207 F. Supp. 341 (U. S. D. C. N. J. 1962)] In fact, the very argument made here that N. J. S. A. 18:3-14 and 15 provide a judicial rather than an administrative remedy (making exhaustion unnecessary), has been considered at length and rejected in the *Shepard* opinion. The argument that the Commissioner would not have jurisdiction over the matters alleged in the complaint because they are based on the

* The system of notation used herein is the same as that used by counsel in their briefs, as follows:

PA —Petition of Appeal
PAF—Petitioners' Affidavit
RA —Respondent's Answer
RAF—Respondent's Affidavit

D-Ha—Deposition, Helen R. Halligan
D-Hi—Deposition, Dr. Clarence E. Hinchey
D-M —Deposition, Bessie M. Marsh

denial of federally protected rights, is without merit. *Baron v. O'Sullivan*, 258 F. 2d 336 (3. Cir. 1958)." *Morean, et al. v. Board of Education of Montclair*, Civil No. 461-62 (U. S. D. C. N. J. July 9, 1962.)

The issue thus clearly defined for the Commissioner's adjudication pursuant to his authority under R. S. 18:3-14 is whether respondent's plan for a tripartite division of the pupils of Glenfield School is illegal, arbitrary, unreasonable, or discriminatory.

Respondent derives its authority to make rules and regulations from R. S. 18:6-19, as follows:

"The board shall make, amend, and repeal rules, regulations, and by-laws not inconsistent with this title or with the rules and regulations of the state board of education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in the district, and also for the employment and discharge of principals and teachers."

and its responsibility for providing school facilities from R. S. 18:11-1, as follows:

"Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils, or as provided in sections 18:14-5 to 18:14-9 of this title."

There is no indication that in either the conception or operation of its plan respondent has failed in its legal duty to provide suitable facilities convenient of access, or to provide transportation where the schools are not convenient. (D-Hi 14). The transfer of certain elementary school pupils from Mt. Hebron School to Bradford School to alleviate overcrowding at Mt. Hebron imposes upon the children so transferred no greater travel distance than is required of other pupils already assigned to Bradford. The Commissioner finds respondent's action not inconsistent with Title 18 or any rule or regulation of the State Board of Education.

Nor does the Commissioner find respondent's action arbitrary or unreasonable. As the record indicates, the question of the most suitable plan for junior high schools had long been before the Board. The original determination to close Glenfield School was based upon an assessment of both the higher per capita cost of education in Glenfield School than in the other three schools in order to provide equal facilities, and the problems encountered in adjusting the small enrollment at Glenfield to the educational program in effect in the junior high schools of the district. A variety of proposals for dealing with the matter was offered, both before and after the decision was reached to close Glenfield School. The original proposal submitted by the Superintendent and adopted by the Board was abandoned in favor of the tripartite plan after a study of the Taylor Report indicated to the Board that

a plan suitable for three years' use was required. It cannot reasonably be argued that the Board acted hastily or without rational basis. A board of education has broad discretionary powers in the government and management of its schools. If in the exercise of its discretion the board acts within its legal authority and with reason, the Commissioner will not substitute his judgment for that of the board. *Boult and Harris v. Passaic Board of Education*, 1939-49 S. L. D. 7, 13, affirmed State Board of Education 15, 135 N. J. L. 329 (Sup. Ct. 1947), 136 N. J. L. 521 (E. & A. 1948).

The burden of petitioners' contention, however, is that the effect of respondent's plan is discriminatory, in that it creates a "double standard of school assignment." Petitioners Morean, Stuart, and Ruprecht reside in the attendance areas established for Mt. Hebron, George Inness, and Hillside Junior High Schools, respectively, where, according to their petition "the neighborhood school policy is enforced." Petitioner Koehnlein formerly attended Glenfield. By "the luck of the draw" he now attends Mt. Hebron Junior High School, which was his second choice, rather than George Inness School, his first choice, although Hillside School is geographically nearer his home than either of the other two schools. (Ex. A-2). He contends that the "neighborhood school policy" is not practiced with regard to him. Petitioner Smith resides in that section of the Mt. Hebron Elementary School area which was reassigned to Bradford Elementary School. No evidence is adduced to show that any of the petitioners has been deprived of any educational opportunities as a result of respondent's plan, or that the educational experiences offered in his present school are in any way inferior to those which he would enjoy in any other school district.

Petitioners lay great stress upon their argument that respondent's plan was motivated and impelled by racial considerations, and that in fact the plan is discriminatory because its only distinctive feature, as opposed to the Superintendent's plan which was rejected, is that it achieves a better racial balance, or at least less imbalance, in the three junior high schools.

Respondent does not deny that racial considerations were important to its decision. The President of the Board described these considerations as a "principal" or a "major" factor (D-Ha 10, 11). The chairman of the Taylor Committee stated that Negroes constituted "over 90%" of the Glenfield School enrollment, while the Negro enrollment at Hillside was "nearly 60%," at Inness "about 18%," and at Mt. Hebron, none. (Ex. A-4) Since most of the Glenfield pupils living south of Bloomfield Avenue, the attendance area dividing line proposed by the Superintendent, are Negroes, their assignment to Hillside School would have increased the proportion of Negroes at that school. On this point, the President of the Board said:

"* * * If the thought in your mind is that an educational device has been used here to determine some racial arrangement, I think the Board's consideration here, the primary consideration right along has been the education of these children, and we have tried to arrive at some plan for the junior high schools that we feel is in the interest of these children. The racial consideration is a matter that certainly in this day and age has to be taken into consideration.

"Q. And was by the Board?

“A. To a degree and in a secondary fashion certainly, yes; but the Board’s primary concern throughout this entire matter is the education of children and I think this is something about which we feel very strongly * * *.” (D-Ha 69, 70)

It should be pointed out that the operation of respondent’s plan, dependent as it is upon a lottery, makes no distinction as to race in the selection and assignment of the Glenfield pupils to the other three schools. The Commissioner finds that while respondent’s action takes account of racial considerations, its effect is to minimize rather than amplify any undesirable results that might accrue from increasing the racial imbalance in Hillside School. He further finds that in the operation of the plan there is no discrimination either for or against any racial group as such.

Petitioners urge that the adoption of a plan which provides, even temporarily, a basis of school assignment for one group of pupils different from that of the remainder of the pupils in the district is discriminatory. The Commissioner finds no foundation in New Jersey school law to support a contention that a local board of education is required to use but one means of assigning pupils to school, provided that no unlawful discrimination is practiced in the means employed. The Commissioner has previously determined that boards of education may make classifications of pupils provided that such classifications are not discriminatory. In the case of *Shrenk, et al. v. Board of Education of Rutherford*, 1960-61 S. L. D. 185, in which petitioners protested that some pupils were provided transportation at local expense while others were denied it, the Commissioner said:

“* * * Petitioners contend that granting transportation to these pupils and denying it to their children is discriminatory. In order to establish discrimination, there must be a showing that one group in entirely the same circumstances as another is given favored treatment.

“In the Commissioner’s judgment, a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district. Such differences need not be great in classification, but no classification may be unreasonable, arbitrary or capricious. *Guill, et al. v. Mayor and Council of City of Hoboken*, 21 N. J. 574 (1956); *Pierro v. Baxendale*, 20 N. J. 17 (1955); *DeMonaco v. Renton*, 18 N. J. 352 (1955); *Borough of Lincoln Park v. Cullari*, 15 N. J. Super., 210 (App. Div. 1951).”

In *Guill, supra*, the Court said at 582:

“There is of necessity an expansive discretionary power of classification in the service of the legislative policy within the area of police action. This, too, is essentially a legislative province controlled by the constitutional principle forbidding invidious distinctions and discriminations. But where the propriety of the division into classes or groups is fairly debatable, the local legislative judgment controls. The State and its municipalities holding properly delegated powers may legislate according to ‘reasonable classification of the objects of the legislation or of the

persons whom it affects.' *New York Rapid Transit Corporation v. City of New York*, 303 U. S. 573, 58 S. Ct. 721, 82 L. Ed. 1024 (1938).

"The classification satisfies the constitutional test of equality and reasonableness if it rests upon some ground of difference having a real and substantial relation to the basic object of the legislation or some relevant consideration of public policy. Even though the distinction be narrow, it suffices if it is reasonably concerned with the end legitimately in view. *Ring v. Mayor and Council of Borough of North Arlington*, 136 N. J. L. 494 (Sup. Ct. 1948), affirmed 1 N. J. 24 (1948). If the local legislative action be not plainly unreasonable or unduly oppressive or discriminatory in this regard, its policy is not a justiciable question. *Independent Warehouses, Inc., v. Scheele*, 134 N. J. L. 133 (E. & A. 1946), affirmed 331 U. S. 70, 67 S. Ct. 1062, 91 L. Ed. 1346 (1947). * * * It suffices if the classification have a rational and just relation either to the fulfillment of the essential legislative design or to some substantial consideration of policy or convenience bearing upon the common welfare. * * *

"* * * If there be a reasonable distinction of circumstance, there is not the oppressive inequality at odds with the equal protection principle. *Washington National Insurance Co. v. Board of Review*, 1 N. J. 545 (1948)."

Petitioners having failed to show that their rights or educational opportunities have been adversely affected by respondent's action, the Commissioner determines that such action, taken within the discretionary authority of the Board of Education, is not discriminatory.

The Commissioner finds and determines that respondent's decision to reassign the pupils of the closed Glenfield Junior High School to the other three junior high schools of the district on the basis of their parents' preference as determined by a lottery, while the pupils of the other three junior high schools continued to be assigned on the basis of their residence, is an action that lies within respondent's discretionary authority and is not illegal, arbitrary, unreasonable, or discriminatory.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

July 3, 1963.

DECISION OF THE STATE BOARD OF EDUCATION

The Decision of the Commissioner of Education dated July 3, 1963 is affirmed for the reasons stated by the Commissioner in his said decision, and for the reasons stated in the Opinion of the State Board of Education in *Deborah Spruill, &c. v. The Board of Education of the City of Englewood, Bergen County*, filed September 26, 1963.

October 2, 1963.

Pending before Superior Court, Appellate Division.

XXXII.

BOARD OF EDUCATION HAS AUTHORITY TO
PRESCRIBE RULES FOR PROMOTION

WAYNE GERSTENACKER, BY HIS PARENT AND NATURAL GUARDIAN,
MARY GERSTENACKER,

Petitioner,

v.

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

Respondent.

For the Petitioner, *Pro Se.*

For the Respondent, Daniel L. Golden, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case was a pupil in respondent's High School during the 1961-62 school year. While not classified by the school as a senior, he was carrying a program of courses leading to graduation in June, 1962. He was suspended from his English class for misconduct; he failed the subject and thereby failed to graduate from high school. He complains that conditions imposed by the school authorities in connection with his suspension wrongfully deprived him of his opportunity to graduate, and seeks an order from the Commissioner directing respondent to give him "permission to graduate." Respondent denies that petitioner was deprived of opportunity to do all the schoolwork necessary to enable him to pass the English course and graduate with his class, and in any event, it contends that he was given opportunity to pass the course by studying in summer school or by being tutored at his own expense for 15 hours.

Oral argument in this matter was heard by the Assistant Commissioner in charge of Controversies and Disputes at New Brunswick on April 9, 1963. By agreement, the minutes of respondent Board for its meeting of August 21, 1962, which incorporate by reference the stenographic report of a hearing conducted by respondent on June 28, 1962, are made part of the record herein.

These minutes show that a complaint was received from the parents of Wayne Gerstenacker, alleging that he was unjustly denied a diploma. Respondent Board met on June 28, 1962, for the purpose of hearing the complaint. All Board members but one were present, together with the complainants and their attorney, the Board's attorney, witnesses, the Board Secretary, and a court reporter. The hearing continued without interruption until about 2 A.M. on June 29. Subsequently, on August 21, 1962, at its regular meeting the Board took the following action:

"MOTION by Fairweather, seconded by Lach and so ordered, that the District Secretary's report of the Wayne Gerstenacker Hearing held June 28, 1962, be incorporated into these minutes and that receipt of the stenographic Report of the Hearing be acknowledged by reference to copies of

such Report of the Hearing on file at the offices of Attorney Golden and the Secretary of the Board of Education.

“MOTION by Fairweather, seconded by Petersen, that this Board of Education, having heard the complainants and their witnesses, and having read the Record, finds that the request for permission to graduate should be denied; and, further, that this decision be communicated to Attorney Golden for proper notice to the complainants.

“Roll call vote on the RESOLUTION resulted in unanimous approval with the exceptions of Reichenbach who abstained because ‘he knows the individuals involved personally’ and Wyluda who disqualified himself because ‘he was not present at the Hearing.’”

In the oral argument before the Assistant Commissioner, Mrs. Gerstenacker challenged the accuracy and sufficiency of the hearing, in that she alleged “untruths” (Tr. 3) and asserted that she had not been given the opportunity to testify. As to her allegation of untrue statements, Mrs. Gerstenacker offered nothing to substantiate her charge when she was permitted to make a statement before the Assistant Commissioner. As to her further assertion of the insufficiency of the testimony, it is clear that complainants were represented by counsel, that all witnesses called by counsel were heard, and that there was uninhibited cross-examination by counsel. The Commissioner finds that respondent afforded complainants a full and fair hearing, and had before it a substantial record on which to base its determination.

Having so found, the Commissioner will not make an independent finding of fact, but, in consonance with the principles set down by the Court *In re Masiello*, 25 N. J. 590, 605 (1958), and in *Kopera v. Board of Education of West Orange*, 60 N. J. Super. 288 (App. Div. 1960) will determine whether, in the exercise of its discretionary authority “to prescribe * * * rules for promotion” (R. S. 18:3-16), respondent had a reasonable basis for its determination. *Borough of Fanwood v. Rocco*, 59 N. J. Super. 306 (App. Div. 1960).

The testimony before the Board indicated that petitioner had made remarks in his English class deemed insulting and degrading to the teacher, that he had been suspended from the class therefor, and that he was offered reinstatement in the class if he would retract the offensive remarks in the presence of his classmates, which at first he refused to do. Ultimately he retracted, and was readmitted to class, but so seriously failed the work of the marking period that the quality of his work during the final two marking periods did not afford him a passing grade for the year, and he did not graduate. Respondent’s determination, as reflected in its resolution, *supra*, sustains the action of the school’s administrative authority, as well as the offer made to petitioner that he could graduate by attending summer school or by satisfactorily completing 15 hours of approved tutoring at his own expense, an offer which petitioner has thus far rejected.

The Commissioner many years ago decided that a pupil who, as a result of a legal suspension, had failed to complete the work of the fourth year of high school, was not entitled to be graduated. In the case of *Laehder and Edick v. Board of Education of Manasquan*, 1938 S. L. D. 680 (1914), he said:

“Albert Laehder has asked that, notwithstanding his suspension, he be granted a diploma of graduation from high school, on the ground that he had practically completed the course at the time of his suspension. * * * From the testimony of Laehder himself, it is clear that he has not completed the work of the fourth year in the high school. He is not, therefore, entitled to a diploma.”

Respondent has offered a reasonable means by which petitioner may complete his work and receive his diploma. In the light of his own intransigence, he cannot properly ask greater consideration than might be granted to any other pupil who had failed a subject.

The Commissioner finds and determines that respondent's resolution of August 21, 1962, follows reasonably upon the hearing and consideration of the facts, that its determination is utterly devoid of any evidence of bias, prejudice, or malice, and that respondent acted well within the broad discretionary powers given it by the Legislature to make rules and regulations “for the government and management of the public schools.” (R. S. 18:7-56)

The petition is dismissed.

COMMISSIONER OF EDUCATION.

July 23, 1963.

Pending before State Board of Education.

XXXIII.

BOARD OF EDUCATION MAY NOT EXCLUDE PUPILS LEGALLY
DOMICILED WITHIN THE SCHOOL DISTRICT

RUTGERS, THE STATE UNIVERSITY; PAUL GAMBLE, ET AL.,

Petitioners,

MICHAEL ANDERSON, ET AL.,

Applicants for Intervention,

v.

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

Respondent.

For the Petitioners and Intervenors, R. E. & A. D. Watson
(Russell E. Watson, Esq., of Counsel)

For the Respondent, Frank J. Rubin, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an action brought by Rutgers, The State University, and by seven parents as next friends of children attending respondent's schools. Subsequent to the filing of the original petition, forty-five parents as next friends of children attending respondent's schools applied for leave to intervene. All the parents and children, as petitioners and as applicants for intervention, live in Piscataway Township in housing facilities owned by Rutgers, located in a section known as University Heights. They appeal to the Commissioner to set aside a resolution adopted by respondent excluding these children from its

schools until satisfactory arrangements are reached for the payment of such sums of money as would be needed to reimburse the Township for the cost of educating the children.

A hearing in the matter was conducted by the Assistant Commissioner in Charge of Controversies and Disputes in New Brunswick on November 26, 1962, January 8, 1963, and February 5, 1963. Briefs and memoranda were submitted by counsel.

The facts in the matter are these: Since 1946 Rutgers has maintained housing facilities which it rents to married students and qualified members of its faculty and staff. The facilities at University Heights are apartments of the efficiency type and one, two, and three bedroom units. Children of the occupants have attended respondent's schools in past years, and through the year 1956, Rutgers paid to Piscataway Township, in lieu of taxes, an amount of money approximating the cost of educating these children. In 1957 the Township assessed these housing units for taxes. Rutgers appealed these assessments, and the matter is still in litigation. Meanwhile, Rutgers discontinued the payments in lieu of taxes, contending that it should not make such payments in addition to taxes, should it fail in its appeal of the assessments.

On January 3, 1962, the Secretary of respondent Board sent to Rutgers a letter in which he enclosed lists of University Heights pupils who had attended Piscataway Township schools in the years 1958-59, 1959-60, 1960-61, and 1961-62, together with tuition bills for those years. In reply, it was testified, Rutgers denied liability. On June 18, 1962, respondent adopted the following resolution:

"WHEREAS, an average of 75 children living in the married student housing development at Rutgers (known as University Heights) have attended Piscataway Township Schools each school year for about the past 12 years; and

"WHEREAS, the University, in each of the years up to and including 1956, contributed to the tax revenue of the Township of Piscataway an amount approximately equal to the cost of educating these children so that their presence would not constitute a burden on the balance of the community; and

"WHEREAS, since 1957, the University has failed to make such payments with the result that the cost of educating children from University Heights has been included in the general tax levy and has been apportioned among the other property owners in the community; and

"WHEREAS, this Board, in the belief that said levy and apportionment constitutes an unfair and inequitable burden upon the community, has made every effort to have the University, as a property owner and landlord, pay its fair share of educational costs in the Township; and

"WHEREAS, the University has consistently refused to discuss the situation, maintaining, in the single meeting that was held for that purpose only that no legal or moral obligation existed on its part;

"Now, THEREFORE, BE IT RESOLVED that no children residing in the housing development known as University Heights be admitted to Pis-

cataway Township Schools after June 20, 1962 unless and until (1) reimbursement is received, or a satisfactory arrangement is worked out for the payment of funds expended in the school years 1957-58, 1958-59, 1959-60, 1960-61, and 1961-62 for the education of University Heights children; and (2) a satisfactory arrangement is worked out providing for payments of costs for the education of these children in 1962-63 and subsequent years.”

It is against this resolution that petitioners filed their appeal on July 23, 1962. The Commissioner requested respondent to withhold application of its resolution until the matter could be adjudicated. The request was rejected and the Commissioner on August 20 ordered respondent to admit the University Heights pupils to its schools until this controversy has been finally determined.

The Board of Education’s authority to make rules for the government of the schools is contained in *R. S. 18:7-56*, in part as follows:

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

The essential question before the Commissioner, therefore, is whether the respondent’s resolution is legal and within the discretionary authority vested by law in the Board of Education.

The pertinent sections of *R. S. 18:14-1*, which defines what pupils may attend school, read as follows:

“Public schools shall be free to the following persons over 5 and under 20 years of age:

“a. Any person who is domiciled within the school district; * * *

“c. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein but no person who has had or shall have his all-year-round dwelling place within the district for 1 year or longer shall be deemed temporarily resident therein * * *.”

The testimony of twenty of the parents as next friends of the petitioners and applicants for intervention — ten called by counsel for petitioners and ten by counsel for respondent — was directed toward the question of whether they are domiciled within the school district of Piscataway Township. It is not necessary to review the separate testimony of each witness. All testified that they are either undergraduate or graduate students or members of the staff of Rutgers, The State University, that they are either enrolled or employed for an indefinite period of years or are attending an Academic Year Mathematics Institute which will be completed before the beginning of the next school year. Except for this latter group, all testified that they maintain no other home or residence, have no other address, and have no present intention of living elsewhere.

Although counsel for respondent cited numerous cases bearing on the question of residence, the Commissioner finds none of them in point. He relies, rather, upon the construction and application of the law which has prevailed in New Jersey in similar cases (*e.g.* *King v. Board of Education of Ocean Township*, 1938 S. L. D. 27; *Board of Education of Borough of Franklin v. Board of Education of Township of Hardyston, et al.*, 1954-55 S. L. D. 80). He looks further to the courts for definition of domicile, and finds in *Kurilla v. Roth*, 132 N. J. L. 213 (*Sup. Ct.* 1944), as urged by counsel for petitioners, the following definition at page 215:

“* * * ‘Domicile’ is the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. 17 *Am. Jur.* 588, 590; 28 *C. J. S.* 3. It is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by law. *Croop v. Walton*, 199 *Ind.* 262; 157 *N. E. Rep.* 275; 53 *A. L. R.* 1386; *Fisher & Van Gilder v. First Trust Joint Stock Land Bank*, 210 *Iowa* 531; 231 *N. W. Rep.* 671; 69 *A. L. R.* 1340; *Shenton v. Abbott*, 178 *Md.* 526; 15 *Atl. Rep.* (2d) 906. This is the rule adopted by the American Law Institute. *A. L. I. Conflict of Laws*, § 9. And every person, in all circumstances and conditions, is deemed to have a domicile somewhere; and, in general, a domicile once established continues until superseded by a new domicile, and the old domicile is not lost until a new one is acquired. *In re Dorrance Estate*, 115 *N. J. Eq.* 268; affirmed, *Dorrance v. Thayer-Martin*, 13 *N. J. Mis. R.* 168; affirmed, 116 *N. J. L.* 362; 17 *Am. Jur.* 590, 601. * * *”

The Commissioner finds and determines that petitioners and applicants for intervention herein are either domiciled within the school district of Piscataway Township, within the meaning of R. S. 18:14-1(a), *supra*, or are residing temporarily therein within the meaning of paragraph (c) of the same statute.

Having so found, the Commissioner determines that respondent's resolution, *supra*, is inconsistent with Title 18 of the Revised Statutes, and is therefore illegal and must be set aside. It thereupon becomes unnecessary for the Commissioner to decide other questions raised by respondent.

The Commissioner directs that respondent's resolution excluding pupils residing in the University Heights housing units from its schools be set aside and declared null and void.

COMMISSIONER OF EDUCATION.

July 31, 1963.

Pending before State Board of Education.

XXXIV.

GOOD REASON MUST BE SHOWN FOR TERMINATION OF
SENDING-RECEIVING RELATIONSHIP

BOARD OF EDUCATION OF THE BOROUGH OF ALLENHURST,
MONMOUTH COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,
MONMOUTH COUNTY,

Respondent.

For the Petitioner, Abraham J. Zager, Esq.

For the Respondent, Joseph N. Dempsey, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner has filed an application to terminate the sending-receiving relationship under which it sends its high school pupils to Asbury Park High School.

A hearing in this matter was conducted by the Assistant Commissioner in charge of Controversies and Disputes at Trenton on March 20, 1963. Hearing memorandums were submitted by Counsel. In addition to exhibits received in evidence, the Commissioner takes judicial notice of such records as are filed with the State Department of Education regarding the physical structure and course offerings of Asbury Park High School.

The relevant sections of R. S. 18:14-7 read as follows:

“Any school district heretofore or hereafter created, which has not heretofore designated a high school or schools outside such district for the children thereof to attend, and which district lacks or shall lack high school facilities within the district for the children thereof to attend, may designate any high school or schools of this State as the school or schools which the children of such district are to attend. Whenever 2 or more schools are designated, the board of education of such school district shall make an allocation and apportionment of pupils to the designated high schools. * * *

“No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner. * * *”

Petitioner seeks termination of the sending-receiving relationship as to its 9th, 10th, and 11th grade pupils effective September 1963, and as to its 12th grade pupils in September 1964. It offers in evidence (Ex. P-1) a resolution of the Board of Education of the Shore Regional High School which offers to

receive high school pupils from Allenhurst on this schedule. Petitioner asserts, and respondent denies, that the educational needs of Allenhurst pupils will best be served by their attendance at Shore Regional High School.

The issue in the instant application, as it has been in similar previous applications, is whether "good and sufficient reason exists for such change." *R. S. 18:14-7, supra*. See, for example, *In the Matter of the Sending-Receiving Relationship of the School Districts of the Borough of South River and the Township of Madison*, 1960-61 S. L. D. 62; *In re Application of Board of Education of the Township of Delran*, 1951-52 S. L. D. 51; *Board of Education of Sparta v. Board of Education of Newton*, 1939-49 S. L. D. 30 (1946), affirmed State Board of Education, 32 (1947); *Board of Education of the Township of Green v. Board of Education of Newton*, 1938 S. L. D. 656 (1937). In *Sparta v. Newton, supra*, the Commissioner reviewed the benefits afforded both the sending and the receiving districts by the statute:

"The high school designation law was enacted to protect districts which had provided facilities for pupils of other districts from the withdrawal of these pupils without good cause. This statute benefits the sending district as well as the receiving district. If this law had not been enacted, sending districts, either individually or by uniting with other districts, would have been compelled to burden themselves with the erection and maintenance of high schools.

"* * * The Commissioner feels constrained to exercise his discretion under this statute with great caution. * * * Only in cases where educational benefits accrue to the pupils sufficient to offset the financial loss to the receiving district is it clearly the duty of the Commissioner to grant an application for a change of designation."

Petitioner herein has rested its argument almost exclusively on the fact that while Asbury Park High School is presently — as it has been since 1958 — operating on double session, a transfer to Shore Regional High School would afford its pupils the benefits of single sessions. The Commissioner has already clearly expressed his belief that

"* * * double sessions cannot be considered an adequate substitute under any circumstances for the complete educational program possible in a normal school day and can only be defended under emergency conditions. Because of the deprivation of full educational opportunities for pupils, of inadequate expedients which must be employed, of the unnatural stresses and strains through inconveniences which are placed on pupils, homes and staff, the Commissioner deplores the necessity to resort to a double session organization. For this reason, in his judgment, requests for changes of designation which will permit the pupils involved to attend school on a one-session basis should be approved *unless it can be shown that the benefits to the pupils will be overbalanced by the harm done to the receiving district by their withdrawal.*" *Board of Education of Bradley Beach v. Board of Education of Asbury Park*, 1959-60 S. L. D. 152, 162. (Emphasis added.)

The Commissioner has found no reason to change his beliefs on this matter. In the instant case, however, he will take into consideration such changes in conditions as have occurred since he approved, on a temporary

basis, the change of designation for a larger proportion of Bradley Beach pupils to attend Neptune Township High School. These changes relate to testimony offered by respondent's Superintendent of Schools that it is the present plan of respondent to eliminate double sessions by 1965. This will result, he testified, from the withdrawal of Ocean Township pupils who now constitute approximately one-third of the enrollment, to attend their own high school, and from projected school building additions in Asbury Park. In 1960, when the Commissioner made his original decision in the Bradley Beach case, *supra*, and again in 1961 and 1962, when he continued the temporary change of designation, there was no indication that there was any solution to the double session problem in sight. To the degree that respondent has at least set a target date for resuming single sessions at its high school, the situation has been modified.

Moreover, the Commissioner finds no significant differences in the curricular opportunities available to pupils at either Asbury Park or Shore Regional High School. Since pupils from Allenhurst attend elementary school in Asbury Park, their continuance in high school there gives them such educational advantages as accrue from pursuing a sequential educational program through their elementary and secondary schooling.

The Commissioner determines that good and sufficient reason does not exist for the termination of the sending-receiving relationship between Allenhurst and Asbury Park Boards of Education in September 1963, and to that extent the petition is dismissed. However, he will retain jurisdiction in this matter and upon application of petitioner he will grant the requested change of designation until such time as respondent has eliminated double sessions in its high school.

COMMISSIONER OF EDUCATION.

August 22, 1963.

BOARD OF EDUCATION OF THE BOROUGH OF ALLENHURST,
MONMOUTH COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,
MONMOUTH COUNTY,

Respondent.

ORDER OF THE COMMISSIONER OF EDUCATION

Application having been filed by petitioner on August 27, 1963, pursuant to the decision of the Commissioner in this matter, entered on August 22, 1963, seeking a change of high school designation for 9 freshmen, 6 sophomores, and 9 juniors of the Allenhurst School District from Asbury Park High School to Shore Regional High School, effective in September 1963; and respondent, after due notice given, having presented no factual reason why such change of designation should not be granted; and the superintendent of Shore Regional High School District having by affidavit declared that the Board of Education of said District will receive said pupils; and it appearing to the

Commissioner that the educational welfare of said pupils requires prompt disposition of this application; now therefore,

IT IS ORDERED, on this 5th day of September, 1963, that the high school designation be changed, effective on this date, from Asbury Park High School to Shore Regional High School for such pupils from among the aforesaid 9 freshmen, 6 sophomores, and 9 juniors as may be requested in writing to petitioner by their parent, guardian, or other person having them in legal custody and control, and

IT IS FURTHER ORDERED, that further hearing be set down in this matter, at which time testimony will be taken and argument heard by the Commissioner on the question of the continuance of this temporary change of designation in the event that respondent eliminates double sessions before the pupils so changed shall have completed their high school education, and, upon the question of granting like changes of designation in succeeding years until said double sessions are eliminated, and upon such other matters as may properly be made a part of this proceeding.

COMMISSIONER OF EDUCATION.

XXXV.

FAILURE TO ADVERTISE CORRECT ELECTION HOURS SUFFICIENT
TO VOID BOND REFERENDUM

IN THE MATTER OF THE SPECIAL ELECTION HELD IN THE SCHOOL DISTRICT
OF BEACH HAVEN, OCEAN COUNTY

For the Petitioner, Richard J. Shackleton, Esq.

For the Respondent, Julius Robinson, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Following a special school district election on a bond referendum proposal held on June 18, 1963, the trustees of the Beach Haven Taxpayers Association, through the Association's secretary, on June 27 requested an investigation of alleged irregularities in the election.

By direction of the Commissioner, the Assistant Commissioner in charge of Controversies and Disputes conducted an inquiry and a recount of the ballots cast, at the Beach Haven Elementary School on July 17, 1963.

The announced results of the voting on the referendum question were as follows:

Yes	107
No	101

The recount of the uncontested ballots gave the following results: .

Yes	105
No	99

with four ballots reserved for the Commissioner's determination.

An examination of the ballot coupons and of the poll list revealed that while the signatures on the poll list are numbered from one through 208, the numbers on the ballot coupons run from 11 through 218. At the inquiry the first ten ballots, numbered from one through ten, were submitted to the Commissioner unmarked and unused; they had been held in reserve for use for military service and absentee ballots.

The relevant statute on this point is *R. S. 18:7-35.5*, which reads as follows:

“Every voter at any school election, shall, previous to the receipt of an official ballot, sign his name without assistance and state his address, in the appropriate column of the poll list and the election officer in charge of the poll list shall record therein opposite the voter’s name, the number of the official ballot furnished to the voter for voting.”

While the record is barren of any implication of wrong intent, or of any motive to confuse either the voters or the results of the election, the Commissioner must determine that the precise requirements of the statute were not observed in this instance, and voters did not receive ballots whose numbers corresponded to the numbers recorded in the poll list. A first step in the protection of the integrity of any election is a scrupulous observance of the procedures set forth in the statutes.

A second irregularity to which the Commissioner’s attention was directed is the discrepancy between the hours advertised in the newspapers and posted notices of the election, and the actual hours during which the polls were open. It is stipulated that the polls were open and ballots were cast between the hours of 5 and 9 P. M., as required by statute, *R. S. 18:7-34*. Exhibits P-1, P-1A, and R-3, on the other hand, show that the polls were advertised to be open from 8 to 9 P. M. Witnesses representing six registered voters testified that they did not vote at the election because of family interest in the graduation exercises scheduled for the same time at Southern Regional High School, of which Beach Haven is a constituent member, but that they would have voted if they had known that the polls were in fact open at an earlier hour. The Commissioner determines this defect to be fatal. While it is not disputed that the error in the advertisements and posters was one of pure inadvertence, either stenographic or typographical, the Commissioner is convinced from the testimony of those who did not vote because of the error that the fault was of sufficient magnitude “as to have repressed a full and free expression of the popular will.” *Application of Wene*, 26 *N. J. Super.* 363, 383 (*Law Div.* 1953) affirmed 13 *N. J.* 185 (1953). The election must therefore be set aside.

Having so determined, it is unnecessary for the Commissioner to make a further determination as to the four ballots contested in the recount.

For the reasons stated, the Commissioner declares the special election held in the school district of Beach Haven on June 18, 1963, to be void, and directs that it be set aside.

COMMISSIONER OF EDUCATION.

September 18, 1963.

XXXVI.

EVIDENCE MUST SUSTAIN CHARGES OF UNFITNESS OF
SUPERINTENDENT UNDER TENURE

IN THE MATTER OF THE TENURE HEARING OF JOHN M. NIES,
CHATHAM TOWNSHIP, MORRIS COUNTY.

For the Board, Aaron Dines, Esq.

For John M. Nies, Joseph N. Dempsey, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This matter concerns the dismissal of a superintendent of schools who had acquired tenure of position in the Chatham Township School District in Morris County.

This school district operates under the provisions of Chapter 7 of Title 18 with a board of education of nine members elected by the citizens. Like many of its neighbors, it has experienced rapid growth in the last few years. In 1951-52 there were 555 pupils attending its single school, staffed by 19 teachers and a supervising principal. In 1961-62 there were 1064 pupils in two schools taught by 49 teachers under the leadership of a superintendent and two principals. These schools housed grades K-8 with high school pupils being sent to Chatham Borough High School. During the time of this controversy, however, Chatham Township has been erecting its own high school to begin operation in 1963.

John M. Nies, who is the subject of the charges herein, was first employed in Chatham Township as a superintendent of schools at the beginning of the 1952-53 school year. During the next five years the school system apparently made good progress under his leadership. A second 16-room school was erected and opened in 1954 and a four-room addition made to it in 1957. The staff was enlarged by the recruitment of able teachers and principals and an excellent esprit de corps appears to have existed.

The present controversy appears to have had its inception in the school year 1957-58. Four new members were elected to the Board of Education in February of that year and, by a 5 to 4 vote, one of those newly elected members was immediately chosen as president in place of the president of the past 7 or 8 years. This factional division, greater or lesser in numbers, persisted and grew in violence over the ensuing years until the entire school system was infiltrated and everyone connected with it became infected to some degree. It further appears that one of the primary sources of difficulty was the advocacy by the majority faction of the board of education of a philosophy of education which was professionally unacceptable to the administration and many of the staff. In any event, the controversy grew greater and culminated in the filing of written charges against the superintendent of schools signed by the president of the Board of Education.

The charges herein were certified as warranting dismissal, if proved true in fact, by the Chatham Board of Education at its meeting on December 14, 1961, and were received by the Commissioner of Education on December 26,

1961. The superintendent was relieved of his duties at that time and has remained suspended during the course of these proceedings. Pursuant to R. S. 18:3-23 *et seq.*, hearing of the charges was begun on February 15, 1962, before the Assistant Commissioner of Education in charge of Controversies and Disputes and concluded on June 27, 1963. Thirty-four days were given to a hearing of the matter in which 40 witnesses were called by the Board of Education and 18 by the superintendent, producing a record of 5,082 pages.

Motions to dismiss particular charges were made from time to time during the course of these proceedings by counsel for respondent, some of which were granted. Findings of facts in respect to the charges dismissed were not made at that time but were reserved and will be dealt with in this decision.

The charges herein are numerous and lengthy. They are contained in 28 separate statements, four of which list individually a total of 43 sub-charges.

CHARGE #1

"He maligned the Office of the County Superintendent claiming to a member of the faculty that he hated the County Superintendent, that it was a waste of time to go to County meetings because the County Superintendent talked through his hat, that the County Superintendent was not worth listening to, and that an administrative assistant in the office of the County Superintendent should be distrusted because she was a spy of the County Superintendent."

Evidence on this charge was given by two board members, the Board secretary, a teacher, and a secretary, each of whom testified to remarks made to them by the respondent in derogation of the incumbent Morris County superintendent. The charge was dismissed at the conclusion of petitioner's presentation and no defense was required of respondent.

The Commissioner notes that there was no testimony that the superintendent made such remarks publicly or gratuitously but in each instance to individuals with whom he was working closely in natural situations. There is no showing that they were made with intent to damage the school system or that they affected the operation of the schools in any way. Nor does it appear that the superintendent "maligned the Office of the County Superintendent" as is charged but rather that he stated his opinions of the person who occupied that office.

The Commissioner finds and determines that the evidence does not support the charge that the superintendent maligned the Office of the County Superintendent and that such remarks as he may have made with respect to the holder of that office do not warrant dismissal. Charge #1 is dismissed.

CHARGE #2

"He employed a spy system within the faculty and specifically encouraged teachers to spy for him. Teachers would have comments, made by them in private to others, quoted to them by the Superintendent shortly thereafter word for word. When a newly employed faculty member was urged by the Superintendent to inform directly to him things said by the teachers in the Teacher's Room and the faculty member refused, this

faculty member was subjected, in an office with locked door, to a severe grilling and cross-examination by the Superintendent who additionally made certain implications regarding an alleged frustration and mental illness of this faculty member and suggested that she see a doctor. Although the teacher was reduced to tears during the discussion, the Superintendent persisted in pressing her on personal matters, completely irrelevant to her job. He further used undue pressure to induce her to resign, warning her not to discuss her resignation with anybody. The Superintendent further coerced this faculty member to state in her resignation that she was leaving because of illness."

Respondent was required to defend against the allegations made in the first two sentences but the balance of the charge was dismissed at the conclusion of petitioner's case.

A careful examination of the testimony discloses that this charge is overstated and exaggerated. For instance, according to the newly employed faculty member's own testimony, the request that she inform (which appears to have been misunderstood) was made at the time she was employed; she did not refuse but remained silent, and the alleged "grilling" did not occur until she later decided to resign, with no apparent connection between the two events. The suggestion that "she see a doctor" actually was that she see the school psychologist because the superintendent and her principal believed her to be emotionally upset. Further, the charge of "undue pressure to induce her to resign" is refuted by the teacher herself who testified that the superintendent and principal said she was a good teacher and urged her to remain. Nor is there evidence that will support a charge of coercion as to the stated reasons for her resignation.

There is evidence that various teachers reported comments and statements of others to the superintendent and it appears that he may have encouraged the practice. The proofs fall short, however, of an organized scheme or method which could be called a "spy system." Whatever methods were used were crude and lacking in finesse. His so-called "spies" were not well recruited and in a number of instances they gave information to the "enemy." The attempts to get information appear to have been incidental to some happening and not by careful pre-arrangement.

A school which becomes split into factions with parts of the staff informing on the others presents a deplorable situation, and to the extent that the superintendent failed to discourage such a practice he fell short of his responsibility. Teachers should be able to speak freely among their colleagues at lunch time, in the faculty room, and on other off-duty occasions without fearing that their comments will be repeated. However wrong the superintendent may have been in encouraging informing, in this case it must be recognized that he had much provocation. The record shows that teachers were going over the superintendent's head and going directly to board members, who were in turn by-passing him. He would have been less than human if he did not think that his opponents were acting against the best interests of the school system and if he did not try to find out what was going on.

The Commissioner finds that the evidence does not support Charge #2 and it is dismissed.

CHARGE #3

“He actively encouraged and promoted division and distrust between and among members of the faculty. He warned one faculty member to be careful of specifically designated faculty members indicating that these teachers were disloyal and unfaithful. He told certain teachers to avoid associating and working with these alleged disloyal and unfaithful teachers, referring to them as trouble causers, thus creating and fostering distrust in the relationships among the teachers within the system. The division and distrust was further encouraged by unfavorable implications made by the Superintendent about certain members of the faculty, in one case claiming to one teacher that a certain other teacher was greatly in debt, had a terrific mortgage on her house, and that she was disturbed and frustrated because of the lack of motherhood. The Superintendent failed to take any steps to eliminate the serious division of the faculty which resulted from his actions, and persisted in the practice of fostering such division contrary to the best interests of education in the school system.”

The Commissioner found insufficient proof to make a *prima facie* case in respect to sentences two and three of this charge and dismissed this portion before presentation of respondent's defense.

A number of witnesses on both sides of this matter agreed that the faculty was divided, and individual teachers were named as being either for or against the administration. It is also clear that they were almost equally divided and that there were just about as many who sided with the administration as those who were in opposition. There is in the testimony, however, nothing to show that the superintendent was the cause of the schism, nor is there any substantial proof that he “actively encouraged and promoted division and distrust” in the staff. There is some specific testimony referring to the art and home economics teachers, but, in the Commissioner's judgment, it is unconvincing and insubstantial to support this charge. It is more than overcome by the reports of other witnesses that the superintendent was aware of and concerned about the split in the staff and that he actively sought to repair it by means of workshops, meetings of various kinds, and by encouraging discussion of problems and the airing of “gripes.”

The Commissioner finds the evidence advanced in support of this charge to be insubstantial and insufficient and Charge #3 is therefore dismissed.

CHARGE #4

“He abetted the preparation and signing of a petition to the Board of Education urging the board to grant him a salary increase. Some teachers were, in fact, coerced by his immediate subordinates to sign this petition.”

This charge was dismissed early in the proceedings. The Commissioner finds no evidence that would link the superintendent to the alleged activities of his subordinates. Charge #4 is dismissed for the reason that it fails to demonstrate a cause of action against the superintendent.

CHARGE #5

“He directed a teacher, over her strong protest, to deceitfully remake a chart of test results so as to conceal from parents the fact that one aspect of arithmetic comprehension was slightly below the national norm.”

Before presenting his defense, respondent's motion to dismiss this charge was granted.

The Commissioner finds no evidence of the deceit or concealment charged here. The art teacher's role, in this instance, was limited to the making of charts depicting the data supplied to her. She had nothing to do with compiling the statistics nor was it her prerogative to decide how the data were to be interpreted to the public. There is no charge that the data were altered. While it is insinuated that the charts were directed to be remade in order to conceal a deficiency in arithmetic, it is as reasonable to assume that a less complex presentation was desirable to insure public understanding.

It should be remembered that the superintendent had no specific duty to present test scores to the public by means of charts. In electing to do so, he had a right to determine how it should be done. The art teacher had no special competence to decide how school statistics should be interpreted and no right to make a decision which belongs to the superintendent. If the superintendent, in the exercise of his discretion, had originally the right to order a graphic presentation of pupil test standings in one way, he had also the right to direct a change to an alternative method. That the art teacher did not like it, is not material. Absent any proof that the superintendent acted in bad faith, it must be assumed that he acted within the scope of his discretion.

The Commissioner finds no evidence of deceit or concealment as alleged and Charge #5 is therefore dismissed.

CHARGE #6

“He made highly improper and unprofessional statements to and about staff members, about parents in the community and about certain children in the school. He falsely accused a faculty member of threatening to throw a child out of the window. He referred on several occasions to another member of the faculty as being frustrated, having family difficulties and an unhappy home life with her parents and husband. He also made unprofessional suggestions that a certain faculty member should wear a better up-lift. He made the crude and offensive remark to another female staff member that ‘your stomach is getting big. What's that, extra curricula activity?’ To one female staff member he made the highly improper and suggestive remark concerning still another female staff member that he ‘would like to be married to her for just one night, so that he could fix her, but good!’ He referred to still another female staff member who was submitting documents for certification as the ‘illegitimate pharmacist operating without a license.’ The Superintendent also made unbecoming statements concerning physical characteristics of certain parents, and referred to P. T. A. mothers as frustrated at home. Further, the Superintendent referred to certain children in a below-level class as ‘idiots.’”

No proofs were offered by petitioner of the two parts of this charge which state:

“He made the crude and offensive remark to another female staff member that ‘your stomach is getting big. What’s that, extra curricula activity?’ * * * Further, the superintendent referred to certain children in a below-level class as ‘idiots.’”

This portion of the charge was therefore dismissed during the hearings.

Much testimony was taken on this charge and produced some evidence that the superintendent made unguarded and injudicious remarks about various persons associated in one way or another with the schools. A study of the whole record reveals, however, that these allegations, like those in Charges #2 and #3, with which this one overlaps, are over-stated and their implied significance is exaggerated. From the testimony it is reasonable to believe that some of the remarks have been taken out of context and given a meaning not intended in the situation in which they were uttered. Some of the comments were made to persons with whom the superintendent was on familiar terms—the art teacher, his secretary, a board member—and to whom he felt able to speak freely. None of these persons appears to have been offended by his remarks nor is there any testimony that they rebuffed him. It appears, rather, that these persons later turned against the superintendent and attempted to use these isolated conversations to destroy him.

Various witnesses reported that the superintendent referred to certain parents as being interested only in children of superior ability, as being trouble-makers, as being jealous of the assignment of children to solo parts in the music program. While such remarks may have been unwisely made, at least as far as the person to whom they were said, it is reasonable to assume that they could have been true and as such would not be unique to this school system.

The Commissioner finds that the superintendent made some foolish and unwise comments about persons in the school and the community. He finds, however, no malicious intent or that the superintendent’s conduct in this respect had any demonstrable damaging effect upon the school system. Considered in the context of the circumstances existing in the Chatham Township school system, the Commissioner attaches little weight to this charge as warranting the dismissal of the superintendent.

The Commissioner finds that Charge #6 is technically supported in part by the evidence but is insufficient to justify dismissal.

CHARGE #7

“He showed and displayed lewd and lascivious cards of an obscene nature to several female staff members, to their disgust and embarrassment.”

Three female staff members—the art teacher, the superintendent’s secretary and the board of education secretary—testified that the superintendent showed them pornographic pictures of playing card size and this is not denied. They implied that this was done to embarrass them. Other witnesses testified that the superintendent’s possession of these pictures was

only one of several instances over the years when such material had been confiscated from pupils. Teachers stated that at such times the superintendent would alert the faculty to the fact and urge them to particular awareness. The superintendent's former secretary reported that discovery of such material in the hands of pupils had occurred periodically during her employment and that each time the superintendent would show the material and discuss the problem with her and key staff members as appropriate steps to eradicating the evil. She attached no significance or ulterior motive to the superintendent's action nor did any other staff members except the three cited above, deeming it entirely proper under the circumstances.

Unfortunately, there are few school administrators who have not had to deal from time to time with the problem of pornography in the possession of pupils. Swift discovery and confiscation of all evidences of it, attempts to trace its source, and counselling of those pupils involved are appropriate and necessary measures to be taken. The participation of members of the school staff is essential, and in order to be effective they must be informed and alerted. In this instance it appears that the superintendent was properly concerned over the appearance of lewd and lascivious pictures among the pupils and he informed those who were in a position to help. It is understandable that those who were confronted with the material might be shocked. The fact that such things find their way into the hands of children is shocking in itself. The record, however, does not demonstrate that the revelation of this material was deliberately calculated by the superintendent for the purpose of disgusting and embarrassing staff members. Absent such a showing it must be assumed that the superintendent's act was performed in good faith with the intent to deal with a problem of a serious nature.

The Commissioner finds that the evidence in support of Charge #7 does not establish a cause of conduct that would justify dismissal.

CHARGE #8

"He boasted that a good way to annoy people, who were critical of and bothered the administration at the school, was to place phone calls to these people at unusual hours during the night, not saying anything when the phone was answered. He further boasted that he had done this type of phone calling in the past and that he thought it very amusing. Certain staff members and Board members have been subjected to such mysterious phone calls with no voice but only heavy breathing at the other end of the line."

Although there is an insinuation here that the superintendent employed the device of anonymous telephone calls to annoy and harass those opposed to him, there is no shred of evidence to support it and this is conceded by petitioner's counsel. The only issue that remains is whether he boasted of his amusement over the making of such calls and whether this constitutes conduct unbecoming a superintendent.

Two witnesses, the board secretary and the cafeteria manager, stated that the superintendent had made such boasts to them. Others closely associated with him disclaimed ever having heard him make reference to the subject. Considering that only two persons, and those both openly hostile to the

superintendent, testified that he made the statements alleged, the conduct can hardly have been far reaching or have had ill effects upon the school system, even if true. The Commissioner believes that this charge, like many others herein, constitutes an unproved insinuation aimed at degrading the superintendent rather than a charge of a substantial nature affecting the conduct of his office.

The Commissioner dismisses Charge #8 as being insufficient to justify the dismissal of a superintendent.

CHARGE #9

"He left the June, 1961 graduation exercise of the Chatham Township 8th grade Class, in full view of the class and the audience when the exercise was only one-half completed. A Principal, when questioned as to where the Superintendent had gone, stated that the Superintendent had told him that he was leaving to attend the graduation exercises of a relative. The Superintendent, however, when later questioned by the Board was evasive and gave misleading information regarding the reason for his abrupt departure, in an apparent attempt to conceal the fact that he had actually left to attend the graduation exercises of his secretary's son."

The uncontroverted facts of this charge are that the superintendent left the Chatham Township graduation exercises before their conclusion and that he later appeared at graduation exercises in a neighboring community in the company of his secretary and her husband, whose son was a participant. Petitioner's witnesses claim that the superintendent at a public meeting of the board at first denied going to the second ceremony but later admitted doing so. The issue raised is evasion and concealment.

The superintendent, who did not testify, admits in his pleadings that he left the graduation exercises because he felt ill, went home, and subsequently, on feeling better, went to the graduation of his secretary's son. He avers that in reply to why he left early, he answered that he was ill and denies any intent to evade or conceal his subsequent activities.

The weight of the testimony on this charge, without any testimony by the superintendent to refute it, goes to show that the superintendent was not entirely frank with the Board about this incident. That this might be due to his alleged inarticulateness or to his being subjected to questioning unexpectedly at a public meeting by board members who he had reason to know were hostile, is open to conjecture. However that may be, the issue is whether such conduct warrants loss of his employment. It seems obvious that this isolated incident would not justify dismissal. Whether it, as part of a total pattern of conduct, would warrant such action will be considered later when all the charges have been dealt with.

The Commissioner finds that Charge #9 is insufficient to warrant dismissal.

CHARGE #10

"He recommended to the Board and caused to be hired, a teacher without credentials, certification or transcript. Although requested by the

teacher to consider the matter of transcript, credentials and certification, the Superintendent took no action but withheld her pay. When the teacher stated that transcripts had been furnished the Superintendent for purposes of certification, the Superintendent retorted, 'You can't prove it.' "

The Commissioner finds very little in the record or in general school practice to give substance to this charge. There is no evidence that the teacher's pay was withheld as charged as a result of her lack of a certificate several months after school began, but it would have been entirely proper if it had been withheld. It is the teacher's responsibility, not the school administration's, to procure a proper certificate for the teaching position held and in the absence of such a certificate the school district is duty bound to withhold salary. Nor is it uncommon to employ a teacher with the understanding that she can and will meet the qualifications for issuance of a certificate by the time her duties commence.

What appears here is that the superintendent offered to process the certificate upon the teacher's supplying the necessary documents and that there was confusion and disagreement as to whether the papers had been furnished and mislaid in his office, or never produced. In any event, it remained the responsibility of the teacher to qualify herself properly, and in the Commissioner's judgment any failure to do so promptly cannot be assigned to the superintendent and made the basis of a charge against him.

The Commissioner finds that Charge #10, even if true, does not constitute improper conduct by the superintendent.

CHARGE #11

"He concealed from the Board of Education a shortage of funds involving a possible theft. When the matter finally became known to the Board, his failure to report promptly and his incomprehensible report describing the shortage, caused the Board embarrassment in its relations with the insurance company."

This charge was dismissed at the hearings.

At the conclusion of petitioner's testimony the Commissioner could find no evidence of concealment by the superintendent or of failure to report promptly. The report in question is comprehensible and no apparent reason for the Board of Education to feel embarrassed is discernible.

The matter of this charge concerns a small amount of money paid by pupils for a publication, which was either mishandled by a secretary or stolen, and not remitted to the publishers. Whatever confusion resulted can be blamed, in the Commissioner's opinion, on the lack of a clear understanding of the division of responsibility between the superintendent and the secretary of the Board. It is abundantly evident in this case that the Board's failure to make a clear distinction between the authority of the superintendent and that of the Board secretary was the underlying cause of many of the allegations herein, and this fact is no more clearly depicted than in the instant charge.

The Commissioner finds that the proofs offered do not support Charge #11 and it is dismissed.

CHARGE #12

"He refused to cooperate or work with the Board secretary. Faculty members were instructed not to have dealings with the Board Secretary. On one occasion, at a public meeting, when being questioned regarding an error of his own, he attempted to alter the discussion to an alleged error by the Board Secretary. On another occasion in a letter to the Board President he quoted a letter from the Board Secretary, deliberately falsifying the quote to include several errors which were falsely stated as being copied exactly from the Secretary's letter. On another occasion, when requested to attend a meeting with the Board Secretary and a member of the Board, to discuss ways of expediting budget preparation, he attended the meeting but refused to enter into any discussion, merely sitting and staring out of the window. When the Board member questioned the Superintendent immediately after the meeting as to what was going on, the Superintendent replied that he would not honor any directives or requests from the Board Secretary and that as far as he was concerned the Board Secretary was dead. On two occasions the telephones in the Board Secretary's office were, without advance notice, cut off, on at least one of these occasions as a result of a phone call by the Superintendent to the telephone company. When questioned by the Board Secretary as to whether or not he was responsible for the telephones being cut off, he went into a tirade such as to cause the Board Secretary to fear the possibility of his doing bodily harm to her. On still another occasion when the Board Secretary discovered an excessive inventory of supplies at the Southern Boulevard School and brought the matter to the attention of the Superintendent, he demanded to know how this was discovered. Although the Board Secretary has, on several occasions, requested cooperation from the Superintendent, the Superintendent has persisted in refusing to deal with the Board Secretary other than by written notes or memoranda."

Portions of this charge were dismissed earlier on motion of respondent. The sentence relating to questioning of the superintendent by a board member was stricken as hearsay. No proof was produced to connect the superintendent with the severance of service on the Board secretary's telephone, and this part of the charge was dismissed. Nor was any evidence taken relating to a demand to know how an alleged excessive inventory was discovered, and this charge was also dismissed for want of proof.

There remains then a recital of bickering, fault-finding, suspicion and lack of cooperation between the superintendent and the secretary of the Board. It is clear that a bitter struggle for authority had developed between these two offices, which the Board of Education instead of settling appeared to encourage, and these charges must be considered in the light of that conflict.

The testimony substantiates the charge that teachers were directed not to contact the Board secretary. In the absence of testimony from the superintendent, it cannot be determined whether this was to maintain his line of authority to have educational matters brought to him or whether it was intended to interfere with the proper execution of the secretary's duties. However that may be, the Commissioner notes that in school systems where

there is a proper division of responsibility between these offices, the teaching staff relates to the superintendent and there is little or no need to contact the board secretary. There is no evidence that the superintendent *deliberately* falsified the quotation he made of a letter from the Board secretary. His secretary was not called to testify whether he had instructed her to misquote intentionally.

Two witnesses corroborated the secretary's testimony that the superintendent had become enraged when accused of discontinuing telephone service and had raised his voice and adopted a menacing attitude. No defense was offered to refute this charge.

That there was open hostility between these two persons is obvious. Each blames the other: the secretary in her testimony and the superintendent in his pleadings. Although there were frequent outbursts of temper on both sides resulting in a breakdown of normal communication, the superintendent avers that this was not permitted to interfere with the operation of the school system and it was in no way harmed. The Commissioner cannot agree. As serious a rift as is apparent here between two vital offices of the school administration could not help having both visible and intangible harmful effects upon the school system, and that it existed at all, let alone to the degree it persisted, is deplorable.

The Commissioner sees no purpose to be served in fixing blame between the superintendent and the secretary. Cooperation is a two-way street, and in this controversy he suspects that neither party's hands are clean. Regardless of that, he is constrained to point out that the real fault here must be assigned to the Board of Education for permitting the situation to develop and continue. The Board of Education had the power to delineate clearly the areas of authority between these two offices. That they did not adopt clear and sound policies in this respect is abundantly revealed in the testimony which shows a haphazard shuttling of duties between the two, inappropriate assignment of responsibilities to one or the other, and a general lack of conformity to sound school administrative practices.

The Commissioner finds that there is evidence to support the general allegation of lack of cooperation with the Board secretary stated in Charge #12. However, in the context of the Board's default, the secretary's evident hostility, and the position in which the superintendent was placed, the Commissioner further finds that proof of this charge is not enough to justify dismissal.

CHARGE #13

"He chose a teacher for a below-level class by causing a group of teachers from on-level classes to pick straws and the person with the shortest straw was assigned to teach this class. The superintendent later deceitfully reported to the Board that a specially trained member of the faculty had been assigned this class. He also made open remarks to members of the faculty that certain other members of the faculty were assigned difficult classes for the deliberate purpose of making things difficult for the teachers as he wanted to get rid of them."

This charge was dismissed in its entirety before respondent called witnesses.

The selection of a teacher to be assigned to a class of children with learning difficulties was in fact done by lot. The testimony reveals that in the absence of volunteers, one of the teachers suggested this procedure. None of the teachers appears to have had special qualifications which would have led to his selection. There is no evidence that the superintendent "deceitfully reported" the assignment of a "specially trained" teacher to this class. While it might be contended that such a method is not the best way to assign teachers, it can also be argued that it was a practical and a fair solution under the circumstances. The Commissioner finds no basis for complaint in this portion of the charge.

With regard to the remark alleged to have been made by the superintendent about making things difficult for teachers so as to get rid of them, the Commissioner finds the evidence conflicting. The testimony of the art teacher is contradicted by that of the reading teacher. Whatever the superintendent said in this connection appears to have been no more than one of his unfortunate remarks which have been dealt with *supra* in Charge #6.

The Commissioner finds that the evidence does not support Charge #13 and it is dismissed.

CHARGE #14

"When a consultant from the County Superintendent's office appeared to assist in a teaching program and the consulting teacher suggested to the Superintendent that the building principal also be present at the discussion, the Superintendent of Schools stated that he had his own system of democracy and to forget about it."

The Commissioner dismissed this charge in his decision on a series of motions of respondent decided April 26, 1962. In his decision, the Commissioner said:

"Motion #5 moves to dismiss Charge #14 which alleges that the Superintendent failed to include a school principal in a conference with a consultant from the office of the County Superintendent. It is argued that even if this be true, it fails to establish conduct which is improper. The Commissioner agrees. Whether to include other staff members in such a discussion rests in the discretion of the Superintendent and a decision to confer with the consultant alone, even if true, cannot be held to be improper. Motion #5 is granted and Charge #14 is dismissed."

CHARGE #15

"He made false and deceptive statements to faculty members and to the Board. In one instance, the Superintendent falsely informed the Board that a faculty member had a record of mental disturbance, that this faculty member had been away because of a mental illness, and that on the last job this faculty member had been to a hospital and was absent constantly. In another instance, the Superintendent was deceitful in his dealings with a substitute teacher. Having hired the teacher, he subsequently told this teacher that the Board would not give him approval as a permanent teacher while, at the same time, the Superintendent was complaining to the Board of Education concerning this teacher's performance. The Superintendent was abrupt and unprofessional in the

manner of terminating the employment of this temporary teacher, which was accomplished by sending him a curt telegram during the Christmas vacation period, notifying him that his services were no longer required. In another instance, when a teacher was required to take a day off to attend the funeral of her grandmother, and so noted on her absence slip, the superintendent encouraged this teacher to change and falsify the absence slip, indicating to her that the Board of Education would not consider this a valid excuse."

That portion of this charge concerning a substitute teacher (sentences 3, 4, and 5) was dismissed earlier for lack of proof. The teacher in question was not called and no evidence was adduced on this complaint.

Several board members and the secretary testified that the superintendent had recommended that a teacher not be re-employed and gave as part of his reasons that she was or had been mentally ill. It appears clear, however, that this was only a part of his analysis of the reasons for the teacher's failure to perform satisfactorily in her employment.

The testimony in regard to the falsified absence slip was given by the art teacher as follows: "I filled it out 2 days absence for death of my grandmother. He said the Board would never accept this—you'd better change it to a virus."

The superintendent did not take the stand, and this testimony therefore stands unrefuted. It is obvious, however, that here again a fragment of an incident or conversation has been taken out of the context of the total situation and made to appear heinous out of all proportion.

The charge is that the superintendent "made false and deceptive statements to the faculty members and to the board." The two instances above, even if true, cannot support a charge of this gravity and the Commissioner is not convinced that this testimony is entirely credible.

The Commissioner finds that the evidence in support of Charge #15 is insufficient to warrant dismissal.

CHARGE #16

"Without authority, the Superintendent following a private executive meeting with members of the Board, had prepared what purported and to some extent appeared to be a verbatim transcript of what had been said at the meeting. This transcript consisted of seven single spaced, letter size pages, and included alleged direct quotations by six different people. When questioned by the Board about this transcript, he specifically denied the use of any recording devices, mechanical or otherwise, claiming that he was able to provide direct quotes because he had used 'perfect recall.'"

It is difficult to understand what the superintendent is charged with here. The testimony shows that after an executive meeting of the Board, the superintendent, and two principals, a duplicated record of the conversations was sent to each member, and that surprise was expressed at the detail in which the discussions were reproduced. There is an insinuation that the superintendent prepared it against the Board's wishes, that he must have used hidden mechanical recording devices or other deceitful methods to

reproduce it so faithfully, and that he lied when he said he used "perfect recall." There is, however, no evidence to this effect.

The burden of this complaint is that the superintendent made a record of the meeting in question "without authority" and that in so doing he exceeded his powers. The Commissioner knows of no statute or regulation, nor is there evidence of any local rule or directive, requiring the school administrator to get permission to record the proceedings of such a meeting. There is nothing to show that there was any order or agreement to dispense with the record and that the superintendent disobeyed. In fact, it is hardly credible that the superintendent would send copies of his transcript to the Board members if he believed it to be a violation. Although the superintendent was not heard, both principals gave convincing testimony to the effect that they and the superintendent, immediately after the session, had reconstructed and recorded the discussion. The Commissioner notes that this meeting occurred after the Board had removed the janitors from the supervision of the principals and while an investigation leading to the suspension of the superintendent was being conducted. Under such circumstances, there is no cause for wonder that the administration should make as complete a record as possible of what transpired.

The Commissioner is constrained to point out here that this complaint is typical of a number of the charges. It is not specific as to the wrong charged and is not substantiated by proof. Moreover, even though the charge as drawn has not been proved, petitioners have attempted by insinuation to leave an impression of the appearance of evil.

The Commissioner finds that Charge #16 is not supported by the evidence.

CHARGE #17

"In matters pertaining to education, he failed to observe and evaluate teachers; he failed until specifically directed, to provide a written curriculum or grid for teacher guidance and public information and he failed both to prepare a curriculum for the new High School and to provide his evaluation, as directed by the Board, of High School curricula prepared by faculty and citizens' groups."

There is contradictory evidence on the first part of this charge. Some teachers stated the superintendent had not observed or evaluated them and others said he had. The testimony of the principals indicated that they did observe and evaluate the teachers under their supervision and reported their findings to the superintendent. It also appears that the superintendent spent more time in observing new teachers and those who needed or requested help than he did with others. The Commissioner finds nothing unusual in this procedure and finds nothing in the testimony that would lead to a belief that the superintendent had not discharged his responsibilities properly in this respect.

The charge that the superintendent failed to provide a written curriculum until specifically directed was proved false. Witnesses for the Board were unable to point to any such specific direction, and there is ample evidence in the testimony and in the exhibits that a written curriculum was prepared during this superintendent's tenure of office and did exist.

With respect to the preparation and evaluation of a curriculum for the projected new high school, the record shows not that he failed to perform these duties but rather than he did not do them in the way that some members of the Board either expected or wanted him to. Legally and technically he was never directed by the Board to prepare a curriculum or evaluate one proposed by a citizens' committee, and it was conceded by the Board president that it was his own directive and not an action of the Board. However this may be, it is a fact that the superintendent did organize a faculty committee which under his leadership and supervision, prepared a proposed curriculum for the new high school, which, it seems to the Commissioner, could be considered an evaluation of the lay committee's effort to the degree that it concurred with, supplemented, or departed from their proposal. There is reason to believe that the product of a faculty committee working with the superintendent would be superior to that which the superintendent could produce alone, and the Commissioner finds nothing which could be called a dereliction of duty or even unusual in this procedure. The only basis for complaint here that the Commissioner can discover is that the superintendent used a method which, as a professional educator, he had reason to believe was the most efficacious to carry out the Board president's direction, rather than follow the way the members of the Board expected it would be done.

Counsel for respondent argues that this is a charge of inefficiency which under the statutes (*R. S. 18:3-26*) requires a 90-day notice period which in this instance was not provided. The Commissioner sees no need to deal with this question at this posture as he finds that the evidence does not support Charge #17 and it is dismissed.

CHARGE #18

"In matters pertaining to the welfare of the school system, he failed to take any positive action for approximately one year in the supervision of transportation although specifically assigned the responsibility therefor; he failed, despite a directive by the Board, to submit a report on transportation; he presented book requisitions beyond the deadline and so replete with errors as to require over-time in the Board Secretary's office for correction; he failed to adhere to schedules for the preparation and completion of the annual budget; he failed to prepare an application under the National Defense Education Act for one year and until the existence of the Act was called to the Superintendent's attention by a member of the Board and he then prepared application forms so replete with errors as to require substantial revision."

No proof was offered in support of the last portion of this charge concerning an application under the National Defense Education Act and it was therefore stricken when petitioner rested its case.

The testimony on this charge illustrates the confusion that can result when no clear lines of authority and responsibility are laid down and when the secretary of the board and individual board members assume administrative roles in a school system. Trying to determine from the testimony who was in charge of transportation can be compared to the confusion in the classic vaudeville sketch about who's on first base. At various times it has been assigned to a board member, the board secretary, to the superintendent,

to one of the principals, or divided somehow among various combinations of personnel. It is to be noted that when the responsibility was divided, difficulties arose, but that when the superintendent asked that he be given complete control, he was refused.

The Commissioner's study of the evidence on this charge leads him to the conclusion that the problems which arose in connection with the pupil transportation program cannot be blamed on the superintendent. Too many people with overlapping responsibility were involved to make a fair judgment as to who was at fault when things were not done or were amiss. The evidence shows clearly that it was not the people who were at fault but the system itself.

Some evidence was presented with respect to late and incorrect book requisition and budget materials, but the Commissioner finds nothing in this testimony of a serious nature which would warrant dismissal.

The Commissioner finds that there is insufficient evidence to support the burden of Charge #18 and it is dismissed.

CHARGE #19

"In matters of professional leadership, he proposed to divide the sections of the fourth grade between two schools without realizing that these two schools were operating on school days of different length; he failed to provide effective assistance in the planning of a new high school; he failed to prepare, as directed by the Board, a transition plan whereby Chatham Township would evolve from a sending program for its high school students to a program in which it would educate such students in its own school; he failed to advise the Board of the impending loss at the beginning of a school year of an elementary school principal, although having had at least six weeks notice of the distinct possibility of such a loss, and he failed for three months following the resignation, which was four months following his knowledge of its likelihood to obtain even one candidate worthy of interview and, further, he failed to provide agencies and universities with sufficient information to make it possible for them to assist in the identification of candidates and, further, he furnished such persons as did seek to apply for the position (one of them only after repeated requests) with application forms for teaching positions; he demonstrated complete incapacity as a speaker and as an interpreter of the school system, his inarticulate exposition of matters relating to the school system, thereby creating distrust and confusion in the community and embarrassment to the Board in meetings with educators from other districts, with the County Superintendent and with representatives of the State Department of Education and the Division of Local Government; he displayed indifference and lack of cooperation to parents who sought to determine the nature or existence of an organized curriculum and course of study; he failed to appear, as requested by the Board, at a well publicized meeting relating to the curriculum for the new high school on which the voters would shortly be asked to vote, notifying the Board several hours prior to the meeting that he had decided to have an annual routine physical examination that evening and providing as his evaluation of the curriculum, which was to have been a significant part of the pro-

gram as planned and made known to him, a brief letter, which in substance, was a single sentence reiteration of a statement prepared by the County Superintendent; he discouraged coordination between 8th Grade teachers of the Chatham Township sending district and Junior High School teachers of the Chatham Borough receiving district."

The first portion of this charge is admitted. A pupil assignment recommendation made by the superintendent was shown to be unworkable. He acceded and the proposal was withdrawn. In the Commissioner's judgment, this is too inconsequential to be considered seriously as a charge warranting dismissal.

The charge that the superintendent failed to provide effective assistance in the planning of a new high school is not supported by the evidence, which discloses that in fact he organized and supervised a faculty committee which prepared a proposed curriculum for the high school and that he attended numerous committee and other meetings concerned with the development of a high school.

The Commissioner sees no need to deal at length with the matter of a transition plan. There is no evidence that the Board directed the superintendent to prepare a plan, but rather it appears that a member requested him to do so. It is admitted that he did supply materials to the board members who had taken this administrative role upon themselves, which they characterized as unusable.

The next allegation was dismissed and respondent was not required to defend against it. There was no proof that the superintendent, by reason of having responded to a request for a recommendation, had prior knowledge of a principal's resignation or that he neglected to seek a suitable replacement. The weight of the evidence is to the contrary. The matter of the application forms, apparently the fault of the secretary, the Commissioner deems trivial.

With regard to the superintendent's inarticulateness, the Commissioner notes that some witnesses denied it and others said that this was a recent development which occurred when the superintendent was being pressed by the board of education. The charge that it created distrust, confusion and embarrassment is exaggerated and without merit.

With respect to the parents who sought curriculum information, it appears that the superintendent may not have exhibited the same concern as these persons, but the Commissioner does not find evidence of indifference and lack of cooperation. The amount of time the superintendent gave to these parents in itself scotches any such charge.

The next portion of the charge concerning the superintendent's failure to appear at a curriculum meeting appears to be true. There may have been extenuating circumstances but no testimony was presented to rebut the charge and the Commissioner therefore finds this allegation sustained by the evidence.

Coordination between the Chatham Township schools and the Chatham Borough Junior High School appears to have been provided to a normal degree. The art teacher and the French teacher are the witnesses in support

of this charge, alleging that they were discouraged from coordinating their work with the Chatham Borough Junior High School teachers. In view of the attitude of these two staff members, the Commissioner can well understand the superintendent's reluctance to have these staff members represent the school system elsewhere. Coordination between the two districts in other respects and other teachers appears to have been provided for to a normal degree.

The Commissioner finds and determines that the general complaint of inadequate professional leadership which is the subject of Charge #19 is not sustained by the weight of the evidence and it is dismissed.

CHARGE #20

"The Superintendent of Schools has been guilty of misrepresentation, deceit and falsification."

This charge is amplified by a series of 16 sub-charges labeled alphabetically (a) to (p) inclusive. These will be recited and decided individually.

"(a) When directed by the Board to offer a teaching candidate an above guide starting salary, the superintendent encouraged the candidate not to accept the position, telling the candidate he could do better elsewhere. The Superintendent then falsely stated to the Board that the candidate had declined the offer because he could not afford to live in the community. Since the candidate was an Industrial Arts teacher, a specialty in which there is a serious shortage of candidates, the failure to acquire this candidate resulted in terminating the Industrial Arts program for four months."

This charge was dismissed earlier for lack of proof. The record shows that the superintendent negotiated with a teacher candidate; that the salary recommendation of \$5,300 was refused by the Board; that the candidate refused the Board's offer of \$4,800, reporting he had another offer of \$5,000; and that the superintendent commented that if he were the candidate he would not accept the lower salaried employment in Chatham Township. The candidate, called by the Board as its witness, testified and repeated his statement that he was not persuaded or influenced by the Superintendent's comment.

The Commissioner notes again the insinuations embodied in this charge which evaporate in the face of the evidence. The charge states that the superintendent "encouraged the candidate not to accept the position" while the Board's own witness clearly indicated that because of the cost of living in the area and the better offer, he had already decided to go elsewhere. Under the circumstances, the superintendent's comment seems natural and justified. The superintendent is charged with "falsely" reporting to the Board the candidate's reason but the record shows that he reported accurately. Finally, it is insinuated that the loss of this candidate and consequent 4 months' hiatus in the Industrial Arts program was the fault of the superintendent. The only evidence educed indicates that the fault, if any, was the Board's in making an offer of salary too low to attract the candidate.

The Commissioner finds that Charge #20 (a) is not supported by proof.

"(b) On another occasion, the Superintendent, in urging the termina-

tion of employment of a staff member, made false statements to the Board of Education regarding an alleged pattern of absences on the part of this staff member. He also further stated to the staff member that information on this alleged pattern of absences had originated from the principal in another school district in which this staff member's husband was a teacher, whereas, in fact, it was the Superintendent who called the other principal to urge the latter to check the husband's attendance record."

The only part of the superintendent's statement concerning the pattern of absences of a staff member that appears to be false is that he said the principal of another school had called him in respect to the matter where in fact the superintendent had initiated the call. From the testimony it seems clear that in all other respects the superintendent's reasons for recommending that this staff member not be re-employed, including the principal's evaluation, were reported accurately. There remains then only the question of who initiated the telephone call and in the Commissioner's opinion this is inconsequential. The staff member referred to was not called as a witness and therefore that portion of this charge which alleges certain statements to her was not proved.

The Commissioner finds that charge #20(b) is not supported by the evidence and it is therefore dismissed.

"(c) On another occasion, the Superintendent told parents of children who were scheduled for a class trip that he would cancel the trip. When questioned later as to why the children were nevertheless sent on the trip, the Superintendent falsely stated to the parents that the Board of Education had insisted on the class trip."

This charge was dismissed earlier on Motion for lack of proof. The testimony elicited on this charge is confused and contradictory. One Board member at least testified with certainty about the matter, and it was later shown that the event in question occurred several years before he became a Board member. Another member said that the Board *suggested* that the trip continue, that it was too late to change, but did not *insist*. In answer to the question, "But the Board did determine that it was going to have the trip?" she answered, "Yes." A rationale was offered in these words: "To say that the Board insisted that we have the trip puts us in a bad way."

The Commissioner considers this charge trivial. It is illustrative of the exaggeration of inconsequential incidents into written statements appearing to be matters of substance, but shrinking into trivia when examined closely, which characterizes many of the charges herein.

Charge #20(c) is dismissed for lack of proof.

"(d) While the superintendent was assuring members of the Board of Education that workbooks were available and in use by members of the faculty, he specifically directed teachers not to use workbooks and refused their requests that they have workbooks."

The facts underlying this charge, misinterpreted by lay persons, are self-evident to members of the teaching profession. It is clear that the superintendent did not favor indiscriminate use of workbooks, and in this point of view he has strong support. The testimony indicates that workbooks were

available and were used in certain classes and for particular purposes. That he discouraged their wide-spread use generally and by certain teachers was a proper exercise of his supervisory responsibility and, in the Commissioner's opinion, is to be commended rather than condemned. There is no evidence that he "specifically directed" teachers not to use workbooks or that he refused any direct request, as charged. It is unfortunate that the superintendent's sound and laudable approach to this and other questions was not communicated adequately to or was not accepted by all of the staff and the Board of Education.

The Commissioner finds that Charge #20(d) is not supported by the evidence and it is dismissed.

"(e) When a principal wrote a letter of resignation suggesting a lack of cooperation from the administration as his reason for resigning, the Superintendent required the principal to redraft and write a second letter omitting such suggestion."

This charge was withdrawn by counsel for petitioner, with the consent of counsel for the respondent, and it is therefore stricken.

"(f) In submitting candidates for a cafeteria position the Superintendent falsely represented to members of the Board of Education that the Cafeteria manager had no preference for any particular candidate."

It is difficult to understand why this charge is made. The evidence shows that the superintendent asked the cafeteria manager to list the candidates interviewed and to indicate her first and second choices with reasons therefor. She complied and he conveyed her report to the Board, who employed the first choice candidate. The only testimony that the superintendent "falsely represented" to the Board that the cafeteria manager had no preference came from the Board president, who testified that he heard the question asked of the superintendent at a committee meeting but he could not identify the questioner. This testimony merits no weight and certainly vanishes in the light of the written report submitted in evidence.

The Commissioner finds no evidence to support Charge #20(f).

"(g) Following several requests by the Board to submit lists of library books for requisitioning, the Superintendent falsely claimed that the librarian was unable to furnish a list because of the short time available and because of an illness in the family whereas, in fact, the librarian had furnished several such lists to the Superintendent during the preceding six months."

Two lists of books for purchase for a central library were prepared by the librarian, one in December and a second in January, but were not ordered at that time. At the close of the year, when apparently it became evident that funds would be available for this purpose, the superintendent requested a new list to present to the Board for approval that evening. The librarian told him it would be impossible to prepare an order on such short notice. She did, however, manage to do so and left the list with the superintendent's secretary late that afternoon. The superintendent reported to the Board that the librarian was unable to furnish a list on such short notice and gave as a reason "illness in her family."

The testimony does not support the charge that the superintendent "falsely claimed." There was no evidence that the superintendent had received the book list left with his secretary or that he had any other reason to believe that the librarian had been able to do what she had told him earlier that day was impossible. There is every reason to believe that the superintendent reported accurately what he had been told by the librarian. The Commissioner attaches no weight to the fact that there were two lists prepared earlier which he did not produce and present. Such lists could easily have been obsolete, with some of the books already obtained or no longer desired.

The Commissioner finds that Charge #20(g) is not supported by the evidence.

"(h) When asked repeatedly for a transcript of a teacher applicant, the Superintendent falsely alleged inability to obtain such a transcript from the teacher's college."

This is another trivial incident amplified out of all proportion. Asked for a transcript of the college record of a teacher candidate he was recommending, the superintendent said it would be difficult to get. A Board member thereupon made a trip to the college and personally obtained the desired transcript and also learned that it had been sent to the school district and returned to the college some time earlier. The testimony reveals that one of the principals had had the transcript and had returned it to the college when it appeared that the Board would re-employ the incumbent teacher and no vacancy would occur.

None of the Board members who testified on this charge said the superintendent claimed a transcript was unobtainable but rather that he said it would be difficult to get. That he yielded to a desire to have the teacher appointed there and then on his recommendation without delaying until the transcript could be obtained again is understandable. Nor does the fact that he was proved wrong by the Board member's special trip to the college necessarily establish deliberate intent to falsify.

The Commissioner finds that Charge #20(h) is not established by the evidence.

"(i) When an accident occurred to a student on school premises, the Superintendent tried to induce a faculty member to give false information to the insurance adjuster regarding the number of students present at the time of the accident."

The only witness on this charge stated that the superintendent motioned to her to reduce her estimate of the number of children on the playground at the time of an accident when she was reporting the matter to the insurance adjuster. Even though it may be argued that, in the absence of rebuttal by the superintendent, a *prima facie* case has been established on this charge, the Commissioner finds it of little weight and insufficient to support dismissal.

"(j) In an attempt to deceive the people, the Superintendent told members of the faculty to collect old and useless curricula into a folder, to put them on the shelf and let the dust collect on them but to show them to parents should they request information about the school's curriculum."

The evidence in support of this charge is from several teachers who testified that the superintendent gave them a booklet which they were to show to parents who inquired about curriculum but otherwise to let it collect dust. There is no evidence that he told teachers to collect old and useless curricula for this purpose, as the charge states. The record is replete with evidence of the existence of curriculum materials of many kinds so that this charge and the vague and indefinite testimony in support of it seem meaningless.

The Commissioner finds no evidence of "an attempt to deceive the people" as charged in Charge #20(j) and it is dismissed.

"(k) He caused and permitted a teacher to be placed on the teacher's salary guide as possessing a four-year college degree, concealing from the Board the fact that the teacher was a normal school graduate."

The evidence on this charge discloses that the error referred to was made by a former president of the Board in a revision of the salary program prepared by him. There is no evidence that the superintendent concealed the fact that the teacher was not a 4-year college graduate. Nor does the fact of the error and its continuance seem to have had any effect upon the salary paid, as the teacher in question testified she was given two merit increases and her salary "never jibed with any figure on the guide." However that may be, the Commissioner finds no evidence of deliberate concealment by the superintendent and dismisses Charge #20(k).

"(l) The Superintendent instructed a staff member to pad her budget so that more money could be received from the Board of Education."

The Commissioner finds no evidence to support this charge and it is therefore dismissed.

"(m) The Superintendent was deceptive to members of the public by falsely assuring them that a written curriculum existed for the elementary grades."

A great deal of testimony from a variety of witnesses was heard with respect to the presence or absence of a curriculum in the Chatham Township schools. Obviously much of the confusion centered on the meaning of the term. Those who claimed that curriculum was lacking evidently were seeking a grade-by-grade syllabus containing specific prescriptions in terms of content in each subject area for each year. This is, of course, an outmoded concept and a "curriculum" in this sense would not be found in many present-day schools. What would be found, which the evidence revealed to be present in the Chatham Township schools, are teacher guides outlining the scope and sequence in various areas of learning.

Both principals and teachers testified to the existence of curriculum guides and to curriculum development procedures which were carried on under the leadership of the superintendent. A large number of exhibits illustrating the variety of curriculum materials prepared by the faculty was received in evidence, and the Commissioner's examination of these leaves no question that curriculum study and revision was given a proper place in the school program.

The Commissioner finds that the evidence fails to support Charge #20(m).

“(n) The Superintendent misrepresented to the Board and to the public a letter of appreciation from a State Department representative to be a State Department evaluation of the entire school system. This misrepresentation was used in a campaign for election of Board members to create false impressions concerning the quality of education in the school system.”

The charge states that the superintendent “misrepresented to the Board and to the public” a letter from a State Department official as being an evaluation of the school system. This claim is entirely unsupported by the evidence. One teacher gave rather vague and indecisive testimony that “I believe he [the superintendent] said it was an evaluation of the school.” No other testimony supported this allegation. Even so, there is no evidence that he so misrepresented the letter to the Board or to the public. Nor was any evidence adduced that the superintendent had any connection with whatever use it may have been put to in the campaign for election of board members.

The Commissioner dismisses Charge #20(n) on a finding of insufficient evidence.

“(o) When questioned by the Board as to why he had failed to attend a meeting called by a letter sent to all local Superintendents by the County Superintendent, he claimed he had not been receiving his mail during the period this letter was mailed, because of hornets in the mailbox, which caused the postman to cease delivery. At least several weeks prior to this, he had given the same excuse, i. e., ‘hornets in the mailbox,’ to a Board member who raised a question as to why the Superintendent had not forwarded certain information that had been requested by letter. The facts are that, although mail delivery had been suspended because of the hornets, regular delivery had been resumed two weeks prior to the date of the first letter. Also, answers to other letters mailed in the same envelope with the latter letter showed that it had, in fact, been received by the Superintendent.”

Two parts of this charge were dismissed during the proceedings. No evidence was presented to sustain allegations contained in the second and the last sentence above and these portions of the charge are therefore dismissed.

The testimony shows that mail service was discontinued to the superintendent from August 3 to 17 because of hornets in the mailbox. However, the letters from the county superintendent’s office were dated August 28 and September 1. This testimony is unrefuted by the superintendent and the Commissioner finds that the reason given by the superintendent to the Board for his failure to attend the county meeting in question was untrue.

The Commissioner finds that a portion of Charge #20(o) is technically supported by the evidence. He further finds that this charge in itself is insufficient to sustain dismissal proceedings.

“(p) When questioned regarding a gross error made by the local Superintendent in preparing a State Aid Form, which error was respon-

sible for an under-estimate by the State Department of \$20,000 in the State Aid due to Chatham Township and hence an unwarranted increase, of the same amount, in the school funds to be raised by local taxes, the Superintendent attempted to involve the office of the County Superintendent with blame and misquoted an Assistant Commissioner of Education, in the presence of the Board and the public, as alleged justification for the Superintendent's error."

The error is admitted. The truth of this charge is that the superintendent, in order to mitigate the burden of the fault on himself, tried to put some of the blame on the office of the county superintendent and misquoted an assistant commissioner of education in justification.

It should be noted that the error entailed no actual financial loss to the district. Although no testimony was taken in regard to the assistant commissioner's statement, the Commissioner is not surprised at the error, as he is aware that it has occurred from time to time in other districts.

In this charge, as in several others, the Commissioner finds an insinuation of wrong-doing which does not stand up under scrutiny. The superintendent made an error, admitted it, and then attempted to place some of the blame on others. While this is not heroic behavior, it is human when considered in the light of the pressures and tensions to which he was subjected.

The Commissioner finds that Charge #20(p) is insufficient to support the dismissal of the superintendent.

Having considered and made a determination of each of the sub-sections, the Commissioner finds that the general charge is not sustained by the proofs and Charge #20 is therefore dismissed.

CHARGE #21

"The Superintendent has disparaged, maligned and undermined the Board of Education:"

This general charge is amplified by a series of 11 sub-charges lettered (a) to (k) inclusive which will be considered individually.

"(a) When a faculty member advised the Superintendent that a weakness existed in reading, the Superintendent blamed the Board of Education, falsely implying that extra money had been refused for the purpose of improving reading. He further stated that he would not admit a weakness in reading and refused to do anything toward correcting the situation."

In the Commissioner's opinion, a distortion of the evidence is required to reach the conclusion stated in this charge that the Board of Education was disparaged. There is no rule which requires a superintendent to ask the board for everything a teacher suggests. There could be many reasons why he might not wish to present a request for a reading teacher at a particular time, none of which he was called upon to divulge to the teacher. There is also a vast difference between saying a reading teacher might be a good idea and stating that the school was weak in reading. To find that this incident constituted maligning the Board of Education is to say that the Board was incredibly hyper-sensitive.

The Commissioner finds Charge #21(a) to be trivial and the evidence in support of it insubstantial. It is therefore dismissed.

“(b) The Superintendent falsely told a member of the faculty that her salary was not raised because the Board refused to do so.”

Evidence was presented that three teachers were below the appropriate place on the salary guide although the superintendent had assured the Board that all of the staff were at the appropriate step. Two of the teachers further testified that the superintendent had told them the Board would not place them at the proper place on the guide. It appears, however, that the proper adjustment was made by the Board when the matter was brought to its attention by the teachers.

No testimony was offered by the superintendent in defense of this charge. The Commissioner must find, therefore, that the allegations in Charge #21(b) have been established. He does not find, however, that this sub-charge, standing alone, constitutes behavior of such a nature as would warrant dismissal.

“(c) The Superintendent referred to members of the Board of Education as nemeses of the teaching profession. He referred to certain Board members as ‘rotten.’”

One board member and two teachers offered testimony that the superintendent had referred to Board members in the terms of this charge. Others testified as never having heard him use disparaging remarks of this kind.

The superintendent offered no defense to this charge. In his Answer he admits these remarks were made as the result of harassment and extreme provocation.

The Commissioner finds that Charge #21(c) is established. He further finds that it does not, in itself, justify dismissal.

“(d) The Superintendent directed the teachers to cease playing bridge during their lunch hour in the teacher’s room claiming falsely that the Board of Education objected to this practice.”

It is clear that a number of teachers developed the habit of playing bridge during the lunch period and that the superintendent spoke to the faculty about it. Those who testified against him said he directed them to stop, threatening loss of increment if they did not, and putting the onus on the Board of Education. Others reported he raised a question of advisability of continuing to play bridge at lunch in the interest of public relations and indicated each should make his own decision. One teacher stated that he and others had been late for class on a number of occasions as a result of absorption in the game, that the superintendent had called him individually to account for it, and that he had deserved the rebuke. One of the principals said that some teachers became so interested that they played during their “service period” in addition to lunch time.

This appears to be another instance of distortion of an action of the superintendent to create an impression not justified by the facts. The Commissioner concludes from the testimony that the bridge playing, harmless in

itself, became too absorbing for the best interests of the school and that the superintendent took appropriate measures to contain it.

The Commissioner finds that Charge #21(d) is not supported by the facts and it is dismissed.

“(e) The Superintendent, when use of a classroom was deferred until a fire escape could be installed, falsely accused the Board of stalling on the letting of bids and contracts for the fire escape. When the teacher complained to the Superintendent about this problem, the Superintendent encouraged this teacher to write a letter of resignation blaming the Board for her resignation.”

The Commissioner finds no substantial evidence of malignment of the Board of Education in the testimony on this charge. The uncontested facts are that the Board discontinued use of the art room until a fire escape could be installed; that the selection of a fire escape, taking bids, and awarding contracts consumed some months; that the deprivation of this facility, even temporarily, gave the art teacher much unhappiness and that she complained about it; and that the superintendent encouraged her to resign.

When considered in the light of the deterioration of the relationship between the superintendent and the art teacher, the above incident appears normal. It is entirely credible that he would encourage the departure of a teacher, much as he appeared to respect her ability, who had become a source of contention in the staff. Also, when her bias is considered, the Commissioner believes that little weight should be given to the testimony that the superintendent told her the Board was stalling on the installation of the fire escape and, even if true, it hardly constitutes a maligning of the Board of Education.

The Commissioner finds that Charge #21(e) is not established by the evidence and it is dismissed.

“(f) The Superintendent discouraged a teacher from serving on a State educational committee on the false excuse that the Board would resent the hiring of a substitute to cover the day during which the teacher would have to be in Trenton. The Superintendent further stated that the Board had no respect for anything with education in the title and would not consider this a worthy reason for hiring a substitute.”

The Commissioner finds that a *prima facie* case has been established by the evidence on this charge and, in the absence of refutation by the superintendent, he determines that this allegation is proven true. He does not find, however, that this sub-charge is sufficient to warrant dismissal.

“(g) In the preparation of her budget, a teacher was informed by the Superintendent that the Board of Education had a negative attitude regarding her budget and thus required her to submit lengthy reports giving reasons for ordering specific equipment.”

Testimony on this issue was given by four teachers who expressed frustration that certain equipment was not provided although they had, at the superintendent's suggestion, attempted to justify its purchase by repeated written requests and estimates of cost. Other teachers testified to the existence of ample instructional materials and supplies and reported no difficulties in obtaining needed equipment.

Some of the particular items mentioned in the testimony as being asked for and not forthcoming were soundproofing of a classroom, a large wash sink, a portable sewing machine, tapes for a tape recorder and a bass clarinet.

The Commissioner finds little substance here to support a charge of disparaging the Board of Education. The superintendent of schools must exercise judgment and discretion in the application of the budget, and the recommendations he makes to the Board for expenditures. The Commissioner fails to see how the Board was maligned by the superintendent's requiring specific and detailed information from teachers in order to support their requests.

The Commissioner dismisses Charge #21(g) for lack of evidence.

“(h) A teacher was discouraged by the Superintendent from going to a faculty dinner sponsored by the Board, falsely implying that the Board did not wish to present this teacher with a service anniversary gift.”

The teacher referred to in this charge was not called as a witness and no testimony was offered in support of it. The Commissioner finds, therefore, that Charge #21(h) falls from lack of evidence and it is dismissed.

“(i) The Superintendent, on many occasions, blamed the Board of Education as being responsible for everything that was wrong telling the teachers the Board was out to put them on the spot. This practice was directed both to the entire Board and to its individual members.”

This is a very general charge. The testimony adduced in support of it was given by four teachers who were obviously opposed to the superintendent, and the testimony itself was vague and indefinite. Testimony by other members of the faculty contradicted these four.

The Commissioner finds that Charge #21(i) is not sustained by the weight of the evidence and it is dismissed.

“(j) The Superintendent assigned a staff member to after-hour duty covering intra-mural events, stating falsely that the Board had complained and required her to stay late.”

The staff member referred to in this charge was not called as a witness and there is therefore no evidence to support it.

The Commissioner finds that Charge #21(j) falls for lack of evidence.

“(k) The Superintendent falsely told his secretary that the Board was going to shorten her vacation. When the Secretary submitted a letter of resignation to the Board, the Superintendent insisted that she include a statement calculated to embarrass the Board of Education. The Superintendent further misrepresented to the Board of Education the Secretary's reasons for resigning.”

Although there is testimony on this allegation, it falls short of establishing the evil implied by the language of the charge. It appears that the Board did discuss reducing the vacation time of the secretarial staff and that the superintendent communicated this possible change to his secretary. After further discussion and on the superintendent's recommendation the Board

took no action and the vacation schedule remained unchanged. The secretary, however, had decided to resign and did so. The superintendent asked her to include loss of vacation time as a reason for leaving in her letter of resignation. There is no evidence that he did so in order to embarrass the Board. It seems to the Commissioner that a contrary conclusion can be reached—that the superintendent wanted to use the letter to convince the Board that a shored-up vacation policy for secretaries should not be adopted. In any event, the statement that this was insisted upon for the purpose of embarrassing the Board is a conclusion not justified by the testimony.

The Commissioner finds that Charge #21(k) is not supported by evidence and it is dismissed.

Of general Charge #21, sub-charges (b), (c), and (f) have been determined to be established by the proofs. However, in the circumstances which form the background of this controversy, the Commissioner, while not condoning or excusing the actions complained of, does not deem them sufficient to establish just cause for dismissal. Charge #21 is therefore dismissed.

CHARGE #22

“The Superintendent disparaged members of the community.”

This general charge is followed by a series of five sub-charges lettered (a) to (e) as follows:

“(a) He openly told teachers that certain members of the community were against everybody including the Superintendent and the faculty.”

While it is argued that this charge can be inferred from the testimony, there is no proof of this specific allegation in the record.

The Commissioner dismisses Charge #22 (a) for lack of proof.

“(b) The Superintendent urged the teachers to stick with him against the community.”

The Commissioner finds no testimony in the record in support of this charge and it is therefore dismissed.

“(c) The Superintendent submitted lists of mothers who were not to be appointed class mothers.”

The Commissioner finds no evidence that there were such lists as the charge alleges. Here again, petitioner's case rests on the testimony of the art teacher and the French teacher, both of whom said they had heard of these lists but admitted they had never seen one. Nor could any other witness testify to having seen such a list, and all the principals denied their existence.

The Commissioner finds that Charge #22(c) is not supported by the evidence.

“(d) The Superintendent implied that certain mothers of the community were undesirable parents and were not friends of the school. These lists were submitted by the Superintendent at teachers' committee meetings and faculty meetings.”

As stated in #22(c) above, there is no evidence of any lists such as charged. There remains then only the allegation that the superintendent "implied" a characterization of certain mothers in the community, which the Commissioner notes may have been true. The Commissioner fails to find any substance in such a vague allegation and Charge #22(d) is therefore dismissed.

"(e) He also made untruthful statements about certain parents in the community to the faculty for the apparent purpose of creating distrust for such parents in the eyes of the faculty."

This sub-charge is also vague and indefinite and contains a conclusion that the alleged statements were made "for the apparent purpose of creating distrust * * *." The Commissioner finds insufficient evidence to support Charge #22(e) and it is dismissed.

Most of the testimony on this general charge was heard from five teachers whose attitude toward the superintendent was unfavorable. The gist of their complaint is that the superintendent characterized certain parents as enemies of the school, that the staff should be wary of particular parents who were troublemakers, and that "class mothers" should be chosen from those who were friends of the School. Other members of the staff, in their testimony, disagreed with these allegations. It seems to the Commissioner that the harshest judgment could hardly find that the superintendent had forfeited his position as a result of injudicious statements such as those reported, even if they are proved true, which the Commissioner does not find.

The Commissioner finds that Charge #22 is not sustained by the evidence and it is dismissed.

CHARGE #23

"The Superintendent has abused, maligned and mistreated personnel in the school system."

This general charge is also illustrated by a series of 11 sub-charges lettered (a) to (k) inclusive which are considered separately as follows:

"(a) To certain faculty members he made oppressive demands of performance. He also made false implications as to one faculty member furnishing certain information directly to a member of the Board of Education, at the same time making derogatory remarks concerning certain members of the Board of Education. He subjected this faculty member to an unprofessional grilling implying leaks of information to members of the Board of Education, retaining the faculty member in a principal's office for nearly an hour while said faculty member was subjected to an undue grilling regarding her relationship with a member of the Board of Education. During this grilling the faculty member's class was left unattended. Thereafter, the Superintendent, in an unprofessional and unbecoming manner and in the presence of other faculty members, left the principal's office saying in a loud voice 'they are plotting against me, they are plotting against me.'"

The weight of the evidence does not support the charge of oppressive demands for performance upon the faculty. The testimony shows that the

superintendent set high standards for the staff, but there is no indication that his requirements were unreasonable.

The music teacher testified that she was called to a conference behind closed doors by the superintendent; that he accused her of discussing school matters with a Board member; that he "went into a tirade" and she became upset and cried; and that he left saying "they are plotting against me." The cafeteria manager also testified on this charge.

On the other side, the principal of the school testified that he was present during the discussion, that the teacher became upset but that at no time was the superintendent's behavior rude, loud or unprofessional.

After weighing the testimony carefully, the Commissioner concludes that the evidence is not sufficient to support Charge #23(a) and it is dismissed.

"(b) The Superintendent of Schools exerted undue pressure, harassment, and annoyance against certain members of the faculty, sometimes deliberately in the presence of other members of the faculty, on occasions and at times when the oppressed members of the faculty were suffering undue stress and strain, due to illness in the family."

The Commissioner's study of the testimony convinces him that in this and a number of other charges, ordinary, everyday incidents which occur in any school, or in any other institution where supervisor-employee relationships are involved, have been misinterpreted or distorted so as to give a connotation not present or to insinuate a non-existent improper motive or action on the part of the superintendent. The testimony on this charge is conflicting; some teachers who opposed him labeled his actions as harassment, pressure, annoyance, while others as strongly denied that this was so.

The Commissioner concludes that the weight of the testimony goes to the superintendent. He finds insufficient evidence to support Charge #23(b) and it is dismissed.

"(c) The Superintendent of Schools gave a false and unprofessional bad reference, concerning a former faculty member, who was a candidate for another position, to the prospective employer of such former faculty member."

The Commissioner must point out that the charge here is that the superintendent "gave a false and unprofessional bad reference" to a prospective employer of a former teacher. The evidence is clear that he gave no reference. In response to an inquiry, he invited the employer to come to his office where he permitted the examination of the former faculty member's file about which he made no comment, and, as a result, no job offer was made to the ex-teacher. The superintendent, in fact, gave no reference.

It should also be noted that the teacher in question is at the center of a number of charges herein; that she had not been recommended for re-employment by her principal or the superintendent; and that the Board of Education had not renewed her contract.

The Commissioner finds that Charge #23(c) is contrary to the evidence and it is therefore dismissed.

“(d) Although the Superintendent of Schools specifically directed certain faculty members not to have a Christmas program, he later criticized the same faculty members for the absence of such a program.”

Very little testimony was heard on this charge. The superintendent's secretary and the music teacher testified to little more than the language of the charge itself. In the absence of rebuttal by the superintendent, and even though the Commissioner suspects that it is the kind of misunderstanding which has its roots in inadequate communication, he must assume that it is true. He cannot find, however, that it is of such a serious nature that it would warrant dismissal.

The Commissioner finds that Charge #23(d) has been established but is insufficient to justify dismissal.

“(e) The Superintendent of Schools unprofessionally forwarded unfounded critical notes to a principal's secretary and, without basis, criticized her orally and falsely for alleged misconduct. The Superintendent subjected this secretary to a severe personal grilling and, in effect, ordered her resignation.”

Counsel for petitioner stated that his witness for this charge was unavailable. No evidence being offered in support of the charge, it should therefore be dismissed.

The Commissioner determines that Charge #23(e) is dismissed for lack of evidence.

“(f) The Superintendent made false accusations that the husband of a faculty member was carrying reports from the faculty member to a Board member.”

This charge represents another unfortunate remark of the superintendent. It is not refuted by any testimony by respondent and it must therefore be held to be true.

The Commissioner finds that Charge #23(f) is supported by evidence but holds that it is not of such a nature as to warrant dismissal.

“(g) On one occasion when a minor error in calculation was made on a final register by a teacher, the Superintendent informed the entire faculty, and all were held on the last day of school until the minor error was corrected. This teacher was told in the presence of the entire faculty that, if she were this inefficient, all of her records must be wrong. All of the records were taken from the file and checked in her presence, until the teacher broke into tears. This error was, in fact, so slight that it had no significant effect on the final total of the register.”

The weight of the testimony on this charge is clearly and convincingly against its truth. The Commissioner found no better example of distortion herein than in this incident. In addition, even were it true as stated, the Commissioner points out that an error in a school register is never *minor* or *slight*; that it is common practice not to dismiss teachers for the summer until all records are in order; and that many superintendents have learned such wisdom the hard way.

The testimony, however, reveals this charge to be utterly false. It appears that the superintendent informed the two teachers responsible for the error and not the faculty as a whole; that the error was quickly corrected and the faculty dismissed; that the teachers were in no way embarrassed or discomfited; and that the charge that all of this teacher's records "were taken from the file and checked in her presence, until [she] broke into tears" is entirely fictitious.

The Commissioner finds that the superintendent's actions as revealed by the evidence in respect to Charge #23(g) were entirely proper and appropriate and he dismisses this charge on the grounds that the evidence fails to support any cause for action against the Superintendent.

"(h) The Superintendent of Schools distributed contracts on an individual basis, and teachers who were considered to be out of harmony with his practices were required to wait unduly prolonged periods of time before distribution was made to them. This practice created tension, annoyance, and personal aggravation to the teachers and kept them doubtful concerning their future, until, in some cases, the last day of school, while others received their contracts at much earlier dates, although the Board of Education approved all contracts, generally at one time."

This is a charge of little significance which is not supported by the weight of the evidence. Some teachers alleged that the distribution of contracts reflected a teacher's status with the superintendent. This was denied by other teachers and the principals, and the Commissioner finds their testimony convincing.

The Commissioner finds that Charge #23(h) is not proved by the evidence and it is dismissed.

"(i) The Superintendent of Schools exerted undue harassment against a member of the faculty, in deliberately interviewing other prospective candidates for his position, during the year when said member of the faculty was a candidate for tenure, and deliberately informed this member of the faculty that these people were being interviewed for his job. This created doubt and confusion in the mind of the faculty member, concerning whether or not he would acquire his tenure."

This charge states that the superintendent "deliberately" interviewed candidates and "deliberately" informed a teacher that the purpose was his replacement. The teacher's testimony does not support this conclusion.

The physical education teacher had expressed concern about his work-load and his health. It is as reasonable to assume that under such circumstances the superintendent was preparing for a possible resignation as that he was harassing the teacher. Regardless of that, all that the testimony reveals is that the superintendent showed the teacher applications from two candidates and asked if he knew either of them. To find that this "exerted undue harassment" upon and "created doubt and confusion" in this teacher stretches credibility.

The Commissioner finds that Charge #23(i) is not sustained by the testimony and it is dismissed.

“(j) The Superintendent of Schools exerted undue annoyance and harassment against a teacher by sending her unkind notes, deliberately withholding her contract, and exerting undue pressures upon her.”

“(k) The Superintendent of Schools on many occasions made disparaging and demoralizing remarks about other teachers, and sent them demoralizing letters, and subjected them to open harassment and abuse. One teacher, because of arriving at school late due to a snow storm, after traveling more than two hours, was charged by the Superintendent with having no interest in teaching and no regard for the children, together with other accusations.”

These two charges overlap to some extent and will be considered together. The evidence in support was given by the secretary to the superintendent and the home economics teacher and is not extensive or conclusive.

The “unkind note” referred to is in evidence. The Commissioner does not find it unkind. To so characterize it indicates over-sensitivity. It appears to be no more than a business-like notification to a teacher of the need for punctuality. One wonders, if the superintendent had not written such a letter, whether he would have been charged with failure to see that staff members were at their appointed places on time.

Withholding contracts has been dealt with under Charge #23(h) and need not be reconsidered here.

Exerting “undue annoyance and harassment * * * and * * * pressures” is a conclusion not supported by the facts, in the Commissioner’s opinion.

The superintendent’s secretary was the only witness to charge that he was “known for nasty notes he put in teachers’ boxes.” The Commissioner is inclined to give little weight to this testimony, unsupported as it is by other evidence. In the light of statements by this witness on other charges which were effectively refuted, her credibility is accordingly diminished.

The Commissioner finds that Charges #23(j) and (k) are concerned with trivial matters which have been exaggerated to appear of consequence. He dismisses both of these charges as being unproved by the evidence.

After considering all of the allegations of the sub-charges, the Commissioner finds that general charge #23 is not supported by evidence and it is therefore dismissed.

CHARGE #24

“The Superintendent permitted the accumulation of large inventories of supplies. When questioned by the Board as to the extent of these inventories he abetted and caused to be submitted to the Board an inventory grossly less than the true inventory so as to deceive the Board of Education and the public. Despite the fact that cartons of supplies remained unopened for three, four and five years, he continued to recommend the purchase of additional similar supplies.”

As this complaint is stated it must be considered one of unbecoming conduct rather than of inefficiency. The thrust of the charge is that the superintendent “abetted and caused to be submitted * * * an inventory * * * so as to *deceive* the Board of Education and the public.”

The testimony shows that at the superintendent's direction a principal prepared an inventory and that the superintendent of buildings and grounds was also directed by a Board member to make an independent count. A comparison of the two shows discrepancies particularly in the number of specific items on hand. From the testimony it is reasonable to assume that the buildings and grounds superintendent's inventory was more meticulous and accurate, but there is no evidence of deliberate falsification or deception by the principal or the superintendent. The superintendent's involvement consisted only of directing the principal to prepare the inventory, accepting his count and submitting it to the Board.

Petitioner's counsel argues that as superintendent of schools, respondent was responsible for the accuracy of the inventory. While this is theoretically true, it can hardly be contended that he should have checked the principal's report by recounting the items himself. To accept the principal's statement, which he had no reason to question, and submit it to the Board as his own was certainly a normal course to follow. Even granting *arguendo* that the superintendent was responsible, there is still no support for a charge of deception.

While the testimony might provide a basis for a complaint of inefficiency, the charge made here is one of improper conduct, and the Commissioner finds this has not been established.

Charge #24 is dismissed on the grounds of insufficient evidence.

CHARGE #25

"He further permitted the accumulation of a large quantity of classroom furniture, much of which was in usable condition. When it appeared that the accumulation of this furniture would come to light, the Superintendent without any authority from the Board, directed a staff member to dismantle it so as to convey the impression that it was junk. Some of this furniture had, in fact, only been used one year. On another occasion, he further directed a staff member, without authority from the Board, to destroy some of this furniture, stating to the staff member that its undue accumulation might some day embarrass him."

From the testimony heard on this complaint it appears that the superintendent did not favor the kind of classroom furniture which connects the pupil's desk and seat in a single unit but preferred separate chairs and desks, and that this judgment was based on educational values which he held. It further appears that he attempted to replace the disfavored units as rapidly as possible and that displaced furniture was placed in storage. The testimony is not exact as to how much unused but usable furniture was on hand, but the largest estimate made was "up to several hundred pieces." It also appears that the superintendent of buildings and grounds was directed by the superintendent to dismantle some of the furniture.

The Commissioner cannot find herein a substantial charge against the Superintendent. The Board was under no coercion to order the purchase of new furniture if it did not wish to accept the superintendent's recommendation to replace a particular kind he found less desirable. There is no substantial evidence of intent to deceive the Board. The furniture was not

destroyed or disposed of, and according to the testimony the Board had an inventory of it.

The Commissioner sees no reason why the Board could not have refused to buy new furniture and ordered the use of the units in storage if it chose.

The existence of stored, no longer desired, but usable furniture could be found in many school systems, to the Commissioner's knowledge. Classroom furniture, sturdily made as it is, is seldom kept in service until it is worn out and no longer fit for use. It is normally retired because of obsolescence and replaced by more modern and improved equipment. It is not unusual to see the displaced units stored for use in emergencies, sudden enrollment increases, and similar reasons, plus the fact that there is no market for such discarded furniture and school authorities are reluctant to destroy or dispose of it cheaply. The Commissioner suspects that some such situation underlies the conditions which are the subject of this charge.

Whether this be true or not, the Commissioner finds no basis in the charge for dismissal of a superintendent and Charge #25 is therefore dismissed.

CHARGE #26

"When the Board directed the Secretary to forward to each staff member a statement of the staff member's accumulated leave, as determined by the Superintendent's records, for confirmation and return by the staff member to the Board Secretary, the Superintendent caused the confirmed statements to be returned to his office and has failed to turn them over to the Board Secretary."

The Board secretary sent a notice to each teacher of his accumulated sick leave, requesting acknowledgment and verification by signature and the return of one copy through the secretary in each school office to the secretary of the Board. The Superintendent, for reasons unknown in the absence of his testimony, gave directions that the signed notices be returned to him, and after intercepting them failed to turn them over to the secretary of the Board.

The Commissioner notes that this event occurred in the fall while the investigation of the superintendent's office was being conducted and immediately prior to his suspension. It is represented by counsel for the superintendent that these collected notices were turned over to him "after the Board refused to allow [the superintendent] a transition period to put these type of things in order * * *."

The Commissioner finds that the evidence supports Charge #26. He does not find the behavior charged sufficient to warrant dismissal.

CHARGE #27

"The Superintendent exhibited reckless indifference to matters pertaining to the welfare of school children concerning current Civil Defense-Disaster Control directives of the State Department of Defense and a related training program which was developed for Morris County, and in fully developing and implementing necessary measures to adequately provide for the safety of Township school children in the event

of a natural or other disaster. Although having knowledge of a meeting on this subject called by the County Superintendent for September 12, 1961, which all local Superintendents or their representatives were urged to attend, neither the Superintendent nor any other member of the Chatham Township School District were present at this meeting. It was only as a result of prodding and a directive by the Board that the Superintendent sent representatives to a make-up meeting for the one he had failed to attend or be represented at on September 12, and took steps to develop an up-to-date plan for the safeguarding of Township school children in line with procedures specified by State and County Civil Defense-Disaster Control authorities."

The Commissioner finds no evidence of "reckless indifference" to Civil Defense-Disaster Control directives on the part of the superintendent. One Board member testified to his concern over the lack of a detailed pupil dispersal plan. Several teachers and principals, however, stated that there had been meetings, directives and bulletins on the subject and that the staff was adequately prepared for the protection of pupils in the event of disaster. Also received in evidence were a number of exhibits illustrative of materials which had been developed with respect to this matter. The Commissioner finds these materials to be consistent with State and Federal recommendations and finds no "reckless indifference" or neglect of duty as charged.

The Commissioner finds that Charge #27 is not supported by the evidence and it is dismissed.

CHARGE #28

"In July, 1961, the Superintendent prepared, signed and forwarded to the Board Secretary an 'Application for State Financial Aid' which contained errors of such magnitude in respect to average daily enrollment of pupils, that the state financial aid being furnished to the Chatham Township School District would have been substantially reduced if these errors had not been detected. At the request of the Board Secretary, the Superintendent was required to change the average daily enrollment figures shown on this application to reflect a correct figure of 779.3 instead of the erroneous figure of 389.7 for the 824 pupils in grades Kindergarten through 6, and to reflect a correct figure of 302.4 instead of an erroneous figure of 415.3 for the 306 pupils in grades 10 through 12. The aforementioned application, as originally prepared and signed by the Superintendent, also showed that there were 111 pupils in the 9th grade and that the average daily enrollment for these 111 pupils was 112.8. These errors are illustrative of the gross carelessness and indifference which has been displayed by the Superintendent in preparing reports materially affecting the cost of operating the Chatham Township Schools."

It is apparent and admitted that mistakes were made in a number of statistical and financial reports which were prepared in the superintendent's office. The question naturally arises whether the errors were the fault of the superintendent or of his clerical staff, as it is unreasonable to assume that this kind of report would be prepared by the superintendent personally. The Commissioner also notes that the Superintendent was evidently also being required to prepare data and reports which normally are the work of the

secretary of the Board. Counsel for respondent points out that the errors were corrected and no harm resulted to the district and that at best this can only be a charge of inefficiency on which the superintendent had no notice as required by statute.

The Commissioner finds that certain errors were made in the superintendent's office which were corrected by the Board secretary and her staff. He does not find Charge #28 to be one warranting dismissal.

* * * *

The Commissioner has found no single charge herein of sufficiently grave a nature as to justify dismissal of the superintendent. The question to be answered then is whether all of the proven charges, considered together, comprise a pattern of behavior which constitutes inefficiency, incapacity, conduct unbecoming a superintendent, or other just cause warranting dismissal. As the New Jersey Supreme Court said in *Redcay v. State Board of Education*, 130 N. J. L. 369, 371 (1943):

“* * * 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.”

There can be no doubt that the charges herein, judging from their number and kind, are intended to have a cumulative effect demonstrating the superintendent's unfitness for his position. Many of the charges are based on relatively small incidents which in the normal day-to-day operation of a school system are ignored or forgotten. In this case they have been seized upon, magnified and distorted so as to give meaning and intent not present in the actual occurrence. The complainants in this case, who must have realized that many of the specific charges border on the trivial, evidently hoped that out of a broadside of complaints such as the extreme number herein, enough would strike home to result in the elimination of the superintendent or that the superintendent's case would collapse under the sheer weight of the number of complaints piled on him.

When examined closely, the evidence in most instances does not support the charge as stated. However, even when the charge was not proved, an insinuation remained apparently calculated to form cumulatively the impression of a crude, rude, professionally inept superintendent prone to mean, intemperate, and boastful remarks and actions which make him unfit for the position he holds. To a high degree, this superintendent appears to have been charged with what he said rather than what he did.

It is clear that the superintendent has occasionally said and done things which were impulsive, injudicious and unwise. It is also true that in some instances he has been lacking in judgment and finesse, particularly with respect to those who opposed him. But these shortcomings, considered in the light of the situation which developed in this school system, fall far short of good cause for dismissal, in the Commissioner's judgment.

During the long course of these hearings, almost every aspect of the Chatham Township school system was subjected to minute scrutiny, and the

roots of the difficulty and the setting in which it grew became increasingly clear.

During most of his tenure, the superintendent and his staff and the Board of Education worked cooperatively and harmoniously to produce a forward-looking school system well suited to the needs of the children it served, and one in which the community could take pride and satisfaction. The administration and the capable and professional staff developed a mutual esteem and respect. This fortunate and commendable state continued until the late 1950's when a rift developed which widened and deepened, culminating in the certification of charges herein. These charges placed the blame for whatever low morale, tensions, bickering, educational deficiencies and general deterioration had developed upon the superintendent and asked for his dismissal.

After hearing all of the witnesses over the many days of testimony and examining the documents and materials submitted as exhibits, the Commissioner cannot agree with this position. While he cannot condone or uphold some of the superintendent's remarks and actions, he cannot find that they exhibit a pattern of behavior which demonstrates unfitness to be a superintendent or just cause for dismissal.

The Commissioner can reach no other conclusion than that much of the responsibility for the current unhappy state of affairs lies with the Board of Education as it became constituted in 1958 and succeeding years. The testimony reveals clearly that some Board members misguidedly exceeded their function as policy determiners and attempted to assume administrative responsibilities. Interference by Board members in the operation of the schools, failure of the Board to establish clear lines of authority and responsibility, and finally deliberate harassment of the superintendent by some Board members in an attempt to force his resignation are clearly established by the testimony and in the Commissioner's judgment represent the major source of the system's difficulties.

There could be no better illustration of this than the Board's readiness to by-pass the school administration to consult with disgruntled staff members either past or present. Inevitably the Board's course of action produced a division of the faculty, and sides were taken for or against the administration. Leading the opposition were the art teacher, whose competency is not questioned, and the French teacher, who was not re-employed. The professional attitude and the role of both of these teachers in these charges is deplorable and inexcusable in the opinion of the Commissioner. Equally inexcusable is the fact that the Board listened to these employees and gave credence to their charges, many of which reveal their professional immaturity and lack of understanding of school administrative practices.

The Commissioner was impressed by those faculty members who testified in behalf of the superintendent. He notes that a number of them have left the Chatham Township school system, preferring to work in a less contentious milieu. The loss of these able teachers and administrators to the Chatham Township schools is a regrettable concomitant of this controversy.

Finally, the Commissioner would point out the striking similarity between this matter and the case of *Rein v. Board of Education of Riverside*, 1938 S. L. D. 302 (1932); affirmed State Board of Education, 306, affirmed N. J.

Supreme Court without written opinion. The subject-matter of that case on appeal to the Commissioner was the dismissal of a supervising principal on charges, as is also true here. In reinstating the administrator the Commissioner said, at page 305:

“The allegations made * * * indicate that he searched for grounds of complaint rather than presenting charges upon outstanding situations which would naturally provoke them.

* * * * *

“Very insignificant circumstances about the certification of teachers are set forth to indicate illegal procedures * * *.

“Most of the charges and the evidence purporting to substantiate them are too trivial to receive individual consideration. If incidental acts occurring in school administration and supervision are permitted to be exaggerated so as to be considered legitimate grounds for dismissal, then the tenure law gives no protection to teachers and fails to meet the purpose for which it was enacted by the Legislature.”

The State Board of Education in its affirmance stated, at page 308:

“* * * if supervising principals and principals are to be encouraged in efforts to promote efficiency and to maintain discipline charges made by and evidence submitted against them by former subordinates who may think they have a grievance must be examined with care. Perhaps there is not an efficient supervising principal or principal in this or any State who at some time has not had to prod a subordinate and the fact that all have some one or more who are or were under them and who have a fancied grievance may explain why the State Teachers' Association had eminent counsel appear before us to plead the cause * * *.”

The Commissioner finds and determines that the weight of the evidence does not support the charges or demonstrate unfitness of John M. Nies to continue in his tenure of office as Superintendent of Schools of the Chatham Township School District, and the Board of Education of that school district is hereby directed to reinstate John M. Nies to his position as superintendent with payment of any salary which has been withheld during the period of his suspension.

COMMISSIONER OF EDUCATION.

October 11, 1963.

XXXVII.

SUPERINTENDENT MAY SUSPEND TENURE TEACHER PRIOR
TO FILING FORMAL CHARGES

FRANK C. MARMO,

Petitioner,

v.

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

Respondent.

For the Petitioner, Frank C. Marmo, *Pro Se*

For the Respondent, Jacob Fox, Esq.

ON MOTION TO DISMISS

DECISION OF THE COMMISSIONER OF EDUCATION

On April 25, 1963, the Board of Education adopted and certified to the Commissioner of Education, pursuant to R. S. 18:3-25, charges against Frank C. Marmo, a teacher under tenure in the Newark school system. At the same time, under the authority given by R. S. 18:3-28, the Board suspended Mr. Marmo without pay. On May 10, 1963, Mr. Marmo petitioned the Commissioner to order the Board of Education to reinstate him as of March 15, 1963, the date of his original suspension by respondent's Superintendent of Schools, preliminary to the filing of charges against him. Respondent Board of Education has moved to dismiss Mr. Marmo's petition of appeal.

Hearing of the charges under the Tenure Employees Hearing Act (R. S. 18:3-23 *et seq.*) was begun on June 12, 1963, before the Assistant Commissioner in charge of Controversies and Disputes, in Trenton, and continued to a later date. Thereupon the Assistant Commissioner heard oral argument on respondent's Motion to Dismiss, and directed that since the charges certified against Mr. Marmo are so closely intertwined with his countercharges, the tenure charges will be consolidated with the petition against the Board for the purposes of future hearings.

In this Order, the Commissioner will deal only with the Motion to Dismiss, but by reference will incorporate the facts, which are not disputed, that charges have been certified and Mr. Marmo has been suspended without pay by the Board of Education, both on April 25, 1963.

Petitioner Marmo asserts that his suspension on March 15 by the Superintendent of Schools was illegal, in that: (1) he was not afforded the supervisory classroom visits and conferences required by respondent Board's rules; and (2) that the Superintendent failed to comply with a rule or regulation of the Board that the Superintendent,

“* * * upon suspending any member and in advance of the filing of charges and specifications, shall inform the accused and the Board of Education of the character of the charges to be met. Such information

shall not prevent the including in the trial of additional charges and specifications, provided the accused is informed thereof."

It is stipulated that the Superintendent filed with the Board of Education and served upon petitioner on March 25 a statement of his charges against petitioner, which were, with minor changes, the same charges certified by the Board a month later. It is petitioner's claim, however, that the word "upon" in respondent's regulation, *supra*, must be interpreted as meaning "at the time of," and that the ten-day interval constituted a delay sufficient to be in violation of the regulation.

Respondent, for the purposes of its Motion, assumes the existence of the regulations on which petitioner bases his complaint, but contends that such regulations must necessarily be invalid, since they limit a statutory right of the Superintendent as expressed in *R. S. 18:6-42*, which reads as follows:

"The superintendent of schools may, with the approval of the president of the board, suspend any assistant superintendent, principal, or teacher, and shall report such suspension to the board forthwith. The board, by a majority vote of all of its members, shall take such action for the restoration or removal of such assistant superintendent, principal, or teacher as it shall deem proper, subject to the provisions of sections 18:13-16 to 18:13-18 of this Title."

The Commissioner has previously held that a board of education cannot, by its own rule, limit powers conferred by statute. *Mastrangelo v. Board of Education of Palisades Park*, decided November 9, 1961. Nor can it by its own rule or action usurp a statutory power granted to its superintendent. *Jeckel v. Board of Education of Chatham Township, et al.*, decided July 11, 1962. See also *Skladzien v. Board of Education of Bayonne*, 1938 S. L. D. 120 (1933); affirmed State Board of Education, 123 (1933); affirmed 12 Misc. 602 (*Sup. Ct.* 1934); 115 N. J. L. 203 (*E. & A.* 1935), wherein the State Board said, at page 125:

"Where an administrative board appoints an officer by authority of a statute, rules of such board limiting and restricting such power are invalid, if they are inconsistent with the statute."

In the instant case, a rule of the Board of Education which limits the authority of the Superintendent beyond the limits imposed by the statute itself, *i. e.*, that the suspension have the approval of the president of the board, and be reported forthwith to the board, is clearly illegal and therefore invalid.

But even assuming, *arguendo*, the validity of the rule, the Commissioner agrees with respondent that the word "upon" cannot be so narrowly construed as petitioner would have it. The list of charges served upon petitioner on March 25, which subsequently became, with only minor changes, the charges certified by the Board under the Tenure Employees Hearing Act, contained some 35 items. In the light of the extensiveness of the charges brought against petitioner, the 10-day period required for their preparation cannot be regarded as excessive. Moreover, in view of the procedures required under the Tenure Employees Hearing Act, involving a determination and certification by the Board, and requiring service of the charges, as

certified, upon petitioner, the Commissioner can find no prejudice to petitioner's rights resulting from the 10-day interval between the suspension and the serving of charges under respondent's rule.

Having so found, the Commissioner concludes that there is no claim presented in the petition upon which relief can be granted. It is clear to the Commissioner that if the charges certified by the Board against petitioner are sustained in the hearings yet to be completed, and petitioner is dismissed, such dismissal will date from the original suspension on March 15, 1963; but if the charges against petitioner are not sustained as warranting dismissal, then his reinstatement would be ordered as of March 15, 1963.

As to petitioner's contention that the procedures followed by the Board in certifying charges against him were faulty in that he was not permitted to testify, introduce witnesses in his behalf, or cross-examine witnesses heard by the Board, the Commissioner finds that this contention has no place here, but may properly be raised and argued by Mr. Marmo, as a defense in the hearings to be completed under the Tenure Employees Hearing Act.

The Motion of respondent is granted, and the petition is accordingly dismissed, without prejudice to any rights of petitioner under the Tenure Employees Hearing Act.

COMMISSIONER OF EDUCATION.

October 24, 1963.

XXXVIII.

JANITOR MAY BE DISMISSED FOR MISCONDUCT INTERFERING WITH PERFORMANCE OF DUTIES

IN THE MATTER OF THE TENURE HEARING OF JOSEPH McDONALD,
CITY OF CAMDEN, CAMDEN COUNTY

For the Board, Leonard A. Spector, Esq.

For Joseph McDonald, *Pro Se*

DECISION OF THE COMMISSIONER OF EDUCATION

Joseph McDonald, a janitor under tenure in the Camden City School system, has been suspended from his duties and is charged with improper conduct warranting dismissal. The charges, signed by Anthony F. Gonski, Business Manager at the Camden City Schools, were certified for hearing before the Commissioner of Education by resolution of the Camden City Board of Education at its meeting on June 25, 1963, and were received by the Commissioner on July 2, 1963. A hearing of the charges was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes at the office of the Camden County Superintendent of Schools on August 27, 1963.

Respondent, who has been employed as janitor of the Lincoln School since 1948, is charged with reporting to work under the influence of alcohol and unable to perform his duties. Two specific instances are recited, the first on June 12 when he was discovered in the late forenoon asleep on a cot in

the furnace room after he failed to respond to buzzer signals from the teacher-in-charge during the morning. The second occurred on June 14 when he arrived several hours late, asked for and received his paycheck and left immediately, refusing in rude language to close and lock the school, which necessitated the sending of a relief man from maintenance headquarters. Both instances are admitted by respondent.

The testimony reveals that these incidents, while possibly more flagrant, were not the first time this problem had arisen. The principal asserts and respondent admits that his "drinking problem" had been the subject of discussion on a number of occasions over the years. Although respondent advances other reasons for his inability to remain awake on the job on June 12, the Commissioner does not find this testimony credible.

A school janitor occupies a position of trust necessitating high standards of dependability and morality. His function goes beyond opening and closing the building and keeping it clean. The safety and welfare of the children may depend on him and the proper discharge of his duties. Reporting to work in unfit condition to tend the heating plant and other equipment which could be potentially dangerous if unattended is a grave offense, in the Commissioner's judgment.

The janitor in a public school not only maintains the plant in a safe, clean, and efficient condition but he can and should play an important role in the educational program. He has often a special kind of relationship to the children for whom he performs his services. He, like the teacher and all other personnel with whom pupils come in contact, must be an exemplar, and to the extent that he neglects to set standards for children to emulate, he fails to discharge an important aspect of his responsibilities. The janitor comes in contact also with other members of the school staff, a number of whom may be women. Under these circumstances it is expected that he will comport himself in a manner which will reflect dependability and inspire confidence. Reporting for work under the influence of alcohol and using rough language or profanity fall far short of the standards of conduct expected of a janitor in a public school.

The Commissioner finds and determines that the charges against Joseph McDonald are established by the evidence as true in fact and that they are sufficient to warrant his dismissal by the Board of Education of the City of Camden.

COMMISSIONER OF EDUCATION.

October 25, 1963.

XXXIX

BOARD MAY NOT ABOLISH SUPERINTENDENCY BY
UNILATERAL ACTION

CHESTER M. STEPHENS,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE,
MORRIS COUNTY,

Respondent.

For the Petitioner, Cassel R. Ruhlman, Esq.

For the Respondent, Joseph D. McGlone, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case seeks to have the Commissioner set aside as illegal a resolution by respondent abolishing the position of superintendent of schools, in which he held tenure.

The facts in this matter were submitted by stipulation, and the argument was presented in briefs of counsel.

The position of superintendent of schools in the Mount Olive School District was created by respondent in accordance with R. S. 18:7-70, commencing July 1, 1960, and petitioner, then a principal in the district, was appointed to the position and was under tenure therein. The Commissioner takes judicial notice of the records of his department that the necessity for the position was certified to the Commissioner by the County Superintendent on July 6, 1960, that the Commissioner approved the establishment of the superintendency on July 8, and that the State Board of Education gave its approval on September 7, 1960. On May 14, 1962, respondent took the following action:

“After extensive deliberation and careful study, the Teachers’ Committee recommends that insofar as there are two non-teaching principals employed by the Mount Olive Township Board of Education, for the best interest of the school system and from an economic standpoint, the position of Superintendent be abolished as of June 30, 1962, and I so move.

“This motion was seconded by Mr. Bawiec and carried.”

Respondent did not submit to the County Superintendent of Schools or to the Commissioner of Education any request for agreement that the position of superintendent of schools was no longer necessary, nor did it ask permission to abolish the position. Petitioner was assigned as principal in one of respondent’s schools, at an annual salary of \$8,000, payable over a ten months’ period. Petitioner has since served in this position under protest.

It is petitioner’s contention that the position of superintendent was illegally abolished. He grounds his argument solely upon the language of R. S. 18:7-70, and what he contends are the necessary implications of that

statute. Respondent, on the other hand, denies that *R. S. 18:7-70* bars it from abolishing the superintendency, and finds further support for its action in the express terms of *R. S. 18:13-19*.

The relevant part of *R. S. 18:7-70* reads as follows:

“A board may, under rules and regulations prescribed by the State Board, appoint a superintendent of schools by a majority vote of all of the members of the board, for a term not to exceed five years, and define his duties and fix his salary, whenever the necessity for such appointment shall have been agreed to in writing by the county superintendent of schools and approved by the commissioner and the State Board. No superintendent of schools shall be appointed except in the manner provided in this section. * * *”

Petitioner contends that the provisions for creating the superintendency are explicit, that the determination of the necessity for the position is not made unilaterally by the local board of education, but requires agreement and approval of the County Superintendent, the Commissioner, and the State Board. It is a necessary and logical implication, petitioner argues, that in order to abolish the position there must be similar approval and agreement that the necessity no longer exists. He supports his position with the widely accepted principles of statutory construction that legislative intent and the avoidance of absurd or anomalous results are integrally a part of the statute.

Respondent, on the other hand, contends that the statute, *R. S. 18:7-70*, *supra*, must be construed within the “natural and literal meaning of its words” and that there is no foundation for speculation on “an unexpressed intention on the part of the legislature.” *Leeds v. Atlantic City*, 13 *N. J. Misc.* 868, 871, (*Atlantic Co. Circuit Ct.* 1935). See also *Duke Power Co. v. Patten*, 20 *N. J.* 42, 49 (1955); *Denbo v. Moorestown Township*, 23 *N. J.* 476, 483 (1957); *Graham v. Asbury Park*, 64 *N. J. Super.* 385, 394 (*Law Div.* 1960). Respondent further argues that the power to abolish the superintendency for reasons of economy or to effect a change in administrative organization belongs uniquely and without restriction to the local board of education. *R. S. 18:13-19*.

The Commissioner cannot agree with such a narrow construction of the statute. In the first place, *R. S. 18:13-19* applies distinctly and solely to questions of tenure. While petitioner’s tenure is involved here, the basic issue concerns the *position*, not the *incumbent*, and this issue cannot be resolved on the question of tenure alone. The basic question is whether the Board of Education can unilaterally abolish the superintendency, and this question would be just as real whether the incumbent in the position were under tenure or not. It is implicit that the right to abolish a position must be in all respects in accord with the letter and spirit of Title 18.

It must be clearly noted that by the terms of the statute (*R. S. 18:7-70*), *supra*, the establishment of the superintendency rests solely on the confirmed necessity for the position. The determination of such necessity is no mere formality. The State Board of Education, pursuant to the authority of the statute, *supra*, has adopted rules for the approval of a superintendency, as follows:

“Any superintendency hereafter approved shall meet the following conditions:

1. The district or districts shall have a staff of at least twenty-five full-time teachers.
2. The superintendent shall hold an appropriate certificate prescribed by the State Board of Education.
3. The salary shall be not less than six thousand dollars (\$6,000.00) per annum.
4. The county superintendent shall certify the necessity for the appointment and the Commissioner of Education shall approve it. This certification to the Commissioner of Education by the county superintendent of schools shall be accompanied by an application for such approval from the employing board or boards of education.”

Prior to the enactment of Chapter 170, Laws of 1909, a Chapter 7 school district was permitted to have, if it so desired, a “supervising principal,” and enjoyed additional state financial aid then allocated for that position. It appears that the clear intent of the legislation of that year was to prevent the indiscriminate establishment of a supervising principalship unless the need for the position was clearly determined to exist, not only in the minds of the local board of education, but also by the County Superintendent, the Commissioner, and the State Board. That this restriction was preserved in the general revision of the school law in 1937, and in all subsequent amendments, is significant evidence of legislative intent.

Thus we come to the critical question: If determination of necessity requires action by two statutory officers and two statutory bodies, can any one of these officers or bodies, without like concurrence by the other three parties to the original action, decide that the necessity no longer exists? To answer this question in the affirmative would be to create an absurdity. A statute should be construed to avoid absurd results. *New Capital Bar and Grill Corp. v. Division of Employment Security*, 25 N. J. 155 (1957). “In construing a statute, where ambiguity exists or a literal interpretation would lead to anomalous or absurd results, the spirit of the law controls the letter.” *Giordano v. City Commission of the City of Newark*, 2 N. J. 585, 594 (1949). See also *Board of Education of Manchester Township v. Raubinger*, 78 N. J. Super. 90, 100 (App. Div. 1963). The stipulation of facts in the instant case demonstrates that if the position of superintendent was necessary in the 1960-61 school year, when the pupil enrollment was at its lowest point in the five-year period between 1958 and 1963, then it continued to be necessary in the succeeding years, when both enrollment and staff increased, requiring some classes to be housed in a church basement and a firehouse. When the Commissioner contemplates the confusion that could result if boards of education, without prior notice and approval, should suddenly abolish their superintendencies and shift the burden of supervision upon the county superintendent of schools, he cannot believe that the Legislature ever intended such a result. He foresees, further, the evils of instability that could result if, without the controls contemplated in the statute, a district could, even yearly, vacillate between having and not having a superintendency.

The Commissioner finds and determines that respondent illegally abolished the position of superintendent of its schools. He directs that petitioner be reinstated in the position with all rights as to tenure and salary that would obtain to his credit had the position not been abolished.

COMMISSIONER OF EDUCATION.

October 25, 1963.

XL.

BOARD OF EDUCATION MAY NOT WAIVE A STATUTORY
REQUIREMENT IN TRANSPORTATION BIDS

LUCY GEORGE,

Petitioner,

v.

MATAWAN REGIONAL BOARD OF EDUCATION,
MONMOUTH COUNTY,

Respondent,

AND FRED WEHRLE,

Intervener.

For the Petitioner, Rosen & Kanov
(Leon M. Rosen, Esq., of Counsel)

For the Respondent, Heuser, Heuser & DeMaio
(Vincent C. DeMaio, Esq., of Counsel)

For the Intervener, Abramoff & Apy
(Chester Apy, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner herein asks the Commissioner of Education to set aside the award of a bus transportation contract made by respondent to the intervener, alleging that respondent improperly failed to require intervener to comply fully with the specifications and statutes in his bid.

The facts in this case are submitted by stipulation agreed upon in a conference of counsel held in the office of the Assistant Commissioner in charge of Controversies and Disputes, in Trenton on August 13, 1963. The exhibits, Schedules A to H inclusive, submitted by respondent in its Answer are stipulated as part of the record. Memoranda were submitted by counsel, and oral argument was heard on the application for intervention and on the law at a hearing before the Assistant Commissioner in Trenton on August 20, 1963. Right to intervene was granted by the Assistant Commissioner at the hearing.

Petitioner and intervener were the only bidders on the contract to provide bus transportation.

Prior to receipt of bids, specifications were furnished to prospective bidders. Item #2 of the specifications reads as follows:

“Buses to have a seating capacity of 49 high school pupils. (15 inches per pupil). Schedule B to be submitted in support of proposal.”

Item #9 of the specifications provided:

"Bids are to be placed in a sealed envelope and plainly marked 'TRANSPORTATION BID FOR ROUTE NO. MATAWAN REGIONAL SCHOOL DISTRICT' and presented to the Board of Education according to the advertised time for receiving bids. Prescribed form of questionnaire shall be submitted with each bid."

When the bids were opened on May 20, 1963, it was noted that bidder Wehrle, who submitted the lower of the two bids received, had not submitted the "prescribed form of questionnaire" and "Schedule B" as called for in the specifications. Before the meeting adjourned that evening he supplied written answers to questions 2, 3, and 4a of the questionnaire, and answers for Schedule B. Answers to questions 1 and 4b of the questionnaire were submitted to the Board as a supplement on May 23.

Petitioner, who submitted a higher bid which was apparently in all respects complete, notified respondent through her attorneys on May 22 that she would regard any award of a contract to bidder Wehrle as irregular and illegal. However, on June 3, after the Board's attorney had reviewed the proposals and found them in acceptable form, the Board authorized its president and secretary to enter into contract with Wehrle, said contract to be subject to the approval of the County Superintendent of Schools.

The right of a board of education to make rules and contracts for the transportation of children is contained in R. S. 18:14-8. Its power to make contracts subject to the County Superintendent's approval is set forth in R. S. 18:14-10. The procedure for advertising for transportation bids is prescribed in R. S. 18:14-11, the relevant portion of which reads as follows:

"* * * Each transportation bid shall be accompanied by information required on a standard form of questionnaire approved by the State Board of Education * * *."

The procedures for opening of bids are set forth in R. S. 18:14-12, which, *inter alia*, contains this sentence:

"* * * No proposals shall be opened previous to the hour designated in the advertisement and none shall be received thereafter. * * *"

Petitioner asks that the contract awarded to bidder Wehrle be set aside as invalid, for the reason that his proposal did not comply with the requirements of either the statutes, *supra*, or respondent's specifications, *supra*. It is petitioner's contention that a board of education may not waive a requirement of the statute, and in support of this contention she relies chiefly upon *Hillside Township v. Sternin*, 25 N. J. 317 (1957), and upon *William A. Carey & Co. v. Borough of Fair Lawn*, 37 N. J. Super. 159 (App. Div. 1955). In the latter case, when the failure of a bidder to include his answers to a questionnaire with his bid, as required in the statutes, was the issue, the Court held that the municipal governing body should not be permitted to waive any substantial variance from the specifications. Petitioner further contends that Wehrle's bid did not substantially comply with either the statutes or the Board's specifications, and that the Board erred in permitting him to supply the deficiency at the meeting after the bids were opened and 3 days later in a supplemental answer. In support of this contention, petitioner quotes from *Belousofsky v. Board of Education of the City of Linden*, 54 N. J. Super. 219, 222 (App. Div. 1959) as follows:

"We find no merit in plaintiff's position. When essential information is missing from a bid when it is opened it may not be supplied then or thereafter by the private understanding of the bidder and the board, nor otherwise. Any other rule would not only be contrary to the letter of *R. S. 18:6-26*, but subversive as well of the purpose and intent of the statute for the reasons fully stated in *Hillside Township, Union County, v. Sternin*, 25 *N. J.* 317, at pages 322-323 and 324-328 (1957). As was pointed out in that case, the two paramount aims of such statutes are that all bidders bid upon the same thing, and that the public know clearly what the bidder must give and the municipality receive, for a consideration plainly stated. These aims would be defeated if a bidder were permitted to supplement his bid in essential details by private understandings or otherwise. The opportunities for favoritism if this were permitted are as obvious as they would be enormous. As has frequently been said, 'In this field it is better to leave the door tightly closed than to permit it to be ajar.' *Hillside Township v. Sternin*, *supra*. Cf., *Case v. Inhabitants of Trenton*, 76 *N. J. L.* 696 (*E. & A.* 1909); *Armitage v. City of Newark*, 86 *N. J. L.* 5 (*Sup. Ct.* 1914); *Tufano v. Borough of Cliffside Park*, 110 *N. J. L.* 370 (*Sup. Ct.* 1932); *Albanese v. Machetto*, 7 *N. J. Super.* 188 (*App. Div.* 1950)."

Respondent and intervener, on the other hand, argue that the Wehrle bid was in substantial compliance with the specifications, and that it is the duty of respondent to waive minor irregularities which do not go to the substance of the bid itself, in the interest of securing the lowest possible cost to the taxpayers. In support of this argument, they rely chiefly upon *Faist v. City of Hoboken*, 72 *N. J. L.* 361 (*Sup. Ct.* 1905), in which the Court said, at page 363:

"Mere irregularity in a bid will not justify its rejection by a municipal body charged with a duty of awarding a contract to the lowest bidder. The form of the bid, not being embodied in the statute, is a regulation prescribed by the city, and failure to technically comply with the form required will not defeat the right of the lowest bidder to have the contract if, after the bids are opened, it appears there has been a substantial compliance with the requirements and he tenders himself ready to execute the requisite contract and furnish responsible bondsmen or good security, as was the fact in this case. The statute is intended to secure to the city the contracting of the work to the lowest responsible bidder, and mere irregularities in the form of the bid, or details of statement which do not in any way mislead or injure, are not sufficient to justify the rejection of such a bid. It is in the interest of the public that the lowest bid, though it be irregular, be accepted, and, if necessary, that the bidder have opportunity to correct an irregularity, while not changing the substance of his bid."

It is respondent's contention that the information called for in the questionnaire and Schedule B, missing from Wehrle's proposal at the time the bids were opened, is not material to the bid itself. The questionnaire asks for information as to (1) the nature of the bond which the bidder will furnish, (2) the extent and nature of his experience in school transportation, (3) the bidder's familiarity with the conditions of the contract, and (4) the name of the proposed driver and information as to whether the County Superintendent has given tentative approval of the bus which is proposed to be used. Schedule B, as provided in respondent's specifications is in fact a section of the pre-

scribed transportation specifications established by the State Board of Education, effective as of September 1, 1962. This section calls for precise information as to the description of the seating arrangement and the length of each seat. Respondent argues that there is no requirement that a bidder even own a bus at the time he bids, or that he have surety at that time. He contends that his bid, and the certified check for 5% of the amount of the bid, to be forfeited as liquidated damages in the event he fails to enter into a contract if his bid is successful, are all that are actually required for a substantial bid. Respondent argues further that the reasoning of the court in *Carey, supra*, is not applicable here since the statutory requirements for questionnaire information in that case were intended for the pre-qualification of the bidder.

The Commissioner does not agree that the information required in the specifications prescribed by State Board rules and in the standard form of questionnaire required by the statute is not material to the bid itself. *R. S. 18:14-11, supra*, requires that the contract be awarded "to the lowest responsible bidder." The information at issue herein clearly goes to the question of the responsibility of the bidder. In previous decisions in which the question of the responsibility of a bidder was raised (*e. g.*, *Crater v. Bedminster*, 1939-49 *S. L. D.* 221 (1947), and *McAllister v. Lawnside*, 1951-52 *S. L. D.* 39), the Commissioner has relied upon the decision of the Court of Errors and Appeals in *Paterson Contracting Co. v. Hackensack*, 99 *N. J. L.* 260, 263 (1923) in which the Court said:

"* * * We do not think that it is necessary to prove corruption or fraud on the part of the commission. The question for their determination was whether the appellant was so lacking in the experience, financial ability, machinery and facilities necessary to perform the contract as to justify a belief on the part of fairminded and reasonable men that it would be unable to perform its contract. * * *"

The responsibility and authority of the State Board of Education to prescribe the form of bid and the standard form of questionnaire were sustained in *Rankin v. Board of Education of Egg Harbor Township*, 1939-49 *S. L. D.* 209 (1945), affirmed State Board of Education 217 (1946), affirmed 134 *N. J. L.* 342 (*Sup. Ct.* 1946), 135 *N. J. L.* 299 (*E. & A.* 1946). In that case the Court of Errors and Appeals said, at page 301, concerning the authority of the State Board in this respect:

"There is no merit in the argument that the State Board lacked authority. The powers of that Board are very broad (*R. S. 18:2-4*). The statute was designed to give that Board general supervision and control of public instruction. Specific authority is given in matters of pupil transportation. * * * no contract for the transportation of pupils shall be made unless each bid shall be accompanied by information required on a standard form of questionnaire approved by the State Board (*R. S. 18:14-11*). The power and authority of the State Board of Education to supervise and control the transportation of pupils including the method of transportation and type of vehicle is not open to question.

"We disagree with the appellants that the local Board had the power to enlarge any rule, regulation or specification imposed by the State Board. It is the prerogative of the local board to contract for the needed facilities

for pupil transportation (18:14-10), but its contracts are subject to the supervision of the State Board under the statutes cited and must be awarded in conformity with the policy underlying the law to encourage competitive bidding.”

Within the scope of the State Board’s authority thus clearly defined, the Commissioner believes, and so finds, that just as the local board cannot *enlarge*, neither can it *waive* “any rule, regulation or specification imposed by the State Board.” This position is in no sense inconsistent with the right of a board to waive a minor irregularity in the form of the bid which is not material to the bid itself, and which was within the board’s power to prescribe and not in violation of statutory requirements. *Taylor, et al. v. Board of Education of Township of Gloucester*, 1955-56 S. L. D. 71, affirmed State Board of Education 75, dismissed, Superior Court, Appellate Division, A-180-55 (1956).

Having determined, therefore, that respondent is constrained to a precise application of the statute, the State Board rules and regulations pursuant thereto, and its own specifications, the Commissioner finds that respondent improperly waived the filing of the standard form of questionnaire and Schedule B by bidder Wehrle as a part of his proposal at the time bids were opened. Having so found, it is unnecessary to determine any other question of the propriety of the Board’s subsequent actions.

The Commissioner therefore directs that the transportation contract awarded to Fred Wehrle, intervenor herein, be set aside as invalid. He further directs that respondent either reject all bids and readvertise for new proposals, or award the contract to the next higher bidder.

COMMISSIONER OF EDUCATION.

October 30, 1963.

Affirmed by State Board of Education without written opinion December 4, 1963.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued January 6, 1964—Decided January 9, 1964.

Before Judges Conford, Freund and Sullivan.

Mr. Leon M. Rosen argued the cause for petitioner-respondent (Messrs. Rosen & Kanov, attorneys; *Mr. Felix-Ramon Neals*, on the brief).

Mr. Chester Apy argued the cause for intervenor-appellant (Messrs. Abramoff & Apy, attorneys).

PER CURIAM

The judgment of the State Board of Education is affirmed essentially for the reasons expressed in the “Decision” of the Commissioner of Education.

Affirmed.

XLI.

IN THE MATTER OF THE SPECIAL ELECTION HELD IN THE SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MORRIS COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of a special school referendum authorizing the issuance of \$740,000 in bonds of the School District of the Township of Washington, Morris County, held October 15, 1963, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes	391	3	394
No	374	---	374
Void	3	---	3
	<hr/> 768	<hr/> 3	<hr/> 771

A request for a recount of the ballots and an inquiry into alleged irregularities in the conduct of the voting dated October 28, 1963, was received from the Washington Township Taxpayers Association. At the direction of the Commissioner of Education, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount and inquiry of the election on November 13, 1963, at the office of the Morris County Superintendent of Schools.

At the conclusion of the recount the tally stood as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes	382	3	385
No	361	---	361
Referred	25	---	25
	<hr/> 768	<hr/> 3	<hr/> 771

Examination of 3 of the 25 referred ballots resulted in agreement that 4 were void and could not be counted and 4 were valid and should be added to the count. The tally then stood:

	<i>At Polls</i>	<i>Counted by Agreement</i>	<i>Absentee</i>	<i>Total</i>
Yes	382	3	3	388
No	361	1	---	362
Void	4	---	---	4
Referred	17	---	---	17
	<hr/> 764	<hr/> 4	<hr/> 3	<hr/> 771

There being a plurality of 26 affirmative votes at this posture, there existed no necessity to determine the 17 ballots remaining, as even if all 17 were counted as voting against the proposal, the affirmative would still prevail.

Testimony was next heard from six voters and a member of the election board of Polling District #2. It was contended that the ballot handed to

each voter at this polling place did not have a numbered coupon at its top. After marking the ballot in the voting booth, the witnesses testified that no coupon was detached as the ballot was presented for insertion in the ballot box. The election official from this district confirmed these allegations stating that the numbered coupon was removed from each ballot and immediately strung on a string before the ballot was handed to the voter. He stated further that this same procedure was followed in the two prior referendums, both of which failed of approval and that it was his understanding that this was correct procedure.

No contention was raised that the referendum should be voided because of this irregularity. Those who testified said that they saw no way by which the election results could have been altered by this deviation from usual procedures. It was made clear that their purpose was solely one of clearing up any shadow which might have been cast upon this referendum and to correct any irregularity which occurred in consideration of future elections.

The statutes clearly and explicitly provide that the ballot handed to each voter shall have a number which corresponds to his number on the poll list which he has just previously signed. *R. S. 18:7-36* states in part as follows:

“* * * after the election officers shall have ascertained that a voter is properly registered and qualified to vote, the election officers shall furnish to the voter one official ballot *numbered to correspond with the poll number of the voter* * * *.”

* * * * *

“The election officers shall instruct the voter how to fold the ballot and shall crease the ballot so as to indicate the point where the voter shall fold the ballot, but before handing the ballot to the voter the election officers shall see that the face of the ballot *including the coupon* is exposed, and at the same time shall call off the ballot number to the official having charge of the polling book, who shall make certain that the ballot number and the poll number agree * * *.” (Emphasis added)

While he is not bound by Title 19, the general Election Law, the Commissioner looks to it for guidance in determining school election questions. With respect to the issue herein he notes that the provisions of *R. S. 19:15-25* are similar to those of *R. S. 18:7-36 supra*. *R. S. 19:15-30* goes on to describe the procedure after the voter has retired to the polling booth and marked his ballot as follows:

“Before leaving the booth the voter shall fold his ballot so that no part of the face of it shall be visible *and so as to display the face of the numbered coupon* * * *.” (Emphasis added)

R. S. 19:15-31 then prescribes:

“He shall then hand the ballot *with the coupon undetached* to the member of the election board having charge of the ballot box * * *.” (Emphasis added)

Finally, *R. S. 19:15-32* states:

“Thereupon the member of the board having charge of the ballot box, without displaying any part of the face of the ballot, *shall remove*

the coupon from the top of the ballot and place the ballot in the box and the coupon on a file string. * * *” (Emphasis added)

It is clear that the election officials in Polling District #2 erred in removing the numbered coupon from the top of the ballot before handing it to the voter. The Commissioner finds no evidence that this irregularity affected the vote in any way and concurs with petitioners that it is insufficient to alter or invalidate the referendum. However, he directs the election officials to become completely informed as to exact election procedure so that all future school elections may be carried out with precise and explicit attention to every requirement of the statutes.

The Commissioner finds and determines that the proposal to issue bonds of the School District of the Township of Washington, Morris County, not to exceed \$740,000, which was presented to the qualified voters at a referendum on October 15, 1963, was approved.

COMMISSIONER OF EDUCATION.

December 6, 1963.

XLII.

BOARD MAY NOT EXCLUDE PUPILS HAVING CONSCIENTIOUS
SCRUPLES AGAINST PLEDGE OF ALLEGIANCE

JAMES HOLDEN, MATTHEW SHUMATE
AND THOMAS X. MCCLAIN,

Petitioners,

v.

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

Respondent.

For the Petitioners, *Pro Se.*

For the Respondent, Joseph G. Barbieri, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners in this case seek the reinstatement in the Elizabeth public schools of their children, who were excluded because they refused to pledge allegiance to the flag of the United States.

A hearing in this matter was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the County Superintendent of Schools in Elizabeth on June 11, 1963.

Petitioner Holden's son, James Gregory Holden, was a pupil in the fourth grade at John Marshall School in Elizabeth during the 1962-63 school year. On February 14 he was suspended from school by the principal for refusing to pledge allegiance to the flag. On March 7 the Board of Education reviewed the suspension and continued it. Petitioner Shumate's son, Harold Shumate, and daughter, Deborah Shumate, were pupils in grades 6 and 4, respectively, of the same school. Harold was suspended on February 18 and Deborah on March 12, for the same reason. Petitioner McClain's son, Jerome, and daugh-

ter, Karen, were pupils in grades 6 and 3, respectively, of the same school. Jerome was suspended from school on March 12, and Karen in the month of February, for the same reason. On March 14 a petition seeking reinstatement of his son was filed by petitioner Holden; subsequently, on April 29, an amended petition was filed to include petitioners Shumate and McClain, and requesting the Commissioner to order their children reinstated *pendente lite*. Such an order was issued by the Commissioner on May 10, 1963.

The New Jersey statute relative to the pledge of allegiance by pupils in the public schools is R. S. 18:14-80, as amended by Chapter 212, Laws of 1944, and Chapter 83, Laws of 1954, the pertinent parts of which read as follows:

“Every board of education shall:

* * * *

“(c) Require the pupils in each school in the district to salute the flag of the United States and repeat on every school day the pledge of allegiance to the flag which shall be as follows: ‘I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all.’ The salute and pledge of allegiance shall be rendered with the right hand over the heart; but children who have conscientious scruples against such pledge or salute, or the children of accredited representatives of foreign governments to whom the United States extends diplomatic immunity, will always show full respect to the flag while the pledge is given by merely standing at attention: the boys removing the headdress.”

Petitioners do not deny that their children refused to pledge allegiance to the flag; in fact, they freely state that they instructed their children to refuse to do so. They do assert, and it was not denied by the teachers who observed the children, that these pupils did stand at attention. Petitioners testified that they believe in a religion known as Islam, and that followers of this religion, called “Muslims,” or sometimes “Black Muslims,” are taught that their sole allegiance is to Almighty God Allah. They are further taught, they testify, that the flag is but a symbol and that it would be contrary to their teachings to pledge allegiance to any flag, including the flag of Islam. Their religious teachings are based on the Kuran, as interpreted to them by one Elijah Muhammad, whom they regard as their leader and spiritual prophet. They therefore contend that their refusal to permit their children to pledge allegiance to the flag falls within the exemption provided in R. S. 18:14-80, *supra*, for “children who have conscientious scruples against such pledge or salute.”

Respondent argues that the exemption for conscientious scruples was never intended to be so broadly construed as to include petitioners’ beliefs. Respondent sought to establish through cross-examination of petitioners that their beliefs were as much politically as religiously motivated, and were closely intertwined with their racial aspirations. In effect, respondent challenges petitioners’ accuracy in labeling their objections to participation in the pledge of allegiance as “conscientious scruples.”

The Commissioner does not find it necessary to determine whether the “teachings of Islam” are religious or political, or both. One need not go outside the history of western civilization to find striking examples of the in-

extricable fusing of political and religious ideologies. The basic question is whether petitioners in this case can rightly invoke “conscientious scruples” as their reason for claiming exemption from the pledge of allegiance.

Freedom of religion is a guarantee of the First Amendment of the Constitution of the United States; it is the law of the land, and has frequently been the subject of Supreme Court study and interpretation. With respect to its application to a required flag salute in the public schools, the Supreme Court established the interpretation in its decision in *West Virginia State Board of Education v. Barnette, et al.*, 319 U. S. 624 (1943). This decision followed upon a series of decisions in state courts which the Supreme Court refused to review (*Leoles v. Landers, et al.*, 302 U. S. 656 (1937); *Hering, et al. v. State Board of Education*, 303 U. S. 624 (1938); *Gabrielli v. Knickerbocker, et al.*, 306 U. S. 621 (1939), a summary decision in *Johnson, et al. v. Deerfield, et al.*, 306 U. S. 621 (1939), and was an outright reversal of its own decision in *Minersville School District, et al. v. Gobitis, et al.*, 310 U. S. 586 (1940). In *Barnette* the Court ruled that a requirement by a State Board of Education or local school board that all pupils salute the flag is unconstitutional since it “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” (p. 642) In a concurring opinion, Justices Black and Douglas wrote, at page 644:

“Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremony, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution’s plan and purpose.”

This point of view was, in a sense, anticipated by our own New Jersey Supreme Court in 1942, when the Court refused to sustain the conviction of parents charged with violation of the compulsory school attendance laws when their children had been excluded from school for refusing to salute the flag for religious reasons. *In re Lattrechia*, 128 N. J. L. 472. In that decision, the Court quoted from *People v. Sandstrom*, 279 N. Y. 523; 18 N. E. Rep. 2d 840, 847 (*Ct. of Appeals of N. Y.* 1939), as follows:

“The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. The flag ‘cherished by all our hearts’ should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored.”

In the amendment to R. S. 18:14–80 which was enacted in 1944 (Chapter 212, Laws of 1944), exemption from the required salute and pledge of allegiance was extended to include “children who have conscientious scruples against such pledge or salute.” It is significant to the Commissioner that the Legislature employed the word “conscientious” rather than “religious.” The Supreme Court in *West Virginia Board of Education v. Barnette, supra*,

decided only a year previously, indicates its feeling that the freedom guaranteed by the First Amendment extends beyond a particular set of religious beliefs to the much broader sphere of intellect and spirit. At page 634, the Court said in its majority opinion:

“Nor does the issue as we see it turn on one’s possession of particular religious views or the sincerity with which they are held. While religion supplies appellees’ motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.”

and at page 642 the Court said:

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”

The use of the term “conscientious scruples” brings New Jersey’s statute within this broader range.

The dictates of conscience are personal and intimate, and often unfathomable. While often they are guided by public morality or the doctrines of religion, they vary in personal interpretation and application as human beings themselves differ one from the other. Unless the dictates of conscience operate so as to present a clear and present danger to the peace, welfare, and security of the people, they suffer no testing against human dicta, no matter how unreasonable they may seem. The Commissioner notes a recent decision of the U. S. District Court, District of Arizona, Prescott Division, in the case of *Sheldon, et al. v. Fallin, et al.*, Civil No. 749, August 29, 1963. In restraining a board of education from excluding plaintiffs from school because they refused to stand during the singing of the national anthem, the Court said in part:

“* * * But all who live under the protection of our Flag are free to believe whatever they may choose to believe and to express that belief, within the limits of free expression, no matter how unfounded or ludicrous the professed belief may seem to others. While implicitly demanding that all freedom of expression be exercised reasonably under the circumstances, the Constitution fortunately does not require that the beliefs or thoughts expressed be reasonable, or wise, or even sensible. The First Amendment thus guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the sincerity or reasonableness of this claim may not be examined by this or any other Court. [*United States v. Ballard*, 322 U. S. 78, 86-88 (1944) ; *Cantwell v. Connecticut*, 310 U. S. 296, 306-307 (1940) ; and see *Reynolds v. United States*, 98 U.S. 145 (1878).]”

The Commissioner regrets that the teachings are such as to cause children not to participate in a common ceremony of respect to the Flag, which is

itself the emblem of those freedoms which all Americans are privileged to enjoy. However, he is cognizant of the fact that those freedoms, as contemplated by Federal and State Constitutions and State law, are broad enough to encompass the beliefs of those who, like the petitioners, claim conscientious scruples.

The Commissioner finds and determines that the children of petitioners have complied with the provisions of R. S. 18:14-80, *supra*, in claiming exemption from pledging allegiance to the flag on the grounds of conscientious scruples against such a pledge, being willing to stand respectfully at attention during the ceremony, and that respondent has improperly excluded said children from its schools. He directs that his order of May 10, 1963, reinstating the children of petitioners *pendente lite* be and hereby is made permanent.

COMMISSIONER OF EDUCATION.

December 17, 1963.

Pending before the State Board of Education.

XLIII.

BOARD MAY SELECT FORM OF BUS TRANSPORTATION FOR PUPILS

GABRIEL FRANK AND SHIRLEY FRANK AND EDMUND C. KLEINER
AND MARY KLEINER,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS,
BERGEN COUNTY,

Respondent.

For the Petitioners, Rose and Gordon
(Lloyd Gordon, Esq., of Counsel)

For the Respondent, Harry L. Towe, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This petition is in the nature of a class action brought by a group of parents residing in the north portion of Englewood Cliffs, whose children travel to Fort Lee High School by public buses on tickets furnished by respondent. Petitioners seek an order compelling respondent to provide free private bus transportation for their children to and from Fort Lee High School.

The case is submitted on a Stipulation of Facts and briefs of counsel.

It is stipulated that all of the high school children represented in this action (some 74 children from 62 families) live in an area of Englewood Cliffs that is more than 2.5 miles from Fort Lee High School, which they are designated to attend, since Englewood Cliffs has no high school of its own. It is also stipulated that in order to reach the public buses on which respondent provides transportation, the children must travel to intersections of local streets with either Palisade Avenue or Route 9W, both of which are conceded

to be heavily traveled highways. On either the trip to school or the return from school, the pupils must cross one of these highways. Police protection is afforded at one of the Palisade Avenue intersections, and was provided on the Route 9W intersection, not an officially marked bus stop, until the children stopped using public transportation on Route 9W because their parents thought it was too hazardous for them to do so. It is further stipulated that respondent provides free private bus transportation, entirely at local expense, for some 140 pupils attending local elementary schools, who reside less than 2 miles from said schools.

Petitioners assert that the action of respondent in providing transportation for its high school pupils on public rather than private buses constitutes an abuse of its discretion, is arbitrary and unreasonable, and unlawfully discriminates against high school pupils. Respondent argues that it has complied fully with the law and acted properly within the limits of its discretion.

Petitioners cite *R. S. 18:11-1* and *R. S. 18:14-8* as the statutory basis for their position. *R. S. 18:11-1* reads as follows:

“Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils, or as provided in sections 18:14-5 to 18:14-9 of this title.”

R. S. 18:14-8 provides for the transportation of children living remote from school, and reads in part as follows:

“Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school * * *.”

It is petitioners' contention that the requirement that boards shall provide “suitable school facilities,” with “convenience of access thereto,” or in the alternative, furnish transportation to schools that are “remote,” as provided in *R. S. 18:14-7* and 8, makes it incumbent upon respondent to provide bus transportation which is both “suitable” and “convenient.” Respondent's refusal to provide private bus transportation which would eliminate considerable walking distances to public bus stops, hazardous traffic conditions, and occasional delays when drivers of crowded buses refuse to stop, constitutes, in petitioners' mind, an arbitrary and unreasonable abuse of discretion. Further, say petitioners, the denial of private bus transportation, 75 per cent reimbursable by the State, to high school pupils, when respondent furnishes such transportation for non-reimbursable distances to elementary school pupils, is unlawful discrimination.

Respondent, on the other hand, contends that in fulfilling its obligation to provide transportation for high school pupils living more than 2.5 miles from the designated high school, it is entirely discretionary with the Board whether to arrange for private or public transportation. Respondent further

argues that the language of *R. S. 18:11-1* requiring "suitable school facilities * * * convenient of access" relates to school buildings and cannot be stretched to describe transportation facilities. As to the charge of unlawful discrimination, respondent points out that the conditions establishing the two categories—elementary school pupils transported within the district for less than 2 miles, and high school pupils transported outside the district for more than 2.5 miles on available public transportation—are sufficiently different as to fall within the reasoning of *Schrenk, et al. v. Board of Education of Ridgewood*, 1960-61 *S. L. D.* 185, 188, in which the Commissioner said:

"In the Commissioner's judgment, a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district. Such differences need not be great in classification, but no classification may be unreasonable, arbitrary or capricious."

The Commissioner has consistently held that he will not substitute his judgment for that of the local board of education in matters which lie purely within the discretionary authority of the board. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S. L. D.* 7, affirmed State Board of Education 15, 135 *N. J. L.* 329 (*Sup. Ct.*), 136 *N. J. L.* 521 (*E. & A.* 1948); *Mackler v. Board of Education of Camden*, 1953-54 *S. L. D.* 53, affirmed State Board of Education 66, 16 *N. J.* 362 (1954); *Noto v. Board of Education of Township of Lopatcong*, 1956-57 *S. L. D.* 71, affirmed State Board of Education 77; *Iden et al. v. Board of Education of West Orange*, 1959-60 *S. L. D.* 96; *Schrenk et al. v. Board of Education of Ridgewood*, *supra*, at page 185. It is the function of the local board to make rules and contracts for the transportation of children to school (*R. S. 18:14-8, supra*), consistent with rules and regulations of the State Board of Education applicable to pupil transportation (*R. S. 18:14-12*). Thus the selection of public transportation over private contract or district-owned bus transportation lies within the discretionary authority of the local board, and will not be upset unless it is clearly arbitrary, capricious, or unreasonable. The Commissioner does not find those elements here.

As to traffic hazards, the Commissioner shares with parents their concern for safe conditions of travel, but repeats his statement in *Schrenk, supra*, at 187:

"The provision for safe conditions of travel is a municipal function. A board of education is limited to educational functions. It can provide instruction in safety in order to inculcate habits of safety. It is not within its authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc. to meet the requirements of safe travel for school children. It can and should point out to the responsible governmental body the traffic hazards and other dangers to which pupils may be exposed. * * *"

Finally, as respondent points out in its brief, the remedy for the failure of bus drivers to stop and pick up pupils waiting along the highway lies in appropriate action through other agencies of local and State government, in which respondent indicates its willingness to join.

The remaining question is whether the Board's action is discriminatory. The Commissioner finds nothing in either statute or State Board regulation which requires a local board to provide the same form of transportation for all the pupils of the district. It is discretionary with the board which form of service to provide, as long as there is no discrimination. In *Schrenk, supra*, the Commissioner said, at page 187:

"* * * In order to establish discrimination, there must be a showing that one group *in entirely the same circumstances as another* is given favored treatment." (Emphasis added.)

In the instant case, respondent finds obvious differences between the elementary school group who are transported within the district, and the high school group who are transported to Fort Lee High School. The Commissioner finds nothing in the Board's classification to warrant its being called unreasonable, arbitrary, or capricious. As to petitioners' emphasis on the fact that the private bus transportation which they seek is 75 per cent reimbursable by the State, whereas the transportation furnished to elementary school pupils less than 2 miles from school is entirely at local expense, the Commissioner finds this argument without merit. State aid for transportation is not conditioned on the *mode* of transportation provided, so long as it is approved by the County Superintendent of Schools. R. S. 18:14-12.10.

It is the Commissioner's opinion, therefore, and he so finds, that respondent is complying with the statutes and State Board rules and regulations in providing for the transportation of the high school pupils represented in this action on public buses, and that in selecting this mode of transportation respondent has not abused its discretion by unreasonable, arbitrary, capricious, or discriminatory action.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

December 17, 1963.

XLIV.

BOARD MAY REQUIRE FULL INFORMATION BEFORE AUTHORIZING HOME INSTRUCTION

ETHEL M. MASSEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE SILVER, AND ROYAL HINTZE,
PRINCIPAL, RED BANK HIGH SCHOOL,
MONMOUTH COUNTY,

Respondent.

For the Petitioner, *Pro Se*

For the Board, Edward C. Stokes, Esq.

For Royal Hintze, Theodore D. Parsons, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case is the parent of a school-age boy who has a chronic physical ailment which interferes with his school attendance. She contends

that the Little Silver School District has failed to provide an adequate education for her son during the school terms commencing September 1960 and ending June 1963. The complaint also includes the Red Bank High School, which is the designated school for Little Silver pupils of high school grades and which the boy attended during part of the 1961-62 school year.

Hearings in this matter were conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on October 8 and 16, 1963, in the office of the Monmouth County Superintendent of Schools in Freehold. During the hearing counsel's motion to dismiss Royal Hintze as a party to the complaint on the grounds that no redress is asked of him, was granted. It appeared that petitioner's intent in naming Royal Hintze in her complaint was to insure his presence as a witness rather than as a party respondent.

The petition in this case grows out of and, in effect, reconstitutes a former appeal by the same petitioner which was dismissed on January 25, 1963, for failure to prosecute. Because the prior action sheds light which helps to clarify the instant appeal, the Commissioner will take judicial notice of the record in that case in his files and will recite herein the entire history of the controversy.

On March 23, 1961, petitioner filed a petition of appeal contending (1) that the Little Silver Board of Education failed to provide home instruction for her son during periods of illness in the 1960-61 school year; (2) that the respondent Board and its employees discredited petitioner's nursery school; (3) that respondent Board accepted a pupil from petitioner's nursery school on transfer without notification or obtaining a certificate of transfer. The Board, in its answer, took the position that home instruction had not been furnished because of petitioner's failure to make proper application therefor or to provide the medical information and certification required to establish the need for such instruction, and it further denied the allegation of illegal conduct expressed in the second and third charges. At a subsequent conference, counsel for both parties expressed the belief that the issues could be resolved and requested time, which was granted, to consult their clients in an attempt to settle the matter.

On October 17, 1961, a notice of withdrawal as counsel for petitioner was received from Chester Apy. More than three months later, on February 6, 1962, a notification of substitution of Thomas Yaccarino as attorney was received. There followed then a second conference of counsel on March 27, 1962, at which time respondent moved to dismiss charges 2 and 3 and made an offer of settlement of charge 1. Petitioner's counsel requested time to consult his client. It was also agreed that if petitioner refused the offer of settlement, a hearing on the issues would be scheduled.

On March 30, 1962, a letter memorandum in support of a motion to dismiss charges 2 and 3 was received from counsel for respondent. By letter dated April 9, 1962, petitioner's attorney advised that he did not intend to file a memorandum in opposition to the motion. The Commissioner then granted the motion on April 26, 1962, and dismissed the second and third counts of the complaint.

On May 1, 1962, notification was received from petitioner's attorney stating that the offer of settlement was not satisfactory to his client and asking

that a hearing date be set. Telephone conversations with counsel on May 2 disclosed that a military training requirement and other commitments on the part of counsel for respondent rendered the month of May unsuitable for him, and petitioner would be away all of June, July and August. On May 11, before arrangements for a hearing could be consummated, notice was received from petitioner's counsel that he was withdrawing from the case. No further word was heard from petitioner and, accordingly, the matter was discontinued on January 25, 1963.

The petition of appeal herein was received on July 16, 1963. This new appeal charges that petitioner's son was denied an education in the public schools for the years 1960, 1961, and 1962, and in its four pages recites petitioner's interpretations and opinions of the circumstances upon which her contentions rest. Subsequently, the petition was amended to include a prayer for relief on two counts: (1) cost of home teaching for the years 1960, 1961 and 1962 to be refunded to petitioner, and (2) home tutoring to be provided in the future if and as needed. Later, by letter dated August 22, 1963, petitioner requested that the petition be amended by striking the relief sought under (2) *supra*.

Respondent board of education says that it has never denied an education to petitioner's son and states that it has at all times been ready and willing to provide home instruction whenever necessary. It contends that petitioner failed to make proper application for the home instruction in question and to provide the medical information required to support such a request.

The facts elicited at the hearings in this matter reveal that petitioner's son, born March 20, 1947, is afflicted with a chronic physical ailment which, according to his doctor, has defied a specific and true diagnosis. (Tr. 6). It appears that when he develops a respiratory infection, his reaction is more violent than typical, characterized by fever, malaise, fatigue, and bleeding from the nose and throat. (Tr. 8, 9). In the opinion of his physician the frequency of these attacks is related to the boy's exposure over a period of time to a large group of children. (Tr. 10). Between attacks he appears well, able to engage in sports and other normal activities, and to attend school. Based on past experience, however, his doctor believes that he should not be exposed daily to a large group of children but that "he could be relatively isolated in a small group * * * and probably do quite well." (Tr. 9).

Although there was some reference to the existence of this problem prior to 1960, the allegations herein begin with that year. In September 1960, petitioner's son was enrolled in the eighth grade in the Little Silver Schools and attended school until October 3. Shortly thereafter, petitioner sent a partially completed Form A-210a, "Information on Physically Handicapped Child," as a request for home instruction, to the school medical inspector for his signature of approval. The medical inspector signed the form but subsequently withdrew his approval of the application pending submission of further medical evidence that the pupil's condition made continued school attendance impossible or unwise. Petitioner complained to the president of the Board of Education, who suggested she obtain a new form, fill it out completely, and submit it to the Board. Petitioner complied but did not furnish any supporting medical records or documentation; instead, she

orally referred the school medical inspector to her family doctor. The Board refused approval of the application for home instruction without further medical evidence, and petitioner filed her original complaint detailed *supra*. Her son remained at home for the remainder of the 1960-61 school year and, according to petitioner's testimony, was taught by tutors supplied by her. She further testified that he had several periods of illness during that year but that between these instances he was well and able to function normally. It was also established that she did not appear before the Board of Education at any time during that year to press her claim.

Respondent Board of Education maintains no high school and sends its secondary school pupils on a tuition basis to Red Bank. In September 1961, petitioner's son, now in the ninth grade, attended Red Bank High School for approximately one week, when he became ill. He was admitted to a hospital in New York City on September 18, 1961, and discharged on September 20, 1961, readmitted September 27, 1961, and discharged finally on October 5, 1961. (Tr. 25). From that time until February 9, 1962, he attended a nearby private school in Rumson. Petitioner testified that he became ill again and remained at home until April 5, 1962, when he returned to the Red Bank High School. (Tr. 135). The record shows that he was able to maintain regular attendance there, missing only 5 days, until the close of the school year.

For the school year 1962-63, petitioner testified that she placed her son in the custody of a friend who lives in another state and that he attended school there. She estimates that he was able to attend only 35% of the time because of his chronic illness.

At the conclusion of the hearings the exact relief sought by petitioner still remained unclear. In response to direct questions as to her specific purpose in seeking a hearing before the Commissioner, she replied:

"The purpose of my bringing this was to find out if my son could get an education in this state or whether he would be forced to move to another state to get an education. That was my main purpose in this hearing. * * *

"The Commissioner: Let me ask you this specific question, then: What is the relief that you hope the Commissioner will provide? What is it that you at this point are asking him to do?

"Mrs. Massey: Well, I thought if we can get the tutoring due it will cover the legal expenses that I have gone to to get this hearing through this three-year period.

"The Commissioner: So that your objective at this point is a reimbursement of whatever portion of the tutoring expenses you have obligated yourself that the Commissioner in his judgment might think you should be reimbursed.

"Mrs. Massey: And find out why this could happen to a child in our State. Why the denial of an education could happen to a child in this State.

"The Commissioner: I have to be clear on this, Mrs. Massey. Are you asking that the Commissioner order Red Bank to accept your boy in school?

"Mrs. Massey: No. I'm asking the Commissioner how a child in this State can be denied an education, which is against State law." (Tr. 217, 218).

Petitioner, however, was unwilling to submit an estimate of the amount allegedly due her for the cost of home tutoring and, in fact, refused to submit such a statement. The net effect of the record and her correspondence in respect to this matter is to reveal that her primary purpose is to fix the responsibility for her claim of a denial of educational opportunity for her son.

Respondent's position is that it was ready to supply home instruction to petitioner's son during the 1960-61 school year but that no proper application was made nor proof furnished that the child should not attend school when he was well. As stated by the president of the Board of Education:

"Generally speaking, the Board's judgment was that they were in full agreement that Lance Massey had this disease, chronic neutropenia, and nobody denied this but our question still was: Is this disease sufficient to keep the child out of school? And since the child had been placed in school by his mother just a short period of time before, had been placed in school continually up to the 8th grade as far as we could tell and then removed from school, we questioned whether the disease in itself was enough and we would like to have some sort of proof that it was. We didn't deny at all that the child had the disease.

"Q. And you had asked Mrs. Massey to submit more proof to the Board?

"A. Yes. This is what we were asking. We did know that the child was in school when he had this disease. Now the child was not in school and still had the disease and the two did not reconcile with the Board." (Tr. 209, 210).

The statutes pertaining to physically handicapped children provide for individual instruction at home or in school whenever in the judgment of the board of education with the consent of the Commissioner " * * * it is impracticable to transport a child because of distance or other good reason to a class * * * ." (R. S. 18:14-71.23(e)). One of the categories of classification is "chronic defects and diseases" (R. S. 18:14-71.18) and the "medical inspector for the school district may administer the procedures for classification required * * * ." (R. S. 18:14-71.19).

The withdrawal of petitioner's son on October 3, 1960, appears to have been the culmination of a number of prior disagreements between school and parent. The testimony reveals that petitioner had been dissatisfied with her son's 7th grade teacher and her request that he be transferred to another class was granted. Again, early in 1960, she complained about the 8th grade teacher and asked for reassignment of her son. It appears that the school authorities found no reason for the request and declined to grant it. Following the lunch recess on October 3, the boy did not return to school, and, at a subsequent conference with school officials, petitioner stated that he would not return until he was placed with another teacher. The school personnel testified that they believed, at least initially, that the boy was withdrawn from school as a result of this altercation and not because he was ill. There followed the communications from petitioner to the county superintendent

of schools, the State Department of Education, and, finally, institution of the first petition of appeal, offer of settlement, etc., recited herein.

The testimony also reveals a clear difference of medical opinion between the family doctor and the school physician. Both agree that the boy has an unusual medical problem but disagree on the question of school attendance at times when he is not incapacitated by illness. The family doctor expressed his opinion as follows:

“* * * this boy cannot tolerate, or has not been able to tolerate the presence of a large group of children without getting into difficulty. As soon as this exposure has been in the past a matter of a couple of weeks, he gets into trouble. Somebody has developed a mild respiratory infection and immediately he is down with not a mild respiratory infection, but a rather, at least initially, serious and disabling illness.” (Tr. 10, 11).

Later, on cross-examination the following testimony was given:

“Q. * * * Except for this possibility that he will obtain an infection from going to school, might even say probability, Doctor, there isn't any other physical reason why he should not attend school, is there?

“A. That's right, unless he is ill.” (Tr. 15).

In the opinion of the school medical inspector, however, the boy was able to attend school in the intervals when he was well between his periods of incapacity. In the absence of complete medical history the school doctor was unwilling to approve home instruction for an indefinite period which would cover not only such days as the boy might be unable to come to school but those times when he was well also. In his testimony the doctor said:

“It was my opinion that this boy should not be given unlimited home tutoring without a recommendation as such from the Johns Hopkins Hospital who had worked the child up because of the rare disease. Mrs. Massey was not in favor of having me write for such a recommendation * * *.

“Q. Did you ask for additional medical information before you would certify whether he should attend school or he should not?

“A. Yes.

“Q. Did you later advise Mrs. Massey that you would not certify for home instruction for Lance unless you got additional medical information?

“A. Yes. If he were ill and he was out, had to be out for a month or six weeks, then he would of course be entitled to it; but it was my opinion that the fact that he was carrying on a normal life, going to this dancing class, had entered into sailing competition with other children of his age, that he was well enough to go to school. I did not feel that it was a threat to his health to be in contact with these other children * * *. I know that he is not getting over this illness. That's not the question. The question is whether or not he can attend school. It was my opinion that he could.” (Tr. 179, 180, 186).

Later, in response to direct questioning by the Commissioner, the school doctor made these statements:

"Q. Do I understand * * * that the application as submitted to you, the supporting data was in the form of conversations with the mother of the boy and the family doctor?

"A. Private physician, yes.

"Q. But no documentary supporting evidence was submitted at any time?

"A. No.

"Q. And in your judgment as the Medical Inspector of the school, in your professional judgment you refused to sign this application on the basis that you felt the child could attend school.

"A. Yes. I must emphasize I did not doubt the validity of the diagnosis. What I'm doubting is the clinical ability of this child. What I'm doubting is whether or not this child is endangered by attending public school." (Tr. 194, 195).

With respect to the Red Bank High School, petitioner's complaint appears to be based on the fact that home tutoring was not provided for the period from February 9 to April 5, 1962; that she disagreed with the algebra teacher in regard to the boy's progress in that subject; and her umbrage at a statement alleged to have been made by the high school advisor that "If Lance is going to continue to be absent due to illness, as he has been in the past, he will be unable to get an education at Red Bank High School."

What emerges most clearly in this case is the almost total breakdown of communication between the persons involved in the problem. The testimony fails to show any real attempts by anyone concerned to meet face to face in an effort to resolve the increasing lack of rapport and consequent difficulty. After the October 1960 conference the record is barren of any further discussions between the Little Silver school officials and petitioner. It is clear that petitioner never appeared before the Board of Education to discuss her claim. Even with Red Bank High School most of the communication was by infrequent letter or by telephone messages. In the Commissioner's judgment, the difficulties herein might have been resolved had there been more of a disposition of petitioner and the Little Silver school officials to cooperate and to communicate effectively.

The Commissioner notes that the pupil in this case, while being denied home instruction, was permitted to remain away from school from October 3, 1960, for the rest of the school year during part of which time, at least, he was well and, in the opinion of the school medical inspector, able to attend school. In the Commissioner's opinion the school officials had a duty to bring this matter to a head by taking appropriate steps to compel attendance at school, in the light of their position that he was not eligible for home tutoring, which duty they failed to perform. Denying home instruction, on the one hand, for the reason that in the school doctor's opinion the boy was able to attend school, and on the other taking no measures to enforce the compulsory education statutes, is an untenable position, in the Com-

missioner's judgment, which permitted the matter to drift and to assume its present proportions.

Despite respondent's neglect to take affirmative action, the Commissioner finds no basis on which he can order payment to petitioner of tutoring expenses for the 1960-61 school year. The record is clear that the application for home instruction was not properly submitted and that the necessary supporting data were not furnished. Approval of home instruction is the statutory responsibility of the school medical inspector and, lacking the data he requested in order to evaluate the necessity therefor, the school doctor's refusal to certify was within the scope of his medical competence and not arbitrary or unreasonable. The Commissioner finds that petitioner failed to furnish the information required to evaluate the necessity for home instruction and is, therefore, not entitled to reimbursement of the costs of home instruction provided on her own initiative. Having so found, there is no need to determine the merits of the request for home tutoring.

It is even more clear that petitioner's claim for reimbursement from Red Bank High School for the February 9 to April 5, 1962, period cannot be granted. The record shows that petitioner's son was entered in a non-public school after his hospitalization in the autumn of 1961, and when he became ill in February 1962, no application was made to the public school for approval of home instruction. Under these circumstances, there is no basis for a claim for the expenses of instruction at home arranged by petitioner without the knowledge or approval of the public school.

Nor can the Commissioner find evidence of a denial of educational opportunity to petitioner's son. It is clear that petitioner withdrew this pupil from the Little Silver Schools during the 1960-61 school year on her own initiative, that he was not excluded by the school authorities, and that he would have been permitted to return at any time. It is also apparent that he was not retained in the 8th grade but was sent, at local school district expense, to the Red Bank High School. His withdrawal from that school following his unfortunate need for hospitalization and his subsequent enrollment at a non-public school were entirely voluntary. He could have returned to Red Bank High School at any time he chose to present himself and, in fact, no bar to his readmission there has existed then or now. (Ex. H-1).

Petitioner's concerns in respect to the algebra teacher and the statement of the high school advisor are without substance, in the Commissioner's opinion. There appears to have been a history of disagreements between petitioner and her son's teachers, and the algebra teacher represents one more in the series. In any event the problem is now moot and its merits need not be considered further. It seems clear, too, that the advisor's comment was gratuitous, intended only to suggest that frequent and extended absences are serious handicaps to a pupil's schooling. To read into the observation an expressed intent to deny educational opportunity is to strain credibility.

Finally, the Commissioner notes that except for the concerns expressed by petitioner herein, a cooperative and harmonious relationship appears to have existed between the family and Red Bank High School. The high school made textbooks available to petitioner's son when he was not in attendance and exhibited an interest and a concern for the boy's progress. Petitioner

likewise, in her testimony, said that except for her criticism of the algebra teacher she had no complaints about the high school teachers and indeed that "Lance was very fond of Red Bank High School. Very fond of it." (Tr. 109).

After a careful consideration of the testimony and exhibits, the Commissioner finds and determines that the action of the Little Silver Board of Education in refusing to provide home instruction for petitioner's son in the 1960-61 school year, lacking necessary information and a complete application, was within its discretionary authority and, therefore, it has incurred no obligation to reimburse petitioner for tutoring costs contracted for without its knowledge or sanction. The Commissioner further finds no evidence of a denial of educational opportunity to petitioner's son other than the unavoidable problems which result from enforced absences brought about by his unfortunate chronic illness. Petitioner's son is, therefore, still entitled to attend the schools of the district or, if he is physically unable to do so, to submit an application for home instruction supported by such data as may be necessary to make a valid evaluation and determination to the board of education of the district in which he is a resident.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

December 18, 1963.

Pending before State Board of Education.

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

CECELIA BARNES, RAYMOND CAVALLI, FRANK CASEY, JACOB CUTHBERT,
RAYMOND DAVIS, WALTER ECKERT, WILLIAM R. FLANAGAN, WILLIAM D.
HAYDEN, ALBERT HERBERMAN, JOHN J. HORAN, ELIZABETH HOULIHAN,
JEREMIAH HURLEY, JOHN LYNCH, THOMAS MEIGH, BENJAMIN
MOSLEY, WILLIAM O'TOOLE, JOSEPH PANUCCI, JAMES REMLER,
WILLIAM SADLACK, JOHN WITTERSCHEIN, WILFRED YEO, JOHN
COLLERAN, THERESA DEMARCO, MARGARET L. GORMAN,
ELIZABETH MCCOY, WILLIAM GILL, SEBASTIAN D'AMICO,
ANTHONY LAMBERTI, ALEXANDER MANZO, JAY MARKEY,
ANNIE SPENCER MORAN, EDWARD WALL, ANTHONY
VARACALLI, JOSEPH ENNIS, ALBERT SAUERBIER,
WILLIAM DUNNE, HAROLD STOEHLING, MICHAEL
FIORE, HENRY MAJOLA, JOHN TOSCANO,
ETTORE VIGNONE,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,

HUDSON COUNTY,

Respondent.

For Petitioner, William Sadlack: Abraham Miller, Esq. and Michael
Hochman, Esq.

For Petitioner, Michael Fiore: Max A. Boxer, Esq. and Lee A. Holley, Esq.

For other Petitioners: Francis X. Hayes, Esq.

For Respondent: John J. Witkowski, Esq.

DECIDED BY THE COMMISSIONER OF EDUCATION FEBRUARY 28, 1962

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Commissioner of Education on appeals by forty-one noninstructional employees of the Jersey City Board of Education from actions of the Board in abolishing their positions or terminating their services.

Generally, all of the petitioners claim that the Board acted arbitrarily, in abuse of its discretion and in bad faith so as to entitle the petitioners to reinstatement to their positions. Additionally, some of the petitioners claim that they had acquired tenure rights which were violated by the acts of the Board. The Commissioner found for the Respondent on all counts, except that he ordered the reinstatement of Petitioner, Wilfred Yeo, to his former position on the ground that his employment had been terminated in violation of his tenure rights.

Prior to the decision of the Commissioner, the appeals of the following were, for one reason or another, discontinued:

JEREMIAH HURLEY
JOHN WITTERSCHEIN
EDWARD WALL
ANNIE SPENCER MORAN
WILLIAM DUNNE

In addition, William D. Hayden is deceased and his administratrix, Mildred D. Hayden, has been substituted. She presses her claim only as to any back salary to which her decedent may be entitled.

Respondent does not appeal the reinstatement of Wilfred Yeo.

We shall first consider the allegations of bad faith, abuse of discretion and arbitrary action which are made on behalf of all the remaining Petitioners. As will be seen, it is our decision that these allegations have not been substantiated. Since only the following named Petitioners assert rights aside from the general claims, we deal with their cases individually:

RAYMOND DAVIS
RAYMOND CAVALLI
FRANK CASEY
JOHN COLLERAN
WILLIAM P. PLANAGAN
ALFRED HERBERMAN
WILLIAM ECKERT
MILDRED D. HAYDEN (for William Hayden)
JOSEPH PANNUCCI
THOMAS MEIGH

WILLIAM O'TOOLE
JOHN LYNCH
BENJAMIN MOSLEY
WILLIAM SADLACK
ETTORE VIGNONE
MICHAEL FIORE

I.

The budget submitted by the Jersey City Board of Education to the Board of School Estimate for the year 1958-59 was \$232,000.00 lower than the budget for the preceding school year. Of the amount submitted, approximately \$1,000,000.00 was required to grant mandatory salary increments and employ needed additional teachers. Economies would have been required were the budget approved as submitted. When the Board of School Estimate approved a budget of more than \$1,000,000.00 less than that submitted, the need for immediate action to effect savings became pressing.

The evidence demonstrates that in comparison with national norms for large city school districts, the noninstructional costs for Jersey City schools were high. Thus, it was apparent that reductions must be had in this area.

The organization meeting of the new Board of Education was called for July 1, 1958. Some days prior to this meeting, there was a gathering at the Hotel Manhattan in New York City. Present were the Mayor of Jersey City, the School Board Counsel and members of the majority bloc of the Board of Education. The testimony is in dispute as to whether, at this gathering, there was discussion as to what should be done to effect the necessary economies.

At the July 1, 1958 meeting, and at adjourned sessions of this meeting, on July 10 and July 24, and August 28, petitioners' services were terminated or their positions abolished. The testimony is abundant that advice of counsel was sought as to tenure rights and that such rights were honored where the Board was told they existed. The Board employee assigned to prepare the resolutions testified that he was instructed to abolish entire job categories. Where an entire category was not abolished, terminations were to be based on tenure rights.

Under *R. S. 18:6-27*, boards of education are authorized to appoint a superintendent of schools, a business manager "and other officers, agents, and employees as may be needed, and may fix their compensation and terms of employment * * *." Tenure of employment accrues to certain specific positions: full-time secretaries, assistant secretaries, and business managers of boards of education (*R. S. 18:5-51*); janitors (*R. S. 18:5-67*); those holding secretarial or clerical positions (*R. S. 18:6-27*); and attendance officers in city school districts (*R. S. 18:14-43*). In the absence of any express statutory provisions therefor, tenure of employment does not attach to any other noninstructional position under a school district board of education. The employment and dismissal of such employees is subject, therefore, to the will and rules of the employing board of education. See *Bowen v. Board of Education of Jersey City*, 1954-55 *S. L. D.* 115; *Cimo v.*

Board of Education of Jersey City, Ibid. 118, and *Corrado v. Board of Education of Hoboken*, 1956-57 S. L. D. 59.

It is clear that the respondent Board of Education had authority to terminate the employment of any petitioner whose position was not protected by tenure.

Apparently, the Petitioners argue that the actions of the Board were taken for reasons other than economy. It seems that commencing with July 1, 1958, the majority of the Board was, for the first time, made up of persons appointed by Mayor Witkowski. It is argued that this majority sought to remove employees who owed allegiance to previous administrations and replace them with Witkowski followers; that the best interests of the school system were not considered in determining which positions to abolish and which persons to terminate; and that not all members of the Board were given an opportunity in advance of the meetings to consider the resolutions.

The words of some of the witnesses in this case indicate that the flavor of politics was present:

(a) Vincent P. Regan, member of Board of Education majority, Transcript pp. 27-28, afternoon session of hearings, held January 28, 1960:

"Q: So, Mr. Regan, you feel that in the case of Mr. Fiore it was a matter of politics that caused his severance from the Board? * * *

A: Let's face it. That's why Mike was fired. He wasn't rubbing the apple the right way."

(b) Mrs. Margaret McFadden, Director of Food Services for Jersey City Board of Education, Transcript pp. 109-110, hearing held March 9, 1960:

"Mr. Hayes, you must have been born and raised in Jersey City, and there was no city in the world as political as Jersey City.

"You know you have got to have small jobs for people who are not getting votes for you.

"Now, these people were vote getters, either one way or the other. It didn't matter who was in, they had jobs, whether Kenny was in, whether Berry was in, whether Witkowski was in, it didn't matter. * * *

"* * * This is all nonsense to me because these women have small jobs and if you are put in by political parties and that party gets out, they have to go out, right?

"They have to find jobs for people."

(c) Fred W. Martin, member of the majority of the Jersey City Board of Education, Transcript p. 20, hearing March 29, 1960 (speaking of Petitioner, Michael Fiore):

"Q: Had he been doing his job on the Board?

A: I don't know. I felt he had gotten it through politics and he didn't have tenure, and I believe in the spoils system, to the victor belong the spoils. I believed he should be knocked out."

Since the Jersey City Board of Education employees were not covered by Civil Service in 1958, the acts of the Board in terminating certain employees were valid even if selections were made for political reasons.

“* * * as long as * * * a board of education * * * acts within the authority conferred on * * * it by law, the courts are without power to, or will not, interfere with, control, or review * * * its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof or error, nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed.” 78 *C. J. S.* 920.

In the absence of clear abuse of the discretionary power of the Board, the Commissioner shall not interfere. It was held in *Boult v. Board of Education of Passaic*, 136 *N. J. L.* 521 (*E. & A.* 1948), concerning the authority of the Commissioner and State Board of Education under *R. S.* 18:3-14 and 15:

“Neither of the quoted statutory provisions was intended to vest in the appellate officer or body the authority to exercise originally the discretionary power vested in the local board.”

The Petitioners argue the manner in which the resolutions of abolition and termination were introduced and acted upon constituted a lack of exercise of discretion and arbitrary determinations rendering the resolutions invalid under the doctrine of *Cullum v. Board of Education of North Bergen*, 1952-53 *S. L. D.* 62, affirmed State Board of Education (1953), affirmed 27 *N. J. Super.* 243 (*App. Div.* 1953), affirmed 15 *N. J.* 285 (1954).

We agree with the Commissioner that the meeting at the Hotel Manhattan was not the kind of caucus frowned upon in *Cullum*. Even if the question of the abolitions and terminations were discussed at the hotel meeting, there was full opportunity for discussion at the later Board meetings. Even if the Board did not consider the particular circumstances of those affected, a procedure was set up whereby recommendations were submitted to the Board, by competent Board employees, as to which positions should be abolished or vacated in the interests of economy. It may be that other boards would have acted otherwise. It may be that the actions of this board were sloppy, rough and tumble. Some might say that certain long-term employees were treated cruelly. However, the Board was faced with the need for prompt economy moves. We believe that in effecting these economies, the Board acted within the limits of its legal discretion. We must affirm the Commissioner in his finding that based on all of the record, there is insufficient evidence to sustain findings of bad faith, abuse of discretion or unlawful arbitrary action.

This leads us to a consideration of the individual claims of those Petitioners who assert special rights.

II.

Of the sixteen employees, named above, whose claims survive the rulings in Point I of this opinion, six claim tenure as clerks under the provisions of *R. S.* 18:6-27 and seven claim the violation of their tenure rights as janitor or janitorial employees under the provisions of *R. S.* 18:5-66.1 and 67.

A. CLAIMS UNDER R. S. 18:6-27.

R. S. 18:6-27 provides:

"All persons holding any secretarial or clerical position under any board of education, or under any officer thereof, in the school system in this State, shall enjoy tenure of office or position during good behavior and efficiency, * * *. No such employee shall be dismissed or subjected to reduction in salary except for inefficiency, incapacity, unbecoming conduct or other just cause after written charge and * * * after hearing * * *."

The employees claiming tenure under this statute, their duties and the Commissioner's findings as to them are as follows:

RAYMOND G. DAVIS—He was appointed as porter in 1946 and in 1951 as an Inspector in the maintenance department. On July 1, 1958, he was classified as Inspector Class I in the maintenance department. His position was abolished for reasons of economy and he was reassigned to his former position as porter, as to which it is apparently conceded he had tenure. The salary of Inspector Class I was \$5,900.00 per annum and that of porter approximately \$3,800.00 per annum. Mr. Davis testified that he made up mechanic's payrolls, collected time cards, kept time records, maintained absentee records, and kept lists of where the mechanics were working and what they were doing. He also personally checked to see if men were on the job. He performed occasional inspections as assigned but the bulk of his time was spent on clerical assignments. His superior, Mr. Eckert, testified that Mr. Davis spent 75% of his time on clerical duties. The record does not disclose who has been performing his duties since July 1, 1958. The Commissioner held his position was not "clerical within the intent and meaning of R. S. 18:6-27."

FRANK CASEY—On July 1, 1958 and since July 1, 1951, Mr. Casey held the position of storekeeper. His services were terminated on July 1, 1958. He was in charge of the administration of the storeroom. He kept time sheets, recorded absences, scheduled and recorded vacations, noted accidents and reported on them, kept delivery and pick-up records, recorded purchase orders, typed requisitions, took inventories, supervised the card index for storeroom records, received and counted supplies, etc. The Commissioner found that the essential nature of the work was to receive, store, handle and issue materials and supplies and that record-keeping was incidental. He found no tenure under R. S. 18:6-27.

ALBERT HERBERMAN—On July 1, 1958, and for more than three years prior thereto, he was a stock clerk. He testified that he was kept busy typing records of what was received and what was requisitioned and of inventory remaining. His services were terminated on July 1, 1958. The Commissioner made the same ruling as to Herberman as he made as to Frank Casey.

WILLIAM R. FLANAGAN—On July 1, 1958 and for more than three years prior thereto, he was a receiving stock clerk. He received goods which came in, checked it, signed receipts. His services were terminated on July 1,

1958. The Commissioner made the same ruling as to Flanagan as he made as to Casey and Herberman.

JOHN COLLERAN—On July 1, 1958, the day his position was abolished, and since 1946, Mr. Collieran was an assistant storekeeper. From December 5, 1938 to January 1, 1946, he was a clerk in the storeroom. His duties as assistant storekeeper consisted of assigning requisitions for execution, listing purchase orders, checking loading of trucks, preparing inventories, maintaining neatness and order in storeroom, typing notices, handling inventory, etc. The Commissioner made the same ruling as to Collieran as he made as to Casey, Herberman and Flanagan.

ETTORE VIGNONE—Mr. Vignone was employed as a timekeeper on June 7, 1948, an Assistant Supervisor of Maintenance on September 1, 1950, and as Supervisor Class IB on July 1, 1952, the position he held until July 1, 1958, when his services were terminated. He testified that 90% of his time was spent on clerical duties and that he was in charge of all maintenance emergencies occurring outside of regular hours. The Commissioner found the clerical duties incidental to his duty to cooperate with the supervisor of maintenance in the supervision of the maintenance department, and thus found no clerical tenure.

R. S. 18:6-27 does not define "clerical position." We find no cases in this state wherein a definition is made which is here helpful. But see *In re Allen*, 95 Atl. 215, 216 (Sup. Ct. 1915).

Bouvier's Law Dictionary, Third Edition, 1914, p. 505, gives a number of definitions, among which are:

"In Commercial Law. A person in the employ of a merchant, who attends only to a part of his business, while the merchant attends to the whole."

"In offices. A person employed in an office, public or private, for keeping records or accounts."

In *The Oxford English Dictionary*, Vol. II, 1933, there are, again, many definitions to be found, for example:

"The officer who has charge of the records, correspondence, and accounts of any department, court, corporation, or society, and superintends the general conduct of its business."

"One employed in a subordinate position in a public or private office, shop, warehouse, etc. to make written entries, keep accounts, make fair copies of documents, do the mechanical work of correspondence and similar 'clerkly' work."

In *Crooke v. Farmers Mutual Hail Insurance Association*, 218 N. W. 513, (Sup. Ct. Iowa 1928), the court became deeply involved in defining the word "clerk." This was a workmen's compensation case which turned on whether the petitioner was "engaged in clerical work only" as distinguished from clerical work subject to the hazards of business. At page 515, the court holds that a "supply clerk" is a clerk as distinguished from a porter, handler, trucker or janitor. Petitioner had the duties of checking and sending out

supplies and was determined to be a clerk. See *In Appeal of Walker*, 294 Pa. 385, 144 Atl. 288 (Sup. Ct. 1928), *Amyot v. Caron*, 88 N. H. 394, 190 Atl. 134 (Sup. Ct. 1937).

“The duties performed rather than the title of the position must be controlling in determining whether a position is protected by tenure. Nomenclatures may not be the deciding factor,” *S. L. D.* 1959-60, *Quinlan v. Board of Education of Township of North Bergen*, pages 113, 114.

It is not a simple matter to determine who are and who are not clerks under our statute, even with the assistance of these authorities. It appears to us that the supply room positions are basically clerical in nature. Petitioners Casey, Herberman, Flanagan and Colleran were primarily involved in record-keeping duties. It would seem from the record that any handling of goods was incidental to the primary task of routing supplies, maintaining inventories and records. We reject the Commissioner's suggestion that “clerk” and “secretary” are basically interchangeable terms. We hold that Frank Casey, Albert Herberman, William P. Flanagan, and John Colleran did, on July 1, 1958, have tenure under the provisions of R. S. 18:5-26. Since Casey, Flanagan and Herberman were dismissed without the mandatory statutory hearing, we direct that they be reinstated in their positions. Colleran's position was abolished. We remand his appeal to the Commissioner for a determination as to what rights, if any, should accrue to him by reason of his tenure.

We are also persuaded that the positions occupied by Raymond G. Davis and Ettore Vignone were essentially clerical in nature, even though their additional duties were in other areas. See *Quinlan v. Board of Education of North Bergen*, 73 N. J. Super. 40, 43 (App. Div. 1962). We direct the reinstatement of Mr. Vignone. Since Mr. Davis' position was abolished, we remand his appeal to the Commissioner for a determination of what rights, if any, should accrue to him by reason of his tenure.

B. CLAIMS UNDER R. S. 18:5-66.1 and 67.

R. S. 18:5-66.1 provides that the “number of janitors, janitor-engineers, custodians or janitorial employees” may be reduced with due regard given to seniority and those dismissed retain reemployment rights.

R. S. 18:5-67 provides that except as set forth in 18:5-66.1, no “public school janitor” may be discharged except for cause after hearing.

The following Petitioners claim rights under the statutes:

RAYMOND CAVALLI was a Supervisor Class III, employed as supervisor of grounds when his position was abolished for reasons of economy.

WILLIAM D. HAYDEN was a Supervisor Class IC when his position was abolished on July 1, 1958. Mr. Deily, Respondent's witness, testified on June 17, 1960, at Tr. p. 93, that Mr. Hayden was in fact the head of the janitorial department and was performing janitorial work.

JOSEPH PANUCCI was a Supervisor IIIE when his services were terminated. His work was that of supervisor of janitorial services, under William D. Hayden.

The Commissioner ruled that Cavalli, Hayden and Panucci were not covered by R. S. 18:5-66.1, apparently due to the fact that they were supervisory employees. As to Cavalli, it is implied that since he was a groundskeeper, this, too, foreclosed him from the statutory benefits.

R. S. 18:5-66.1 refers to "janitors, janitor-engineers, custodians or janitorial employees." We believe it was the intention of the legislature to include the entire janitorial staff within the cloak of the statutory protection. See *Ash v. Board of Civil Service Commissioners of the City of Des Moines*, 247 N. W. 264 (Sup. Ct. Iowa, 1933), at p. 266. We hold that the legislature meant to include groundskeepers. It is difficult to find a logical reason for those duties are limited to the interiors of buildings and those who are concerned with the grounds. The statutory word "custodian" should be read to include groundskeepers. We direct that Panucci be reinstated, since his employment was not terminated in accordance with the provisions of R. S. 18:5-67 and we remand the cases of Cavalli and Hayden to the Commissioner for a determination as to whether any of their rights were infringed by the abolition of their positions.

THOMAS MEIGH and WILLIAM O'TOOLE were employed as utility men until July 24, 1958, when their services were terminated. Their duties included general cleaning work, grounds work, moving of furniture, etc. From the uncontradicted testimony, their work appears to us to be of a janitorial nature. The Commissioner found that since they were not enrolled in the Teachers' Pension and Annuity Fund as janitorial employees (R. S. 18:13-112.4 (p)), they must not have janitorial positions. We are not impressed by this argument. If their duties are janitorial, they are entitled to the protection of the applicable statutes. However their employer may have considered them for the purposes of the pension fund is not relevant. We direct that Meigh and O'Toole be reinstated to their former positions in that they were not dismissed in accordance with the provisions of R. S. 18:5-67.

JOHN A. LYNCH was a watchman when his services were terminated on July 1, 1958. He testified that from late in 1957 on, he had been assigned some janitorial duties. We agree with the Commissioner that the position of watchman is not covered by the statutes protecting janitors. The difference in the kinds of work is self evident. Nor can we hold that the relatively short period during which this watchman performed some janitorial duties be deemed sufficient to convert his status, more so in the light of his testimony that "nobody stopped me" from performing janitorial duties. The Commissioner is affirmed as to John A. Lynch.

BENJAMIN MOSELY. On July 1, 1958, Mr. Mosely was a Fireman Class B. At the July 1 meeting, he was demoted to porter and on July 10 reassigned as watchman, the position in which he had originally been employed in January, 1957. He had been promoted to fireman in March, 1958. The position of fireman is protected under the terms of R. S. 18:5-66.1. On September 10, 1959, Mosely was reassigned as fireman. On the basis of Mr. Mosely's testimony that he knew of no one who was employed as a fireman between July 1, 1958 and September 10, 1959, the Commissioner held that none of Mr. Mosely's rights were impinged upon. However, Mosely now claims that on July 1, 1959, Henry Lipinski was appointed as a Fireman Class B. The minutes of the meeting of July 1, 1959 (page 69) seem to bear this out. Mr.

Mosely thus claims he is entitled to the pay he lost between July 1, 1959 and September 10, 1959, by reason of not receiving the first available appointment as fireman. We remand Mr. Mosely to the Commissioner to determine whether Mr. Mosely was in fact entitled to the July 1, 1959 appointment, over Mr. Lipinski, and to enter the appropriate order.

III. OTHER EMPLOYEES.

WALTER ECKERT was Supervisor of Maintenance when his position was terminated on July 1, 1958 and he was returned to his position of custodian. No claim is made that he had tenure as Supervisor of Maintenance. We affirm the Commissioner's dismissal of Eckert's petition. The Board was within the limits of its discretion in shifting non-tenure positions within the maintenance department as part of its economy drive.

WILLIAM SADLACK was Supervisor of Attendance Department when his position was abolished on August 28, 1958 and he was reassigned as an attendance officer. His position of attendance officer is protected by tenure after one year by the provisions of *R. S. 18:14-43*. This protection extends to attendance officers only and not to any supervisory position. See *Werlock v. Board of Education of Woodbridge*, 5 N. J. Super. 140 (*App. Div.* 1949) and *Lange v. Board of Education of Audubon*, 26 N. J. Super. 83 (*App. Div.* 1953). The Board was within its rights in reassigning Mr. Sadlack. The Commissioner is affirmed.

MICHAEL FIORE was employed as a teacher by the Respondent for a number of years. In 1953, he vested his rights in the pension fund. On July 15, 1957, he was appointed Business Manager. On October 10, 1957, the Board passed a resolution, effective July 15, 1957, establishing the position of Custodial Director and Business Manager and amending the July 15 resolution so as to appoint Fiore Custodial Director and Business Manager. Petitioner concedes that the change in title involved no change in duties. Apparently the change was made to enable Fiore to obtain reinstatement to the pension fund as a custodial worker. On July 1, 1958, the Board, by resolution, abolished the position of Custodial Director and terminated Petitioner's services as Business Manager.

Petitioner makes much of the fact that the Board, on July 1, 1958, treated first with the position of Custodial Director and then with that of Business Manager. He says that since his position was that of "Custodial Director and Business Manager," his status was not legally affected. We are not convinced. Perhaps it would have been more orderly had the Board abolished the position of "Custodial Director and Business Manager" and then recreated the position of Business Manager. Had this been done, Fiore would be in the same position he presently finds himself. The intent of the Board is perfectly clear. We will not allow the quibble over terminology to affect substantive rights.

A Business Manager acquires tenure after three years' service (*R. S. 18:5-51*). Prior to acquiring tenure, he may be removed by a majority vote of all the members of the Board (*R. S. 18:5-45*). Fiore did not serve three years and thus did not acquire tenure. He was removed by a majority vote of all the members of the Board. He claims tenure as a custodial worker under *R. S. 18:5-66.1* and 67. However, he concedes that when his title was changed

from Business Manager to Custodial Director and Business Manager, there was no change in his duties. This confirms our impression that the duties of Business Manager should normally include general supervision over the entire custodial staff. Whatever his title, Fiore's duties were those of Business Manager. His tenure rights stand or fall on the statutes relating to Business Managers. They fall. The majority of the Board had a right to terminate Fiore's employment and we have no right to examine their motives. We affirm the dismissal of the petition by the Commissioner.

December 4, 1963.

Pending before Superior Court, Appellate Division.

FLORENCE S. EVAUL,

Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN,

Respondent.

Decided by the Commissioner of Education June 4, 1962.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal arising out of the decision of the Supreme Court of New Jersey in the case of *Evaul v. Board of Education of the City of Camden*, 35 N. J. 244 (1961). The Court held, at page 250:

"* * * in the unusual circumstance of this case, it is unduly harsh for appellant to lose rights acquired during the many years she served as a teacher in the Camden school system * * *."

"To avoid later litigation, however, we hold that because the loss of her teaching position was occasioned by her own impetuous conduct and her reinstatement is based upon equitable principles, she is not entitled to collect her salary for the period dating from the acceptance of her resignation until her reinstatement."

Petitioner was absent from her employment for approximately two years during the litigation of the matter. Although she claims no payment for the period of her absence, petitioner now claims, for the year in question, the benefit of the salary increments and adjustments which she would have received had she been working continuously.

The facts and law involved in this case are set forth adequately in the decision of the Commissioner. We approve the Commissioner's determination and adopt his opinion as our own.

Additionally, it should be noted that petitioner misconceives the import of the word "reinstatement," as used in the decision of the Supreme Court. It is clearly the intention of the Court that the petitioner was not deprived of "rights acquired" during her years of service. She was not to receive any benefits during the period of her absence from the employ of the respondent. The increments and adjustments during the period of her ouster were not

rights previously acquired. She is not entitled to them. Increments and salary adjustments, according to the salary schedule of respondent, are awarded for years of service. Although the Court returned petitioner to her employment, it was abundantly clear that it was not intended that the petitioner should profit from her "impetuous conduct."

For the reasons stated above, the decision of the Commissioner of Education is affirmed.

March 6, 1963.

IN THE MATTER OF THE TENURE
HEARING OF DAVID FULCOMER,
(HOLLAND TOWNSHIP, HUNTERDON COUNTY)

Decided by the Commissioner of Education June 11, 1962.

DECISION OF THE STATE BOARD OF EDUCATION

In this case, the Commissioner of Education found that David Fulcomer, a teacher in Holland Township School, improperly and unnecessarily did physical violence to the person of a pupil, Donald Yowell, in 2 incidents on the morning of December 21, 1961 in his classroom at the said school. The Commissioner further found and determined that the said acts constituted conduct unbecoming a teacher and that the said findings were sufficient to warrant his dismissal by the Board of Education of Holland Township under the provisions of *R. S. 18:13-17*. Pursuant thereto, the said David Fulcomer was dismissed from his position as teacher in the said Township. He thereupon appealed to this Board.

Having read the briefs of the respective parties and having heard oral argument thereon, the Legal Committee recommends that the State Board affirm the finding by the Commissioner to the effect that the aforesaid conduct of David Fulcomer constituted conduct unbecoming a teacher. However, your Committee feels that there is not sufficient evidence in the record before this Board in order to reach a determination as to whether outright dismissal from the system was warranted, or whether a lesser penalty would have sufficed.

Your Committee therefore recommends that the State Board of Education order that this matter be remanded to the Commissioner of Education to the end that he shall forthwith conduct a hearing at which there shall be developed all evidence relevant to the question of the propriety of the penalty to be imposed upon David Fulcomer for his conduct as above set forth. At said hearing evidence shall be produced by all parties concerned showing David Fulcomer's record as a teacher prior to the incidents of December 21, 1961, evidence bearing upon the question as to whether Mr. Fulcomer's conduct amounted to deliberate premeditated action, motivation or provocation for such acts, and any other evidence which the Commissioner may deem relevant to the question of the penalty to be imposed. Evidence shall likewise be introduced at said hearing bearing upon the employment of Mr. Fulcomer subsequent to the above incidents and down to the present date. It is further recommended that upon completion of said hearing the Commissioner shall report to this Board his findings and decision as to the proper penalty. It is

also recommended that this Board retain jurisdiction of this appeal, except as herein provided, until further order of this Board.

December 4, 1963.

Further proceedings on remand pending before Commissioner of Education.

BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY
FUND OF THE STATE OF NEW JERSEY, *Appellant,*

v.

ALEX A. LATRONICA, *Respondent.*

BOARD OF EDUCATION OF THE TEACHERS' PENSION AND ANNUITY
FUND OF THE STATE OF NEW JERSEY, *Appellant,*

v.

HOWARD B. BRUNNER, *Respondent.*

BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY
FUND OF THE STATE OF NEW JERSEY, *Appellant,*

v.

PAUL D. O'CONNOR, *Respondent.*

Decided by the Commissioner of Education September 14, 1961.

DECISION OF THE STATE BOARD OF EDUCATION

Each of the respondents is a veteran and member of the Teachers' Pension and Annuity Fund. Each has retired from his employment with a local board of education and thereby became entitled to a pension from appellant. The appellant, in determining the amount of retirement income payable to the respondents has, in each case, disallowed a portion of the salary paid during the last year of service, thereby reducing the amount of retirement income. The rulings of the appellant were based upon its finding that the disallowed salary constituted "extra monies" paid in contemplation of or upon retirement.

The appeals of the three respondents were consolidated for hearing before the Commissioner. The Commissioner decided in favor of respondents and remanded the cases to appellant Teachers' Pension and Annuity Fund for the purpose of redetermining the retirement allowances due to respondents, giving full credit for salaries paid during the last year of the employments. Appellant appealed to the State Board of Education and the Commissioner granted a stay of his decision pending the determination of the appeal.

We are informed that following the decision of the Commissioner, appellant made a motion to the Appellate Division of the Superior Court requesting leave to appeal and for other relief. The motion was denied without prejudice to the right of appellant to argue the question of jurisdiction in the event of a further appeal from the decision of the State Board of Education.

Prior to the hearing before the State Board of Education appellant moved that the Board “exercise original jurisdiction to hear (1) the question of the jurisdiction of the Commissioner of Education to render his decision in these cases; (2) additional evidence in the form of statistical and actuarial reports which depict the financial effect upon the Teachers’ Pension and Annuity Fund as a result of the actions taken herein by the local boards of education.”

We shall first consider the question of the jurisdiction of the Commissioner over the subject matter of the dispute. Although the question is not discussed in the decision of the Commissioner, the issue was raised in the pleadings below and has, in fact, been in the background during the entire course of the litigation. We therefore turn to the merits of question raised by the motion.

R. S. 18:3–14 entitled “Hearing and decision of disputes” provides:

“The Commissioner shall decide without cost to the parties all controversies arising under the school laws, or under the rules and regulations of the state board or of the commissioner.”

Appellant argues that since *R. S. 18:13–112.58* established a Board of Trustees of the Teachers’ Pension and Annuity Fund clothed with the “general administration and responsibility for the proper operation of the Teachers’ Pension and Annuity Fund and for making effective the provisions of this act” and since *P. L. 1955, Chapter 70* established a Division of Pensions within the Department of the Treasury and transferred the Board of Trustees of the Teachers’ Pension and Annuity Fund to the Division of Pensions, the appellant is an agency within the Department of the Treasury and not within the Department of Education. Thus, says appellant, determinations of the pension Board are not reviewable by the Commissioner under *R. S. 18:3–14*.

Prior to the enactment of *P. L. 1955, Chapter 70*, the courts clearly considered pension matters to be part of the structure of the school laws of the state. See *Board of Education of Beach Haven v. State Board of Education*, 115 *N. J. L.* 364, 367 (*Sup. Ct.* 1935); *Teachers’ Pension and Annuity Fund v. Board of Education of the Township of Boonton*, 1939-49 *S. L. D.* 3 (1945). The cases of *Fox v. Board of Education of Newark*, 129 *N. J. L.* 349 (*Sup. Ct.* 1943) and *Reilly v. Board of Education of Camden*, 127 *N. J. L.* 490 (*Sup. Ct.* 1941), relied on by Appellant, are not in point. *Fox* involved the Veterans’ Tenure Act and *Reilly* the Veterans’ Pension Act. Although school employees were involved in both cases, in neither was a right under the school law asserted.

The question remains as to whether the enactment of *P. L. 1955, Chapter 70* changed this situation. The statement of purpose appended to this act reads:

“The purpose of this legislation is to create in the Department of the Treasury, a Division of Pensions, to which will be transferred all of the existing State Pension Agencies.”

Section 7 of Chapter 70 (*R. S. 52:18A-101*) reads:

“Nothing in this act shall be construed to deprive any person of any tenure rights or of any right or protection provided him or her by Title 11 of the Revised Statutes, or any pension law or retirement system.”

There is nowhere to be found any express indication that the historical statutory right to appeal to the Commissioner and the State Board of Education has been abrogated. As we read the legislative enactments, they were grounded in a desire to centralize the bookkeeping and actuarial activities of pension funds and not intended to disturb the remedies of dissatisfied pensioners.

The Commissioner has continued to exercise his appellate jurisdiction in pension cases since the enactment of P. L. 1955, Chapter 70. See unreported Appellate Division opinion in *Harenberg v. State Board of Education* Docket No. A-426-60 Consolidated with Docket A-323-58 cert. denied 36 *N. J.* 135 (1961).

Appellant also argues that the failure of the legislature to reenact *R. S. 18:13-58* as part of the revision accomplished by P. L. 1955, Chapter 37 indicated the end of the power of the Commissioner to hear pension appeals. *R. S. 18:13-58* provided:

“An applicant for disability retirement who is dissatisfied with the decision of the board of trustees, may appeal to the state board of education. The decision of the latter shall be final and binding upon all parties.”

Quite obviously this provision dealt with the narrow area of disability retirements. The failure to reenact the statute is most logically read as a manifestation of an intention to do away with the distinction between appeals involving disability pensions and those concerned with retirement under other provisions of the pension act. We cannot conclude that the end of *R. S. 18:32-58* signified the end of the Commissioner's power of review in pension cases.

We conclude that this appeal was properly brought before the Commissioner and appellant's motion addressed to jurisdiction is denied.

We now turn to the Appellant's motion that we exercise our original jurisdiction to hear additional evidence. We are advised that this evidence will demonstrate that the Commissioner's decision will have an adverse effect upon the Teachers' Pension and Annuity Fund.

In the light of our determination on the merits of the case, the evidence offered becomes irrelevant. Since we find that Appellant has no statutory rights to interfere with salary determinations made by local boards of education, there is nothing in the proffered evidence that could change the result. We do not pass on the question of whether we have the power to hear additional evidence on appeal from a decision of the Commissioner. We note that we are unable to find any case in which the State Board of Education heard new evidence, on appeal. The motion is denied.

On the merits of the case we affirm the decision of the Commissioner on his well reasoned opinion and adopt as our own his statement of facts, exposition of the law and conclusions.

January 9, 1963.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued October 28, 1963—Decided December 16, 1963.

Before Judges Goldmann, Kilkenny and Collester.

Mr. Thomas C. McGrath, Jr., Law Assistant, argued the cause for appellant (*Mr. Arthur J. Sills*, Attorney General of New Jersey, attorney).

Mr. Cassel R. Ruhlman, Jr. argued the cause for respondents.

The opinion of the court was delivered by COLLESTER, J. A. D.

This is an appeal from a decision of the State Board of Education affirming a decision of the Commissioner of Education in three consolidated cases. The Commissioner reversed a decision of the Board of Trustees of the Teachers' Pension and Annuity Fund, which awarded to three teachers smaller retirement allowances than they believed they were entitled to under *N. J. S. A.* 18:13-112.73. Both the Commissioner and the State Board of Education held that the Board of Trustees had no statutory authority to interfere with salary determinations made by the local boards of education.

The Board of Trustees here contends that neither the Commissioner nor the State Board of Education has jurisdiction to review rulings of the Board of Trustees; that the appeal from its decision should have been taken directly to the Appellate Division, and that the Board of Trustees may refuse to award retirement allowances based upon extra compensation paid to a teacher during his final year of employment preceding retirement.

The teachers, Alex A. La Tronica, Harold B. Brunner, and Paul D. O'Connor, are veterans and members of the Teachers' Pension and Annuity Fund. Each has retired from employment with a local board of education and has thereby become eligible for a retirement allowance of "1/2 of the compensation received during the last year of employment upon which contributions to the annuity savings fund or contingent reserve fund are made." *N. J. S. A.* 18:13-112.73. "Compensation" is defined as "the contractual salary for services as a teacher as defined in this act." *N. J. S. A.* 18:13-112.4(d)

The facts pertinent to each teacher are as follows:

ALEX A. LA TRONICA—Each spring, from at least 1954 through 1957, La Tronica's salary, including an annual increment, was approved by the Lyndhurst Board of Education at the same time that the salaries of many other teachers were established. On July 24, 1957 he was engaged as High School Dean for the school year 1957-58 at a salary of \$6,300. In the spring of 1958 he was reengaged for the 1958-59 school year along with 132 tenure employees, his salary being increased to \$6,700. However, on November 19, 1958 the local school board's finance committee voted to increase his salary to \$7,950, retroactive to September 1, 1958. La Tronica retired on July 1, 1959 and claimed a retirement allowance of \$3,975, or 1/2 of \$7,950. He was awarded \$3,350, or 1/2 of \$6,700, by the Board of Trustees.

HAROLD B. BRUNNER—Mr. Brunner's salary for the school year 1958-59 was \$13,530. Thereafter, in a letter to the Secretary of the Board of

Trustees of the Teachers' Pension and Annuity Fund dated April 2, 1959, which is included in the record on file with the Appellate Division, Brunner stated that it "now looks as though my salary for the new school year will be fixed at \$14,900." He then proposed a plan whereby the school board would pay this salary of \$14,900 at the rate of \$1,693.33 per month from July to December of 1959 and \$790 per month from January to June of 1960. His purpose in suggesting this kind of salary arrangement was "to avoid the social security cut-off" by earning less than \$4,800 in 1960 before his contemplated retirement on June 30, 1960 at the end of the school year. The Board of Trustees considered Brunner's suggested plan but concluded that "any program to accelerate or change the method of salary payment in the final year of service is an evasion of basic pension principles and would be considered an attempt to circumvent the statutes." On June 18, 1959 the Scotch Plains Board of Education voted to fix his salary for the nine-month period from July 1, 1959 to March 31, 1960 at \$14,250, the motion reciting that "The dates were fixed at the request of Mr. Brunner who will retire as of March 31, 1960." Brunner retired on April 1, 1960 and claimed a retirement allowance of \$8,816, or $\frac{1}{2}$ of a final year's salary of \$17,632 (\$3,382 from April 1 to June 30, 1959 plus \$14,250 from July 1, 1959 to March 31, 1960). The Board of Trustees awarded him \$7,000.56 based on a final year's compensation of \$14,070 ($\frac{3}{12}$ of \$13,530 (\$3,382.50) plus $\frac{9}{12}$ of \$14,250 (\$10,687.50)). The Board of Trustees determined that the salary of \$14,250 fixed on June 18, 1959 was an annual salary, so that over the nine-month period ending March 31, 1960 Brunner could only be credited with $\frac{9}{12}$ of that amount as "compensation" within the meaning of the statute.

PAUL D. O'CONNOR—Each April, from at least 1957 through 1959, the Allendale Board of Education set his salary for the following school year, along with that of other school board employees. In 1958-59 he received \$9,500. For the 1959-60 school year his salary was set at \$10,500. On September 8, 1959 O'Connor announced his plan to retire, effective April 1, 1960, whereupon the local board of education voted to "reissue a new contract" with a salary of \$10,500 for the period July 1, 1959 through March 31, 1960. O'Connor claimed a retirement allowance based upon a final year's compensation of \$12,875 (\$2,375 from April 1 to June 30, 1959 plus \$10,500 from July 1, 1959 to March 31, 1960). The Board of Trustees awarded him a retirement allowance of \$5,125 or $\frac{1}{2}$ of a final year's compensation of \$10,250 ($\frac{3}{12}$ of his 1958-59 salary of \$9,500 (\$2,375) plus $\frac{9}{12}$ of his 1959-60 salary of \$10,500 (\$7,875)). The approach of the Board of Trustees in O'Connor's case was similar to its treatment of Brunner.

The Board of Trustees has declared as its established policy that certain payments shall not be recognized as compensation for pension coverage. These include *inter alia*: (a) a retroactive salary adjustment or an inter-school year pay adjustment made in a member's final year of service, unless such adjustment was made as a result of an across-the-board pay adjustment program for all personnel in the school district; (b) individual pay adjustment made within or at the conclusion of a member's final year of service; (c) increment granted for retirement credit, and (d) increment granted in final year of service in recognition of member's service.

The reason for this policy may be stated in the words of the Secretary of the Teachers' Pension and Annuity Fund:

“At a regular meeting conducted on April 9, 1959, the Board of Trustees ruled that any program to accelerate, adjust, or change the method of salary payment in an employee’s final year of service was an evasion of basic pension principles and would be considered an attempt to circumvent the statutes. The Board observed that the statutes vest it (the Board) with the responsibility for the general administration and the proper operation of the Fund, therefore the Board has the right to rule on or define creditable compensation in the interest of safeguarding the actuarial soundness of the Fund and the preservation of the rights, privileges, and benefits of the membership of the Fund. The Board also bears the responsibility for the proper determination and certification of the employer’s annual contribution to the Fund, payment of which is assumed by the State of New Jersey. The State, by law, in addition to appropriating the employer’s normal annual contribution each year, must also appropriate sufficient monies to cover any deficits in the Fund’s reserves. Deficits do arise in the Fund’s reserves where abnormal salary adjustments are made just prior to or at the time a member qualifies for benefit, since the actuarial salary projections for contributions do not make allowance for such abnormal salary adjustment. Discriminatory recognition of abnormal salary adjustments would constitute a raid on the Fund’s reserves.”

Respondents contend that the Board of Trustees, as an administrative agency, cannot establish their own such policy because it would deviate from the principle and policy of the statute as enacted by the Legislature. The Board of Trustees argues that its statutory responsibility for administering the Fund requires it to define creditable compensation in the interest of safeguarding the actuarial soundness of the Fund.

I.

Review of the final decision of a state administrative agency is by appeal to the Appellate Division. *R. R.* 4:88–8. This court is asked to decide whether a decision of the Board of Trustees is so appealable, or whether the proper procedure is to channel it through the Commissioner of Education and State Board of Education before reaching the Appellate Division, as was done in the present case. An appeal to the Commissioner and the State Board must be based upon *R. S.* 18:3–14, which reads:

“The commissioner shall decide without cost to the parties all controversies and disputes arising under *the school laws*, or under *the rules and regulations* of the state board or of the commissioner.” (Emphasis added).

The present controversy quite obviously does not arise under “the rules and regulations” of the State Board or of the Commissioner. We are also satisfied that it does not arise under “the school laws.”

The Board of Trustees of the Teachers’ Pension and Annuity Fund is now an administrative agency within the Department of the Treasury, having been transferred there pursuant to *L.* 1955, c. 70, § 2; *N. J. S. A.* 52:18A–96. Said statute provides, *inter alia*:

“[T]he Board of Trustees of the Teachers’ Pension and Annuity Fund,
* * * and all of their respective present functions, powers, duties, equip-

ment and records, * * * are hereby transferred to the Division of Pensions created and established hereunder in the Department of the Treasury.”

The statement of purpose appended to *L. 1955, c. 70*, reads:

“The purpose of this legislation is to create in the Department of the Treasury, a Division of Pensions, to which will be transferred all of the existing State Pension Agencies.”

Respondents contend that prior to the enactment of the 1955 Act the courts considered pension matters to be part of the structure of the school laws, citing *Bd. of Education, Beach Haven v. State Bd. Education*, 115 *N. J. L.* 364 (*Sup. Ct.* 1935) and *Teachers' Pension and Annuity Fund v. Bd. of Education of Boonton Twp.*, 1939-49 *School Law Decisions* 3 (1945). These two cases are only tangentially related to the questions before us and are not authority for the position held by respondents. In *Beach Haven* the local board of education instituted retirement proceedings before the Trustees of the Teachers' Pension and Annuity Fund. The court held that the dispute between the teacher and the school board as to its obligations under her employment contract was within the cognizance of the Commissioner of Education, subject to appeal to the State Board of Education. In answer to a claim that the Commissioner lacked jurisdiction, the court stated that the appeal was taken from the action of the local board and not from the Trustees. The court's statement that the action of the Trustees was ministerial and that the Teachers' Pension and Annuity Fund was part of the school law was not necessary to its decision. Moreover, the court could not have decided that the Commissioner was authorized to hear appeals from the determination of a separate State agency, since the Board of Trustees was not yet such an agency.

Although included in the controversy before us is the legality of the salary increases given by local boards of education, it is the ruling of the Fund that is the crux of the situation. What the Department of Education, an administrative agency of the State, has attempted to do here is to pass on the validity of a ruling by the Board of Trustees, another duly constituted State agency—a procedure we deem not only contrary to statute and case law, but to our rules.

In *Boonton*, a matter decided at the Department of Education level some years before the 1955 Act, the Fund petitioned the Commissioner to require a local school board to dismiss a janitor who had been certified for retirement but continued to work. The fact that the Fund found it necessary to invoke the powers of the Commissioner to deal with a local board in no way indicates that the Commissioner has the power of review over the action of the Board of Trustees of the Fund. Of course, under *R. S. 18:3-14*, the Commissioner had and still possesses the power to review the actions of local boards of education. *In re Masiello*, 25 *N. J.* 590, 604 (1958).

The creation of a Division of Pensions consolidated all existing state pension agencies in the Department of the Treasury. The nature of pension decisions requires a particular expertise of its own, distinct from the expertise and background of the Commissioner of Education and the State Board.

In 1955 the Legislature also enacted the Teachers' Pension and Annuity Fund-Social Security Integration Act, *L. 1955, c. 37*, thereby repealing *R. S. 18:13-24* through 110. Under section 56 of chapter 37 (*N. J. S. A. 18:13-112.58*) the following provision was made:

“Subject to the provisions of chapter 70 of the laws of 1955, the general administration and responsibility for the proper operation of the * * * Fund and for making effective the provisions of the act shall be vested in the board of trustees. Subject to the limitations of the law, the board shall, from time to time, establish rules and regulations for the administration and transaction of its business and for the control of the funds created by this act * * *.”

Further, under section 58 of chapter 37 (*N. J. S. A.* 18:13–112.60) the board was charged with the following responsibilities:

“* * * Upon the basis of such investigation and valuation [by the actuary] the board shall:

(a) Adopt for the retirement system such mortality, service and other tables as shall be deemed necessary;

(b) Certify the rates of deduction from compensation computed to be necessary to pay the annuities authorized under the provisions of this act; and

(c) Certify the rates of contribution, expressed as a proportion of the compensation of members, which shall be made by the State to the contingent reserve fund.”

The Board of Trustees is charged with the full responsibility for the workings of the Fund. While the act of 1955 was incorporated into Title 18, Education, there is no reference in the act itself to a review of the Board's rulings by the Commissioner. In fact, the only provision for review contained in the prior statute, *R. S.* 18:13–58, which had provided for an appeal to the State Board from the decision of the Board of Trustees in disability retirement applications, was not reenacted. It will be further noted that the provisions relating to the Board of Trustees found under Title 18 are expressly made subject to chapter 70 of the Laws of 1955. See *N. J. S. A.* 18:13–112.58.

It is clear that since the enactment of *L. 1955, c. 70* (*N. J. S. A.* 52:18A–95 *et seq.*), the Board of Trustees is an administrative agency within the Department of the Treasury and a review of its decisions lies with the Appellate Division pursuant to *R. R.* 4:88–8. The appeal from the decision of the Board of Trustees in the instant case was improperly taken to the Commissioner of Education and to the State Board which no longer has jurisdiction in pension matters.

II.

The fact that the appeals were improperly taken to the Commissioner and State Board will not preclude full consideration here of the merits of the case.

Respondents contend that “compensation” as used and defined in the Teachers' Pension and Annuity Fund Act leaves no room for discretionary action by the Board of Trustees in determining the amount of that compensation. It should be clear at the outset that the Board of Trustees does not seek to determine how much pay is to be received by the teachers, but only to what extent that pay shall be the basis for computing the extent of retirement allowances.

The Board of Trustees is required to make rules and regulations for the administration and transaction of its business and for the control of funds,

subject to the limitations of law. See *N. J. S. A.* 18:13–112.58 quoted above.

Respondents cite *Abelson's, Inc. v. N. J. State Board of Optometrists*, 5 *N. J.* 412 (1950) for the statement therein made that the rules and regulations and administrative action of an agency cannot subvert or enlarge upon statutory policy, rules or regulations, and that administrative implementation cannot deviate from the principle and policy of the statute. The rules and regulations of the Board of Trustees as embodied in their statement of policy are consistent with the letter and spirit of the *Abelson's* statement.

A pension fund is based upon actuarial principles incorporating known or reasonably anticipated statistics with regard to life expectancies and present and future payments into and out of the fund, to the end that all the members may be served without jeopardizing the financial soundness of the fund. In consideration of the other contributing members of the fund, the benefits of a few cannot be enhanced by *ad hoc* salary increases intended to increase retirement allowances without adequate compensation to the fund. Clearly the actions of the local boards and the subsequent demands of the respondents have a something-for-nothing color to them which should be deplored. The local boards could, if the action taken by them in this case were approved, defer adequate compensation to its teachers until their final year, then catapult the teacher to a high level of compensation, and cause the Pension Fund to compensate for the local board's failure to grant increases in the past. This would permit the local board a grand gesture of farewell at little expense; it also would draw heavily on the Pension Fund without having provided sufficient compensation in prior years. The Pension Fund does include provisions for accommodating regular increases in salary, and undoubtedly in actuarial terms these increases have been anticipated and accounted for in establishing the Fund and its rates of contribution and award. But increases of the type under consideration in this case cannot be anticipated, and are rightly excluded by the terms of the Board of Trustees' established policy.

Local boards should not be allowed to make up for an earlier failure to grant increases through generosity with the Pension Fund's money. Such a use of the Fund requires a revision of its purpose and structure which would better be left to the Legislature.

The case of *Casale v. Pension Com., etc., of Newark*, 78 *N. J. Super.* 38 (*Law Div.* 1963), holding that the pension of a municipal employee must be based on his salary at retirement, and not on a retroactive salary increase made after his retirement, deals with a question similar to the one in the present case, with a similar conclusion.

The decision of the State Board of Education is reversed, and the decision of the Board of Trustees is approved and adopted. 81 *N. J. Super.* 461.

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER,
OCEAN COUNTY, *Petitioner-Appellant,*

v.

DR. FREDERICK RAUBINGER, COMMISSIONER OF NEW JERSEY STATE
BOARD OF EDUCATION AND MILO E. SCHUMACHER, JR.,

Respondents-Respondents.

Decided by the Commissioner of Education, August 20, 1962.

Motion to stay order of the Commissioner denied by State Board of Education, September 5, 1962.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued January 14, 1963—Decided January 21, 1963.

Before Judges GOLDMANN, FREUND AND FOLEY.

Mr. Morton C. Steinberg argued the cause for appellant (*Messrs. Steinberg & Steele*, attorneys).

Mr. Franklin H. Berry, Jr., argued the cause for respondent Schumacher (*Messrs. Berry, Whitson & Berry*, attorneys).

Mr. Joseph A. Hoffman, Deputy Attorney General, argued the cause for respondent Commissioner of Education (*Mr. Arthur J. Sills*, Attorney General, attorney; *Mr. Hoffman* on the brief).

The opinion of the court was delivered by

GOLDMANN, S. J. A. D. The decision in this case turns on the meaning of the words "three consecutive calendar years" in *N. J. S. A.* 18:13-16, which deals with the tenure of public school teachers, principals and superintendents. The matter comes before us by way of appeal from the decision of the Commissioner of Education determining that respondent Schumacher acquired tenure as principal in the Manchester Township school system on the completion of employment for three consecutive calendar years, from July 1, 1959 to June 30, 1962.

Schumacher was appointed principal by resolution of the Board of Education of Manchester Township adopted May 14, 1959, and a two-year contract was entered into providing for his employment from July 1, 1959 to June 30, 1961. He was reappointed principal by resolution dated May 11, 1961, and a one-year contract was executed providing for his employment from July 1, 1961 to June 30, 1962. Each of the contracts contained a clause permitting either party to terminate the employment by giving the other 60 days' written notice of such intention. Neither party gave written notice. At a regular meeting held on May 10, 1962, the board of education voted that "an employment contract be denied Mr. Schumacher."

Schumacher contends that by virtue of the terms of his employment and the board's failure to give him 60 days' notice of intention to terminate his

contract, he acquired tenure pursuant to condition (a) of *N. J. S. A.* 18:13-16. The full text of that statute is:

"The services of all teachers, principals, superintendents and assistant superintendents, of the public schools, excepting those who are not the holders of proper teachers' certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of three consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years, some part of which must be served in an academic year after July first, one thousand nine hundred and forty; *provided*, that the time any teacher, principal or supervising principal had taught in the district in which he was employed at the end of the academic year immediately preceding July first, one thousand nine hundred and forty, shall be counted in determining such period or periods of employment in that district.

An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation."

The board, on the other hand, claims that "calendar years," as used in the statute, can only be construed to mean periods beginning January 1 and ending December 31 of each year. It reckons Schumacher's employment as follows:

July 1, 1959 to December 31, 1959	6 months
January 1, 1960 to December 31, 1960	1 year
January 1, 1961 to December 31, 1961	1 year
January 1, 1962 to June 30, 1962	6 months

The argument of the board is that this employment does not constitute "three consecutive calendar years" within the meaning of the statute, but only two.

It is not disputed that Schumacher was employed as principal in the Manchester Township school system for 36 consecutive months, from July 1, 1959 to June 30, 1962.

Following the board of education's formal action in denying Schumacher any further contract, he petitioned the Commissioner of Education for an order declaring that he had acquired tenure as a principal and directing his reinstatement to that position. In determining that Schumacher had acquired tenure, the Commissioner considered the legislative history of *N. J. S. A.* 18:13-16, the administrative interpretation given the statute, and the decisions of our courts. He found that the principal design of condition (a) of the statute was to establish a 36-month probationary period, measured from the date on which employment began. In his view, this interpretation was the most reasonable one, and was consistent with the purpose of the tenure act.

In arguing for the proposition that "calendar year" in condition (a) means from January 1 to December 31, appellant board refers, among other things, to the historical controversy which led to the adoption of the

Gregorian calendar, dictionary definitions, and the fact that nowhere in *Title 18, Education*, has the Legislature expressly provided for a 36-month probationary period. It also points to the provision of *N. J. S. A. 1:1-2*:

“Unless it be otherwise expressly provided or there is something in the subject or context repugnant to such construction, the following words and phrases, when used in any statute and in the Revised Statutes, shall have the meaning herein given to them.

* * * *

Month; year. The word ‘month’ means a calendar month, and the word ‘year’ means a calendar year.”

We do not find this definition section of the *Revised Statutes* helpful, in view of the language of its opening paragraph which calls for a consideration of the subject or context of the particular statute under consideration. The first, and immediately preceding section of the *Revised Statutes*, *R. S. 1:1-1*, directs that in the construction of a statute, words and phrases are to be read and construed with their context and shall, “unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning.”

We are therefore compelled to study the statutory history and context, and to seek out the legislative purpose sought to be achieved by *N. J. S. A. 18:13-16*. General dictionary definitions, and meanings accorded to “calendar year” in decisions dealing with entirely different statutory provisions, are singularly unenlightening in view of the specific problem posed by this appeal. For example, appellant board refers us to *R. S. 18:7-79*, which deals with school district appropriations based on the calendar year. That statute concerns school fiscal matters and calls upon the legal voters of the school district to determine the amount to be raised for the period from January 1 to June 30 of each year, and to determine annually the amount to be appropriated for the succeeding school year.

The board also relies on *Newman v. Fair Lawn*, 31 *N. J.* 279 (1960), and the language of the court (at page 283) that a calendar year runs from January 1 to December 31. But that case dealt with the terms of one class of members of a municipal planning board under the Municipal Planning Act (1953), *N. J. S. A. 40:55-1.1 et seq.* The section of the act considered was *N. J. S. A. 40:55-1.4*, which provides that the governing body may by ordinance create a planning board of not less than five nor more than nine members, to be divided into four classes. Among other things, that section provides that the term of one member of class IV first appointed “shall expire at the end of each year beginning at the end of the first year.” The *Newman* court recognized that the word “year” has been given many meanings, and may denote a 365-day or 12-month period, regardless of when it begins. However, “where the Legislature has indicated how the word should be construed in the absence of an obviously contrary intent, ‘year’ is taken to mean the period between January 1 and December 31, *unless strong reasons compel a contrary conclusion.*” (Italics ours) The court found no logically compelling circumstances to indicate that the Legislature intended any period other than January 1—December 31 (at pages 283-286). We view that conclusion as strictly limited to the particular statute and facts involved in *Newman*.

We are persuaded that there exist "strong reasons" compelling a conclusion contrary to that for which appellant board argues, and that "calendar year" in *N. J. S. A.* 18:13-16, condition (a), does not in the factual context of this appeal mean January 1 to December 31.

The original tenure law, *L.* 1909, *c.* 243, provided for tenure "after the expiration of a period of employment of three consecutive years in that [school] district, unless a shorter period is fixed by the employing board." We are informed that the law invited certain abuses. For example, a board of education could indefinitely prevent a teacher from obtaining tenure by the simple device of interrupting continuity of employment for a short period at the end of each year.

The law was amended by *L.* 1934, *c.* 188, so that a teacher, principal or supervising principal in any school district could attain tenure "after the expiration of a period of employment of three consecutive calendar years in that district unless a shorter period is fixed by the employing board; or upon beginning service for the fourth consecutive academic year, or upon continuous employment during all the time schools are open in the district for a period of three calendar years from the date of original employment." The 1934 act went on to define "academic year" for the first time, as meaning the period from the time school opens after the general summer vacation until the next succeeding summer vacation. It is clear that the 1934 Legislature, in passing *chapter* 188, understood the term "calendar year" to mean something quite different from the period extending from January 1 to December 31. It indicated that a "calendar year" could mean any 12-month period.

The tenure act was again amended by *L.* 1935, *c.* 27, so as to read that tenure could be acquired "after the expiration of a period of employment of three consecutive calendar years in that district unless a shorter period is fixed by the employing board; or after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year." The definition of "academic year" was retained, thus distinguishing its lesser term from a 12-month calendar year.

In 1940 the Legislature further amended the tenure act. *L.* 1940, *c.* 43. *N. J. S. A.* 18:13-16 stems from that act, which has continued unchanged in the *Revised Statutes* except for the slight amendment effected by *L.* 1952, *c.* 236, § 12, extending the tenure provision to superintendents and assistant superintendents in the public schools.

A review of the initial 1909 law and the subsequent amendments refining the meaning of the original phrase "three consecutive years" makes it clear that the Legislature intended nothing more as a condition to obtaining tenure than employment for 36 months, regardless of the date when such employment began. This term of service was to serve the obvious purpose of a probationary period.

Strict or literal meaning cannot be given to legislative language when it is apparent that such meaning was not intended. The rule of strict construction cannot be allowed to defeat the apparent legislative design. In *Wright v. Vogt*, 7 *N. J.* 1, 7 (1951), the Supreme Court, adopting the language of a New Hampshire case, said that the will of the lawgiver is to be

found, not by the mechanical or formal application of words and phrases, but by the exercise of reason and judgment. "Scholastic strictness of definition" cannot be adopted if it prevents a reasonable construction. And see *Alexander v. N. J. Power & Light Co.*, 21 N. J. 373, 378 (1956). In this as in other cases of statutory construction, the reason and spirit of the act prevail over the strict letter.

If appellant board's construction of the statute were to prevail, Schumacher, to acquire tenure, would be obliged to complete not 36, but 42 months of employment, in order to embrace three calendar years beginning with January 1 and ending with December 31. The Commissioner of Education could find no such intention or purpose in the statute, either by its own terms or in long-standing administrative and judicial practice. Nor can we.

The court in *Lane v. Holderman*, 23 N. J. 304, 322 (1957), followed the well established principle that "resort may be had to long usage and practical interpretation in construing statutes to ascertain their meaning, to explain a doubtful phrase or to illuminate any obscurity." And see *Schierstead v. Brigantine*, 29 N. J. 220, 231 (1959). A long-standing statutory interpretation by an administrative agency is entitled to great weight, and when that interpretation is adopted by the courts, it becomes practically conclusive.

The Commissioner and the State Board of Education have over the years consistently held to the view that employment for three consecutive calendar years does not necessarily refer to the periods beginning January 1 and ending December 31. The probationary period of 36 months was recognized in 1912 in the case of *Davis v. Overpeck Tp. Board of Education*, 1938 N. J. School Law Decisions (hereafter S. L. D.) 464, reversed by the State Board of Education, *ibid.*, 466 (1913), whose decision was affirmed by our former Supreme Court, *ibid.*, 470 (1913). The tenure act, L. 1909, c. 243, called for three consecutive years of service. Davis had been a school principal for three consecutive years beginning September 1909. He was summarily demoted to the rank of teacher. The Commissioner, State Board of Education and Supreme Court all concurred that Davis had tenure. Cf. *Allen v. Belleville Board of Education*, 1938 S. L. D. 380, 382 (1928), where appellant was employed as a teacher in the Belleville schools from July 1, 1925 to January 30, 1926, and again for the school years 1926-7 and 1927-8. He was notified of his dismissal on June 14, 1928. The Commissioner concluded that appellant had not actually been employed as a teacher for "three consecutive calendar years, namely, from July 1, 1925 to June 30, 1928," so as to acquire tenure under the 1909 act.

In *Carroll v. Matawan Board of Education*, 1938 S. L. D. 383 (1929), appellant was appointed a teacher under a contract executed July 15, 1926, for a term of one year beginning September 7, 1926. She was reappointed in 1927 under a similar contract, effective September 1. Her third contract provided for a one-year employment from September 4, 1928. Her services were formally terminated as of August 15, 1929. Miss Carroll contended she had tenure, claiming that her employment began July 15, 1926. The Commissioner, after referring to C. S. 4973 (now N. J. S. A. 1:1-2) defining "year" as a calendar year, said that "a calendar year must mean any period of 365 days, or any period including twelve calendar months," and that the statute

had been so construed by the Supreme Court in the *Davis* case, cited above. A teaching contract, said the Commissioner, might legally run from September to September, but the tenure law required completion of three such calendar years of employment. He concluded that the termination of appellant's services on August 15, 1929 was entirely legal. The State Board of Education affirmed, 1938 S. L. D. 387 (1930). On appeal, our former Supreme Court again affirmed, 8 N. J. Misc. 859, 861, 152 A. 339 (1930), holding that Miss Carroll "under no circumstances would have performed three calendar years of service until September 7th 1929, three years from the commencement of her first contract of employment." Although the *Carroll* case was decided before the amendment of L. 1934, c. 188, we have here a clear expression by the court that "calendar year" is not to be confined to the period from January 1 to December 31.

More recently our Supreme Court, in *Zimmerman v. Newark Board of Education*, 38 N. J. 65 (1962), had occasion to consider the tenure act as it now reads, N. J. S. A. 18:13-16, and held that Zimmerman had not been employed for three calendar years within the meaning of the statute. It expressly agreed with the interpretation given the act in the *Carroll* case.

The latest administrative application of N. J. S. A. 18:13-16, condition (a), may be found in *Mullen v. Jefferson Board of Education*, 1960-61 S. L. D., 194 (1961) on appeal to the State Board of Education. The Commissioner there found that petitioner had tenure, since his employment "began on July 1, 1957 and continued without interruption until June 30, 1960, a period of three calendar years."

Beyond the aid given to the construction of the statute by its legislative history and the long years of administrative and judicial practice in recognizing a 36-month probationary period, however designated, as the basic period for acquiring tenure, other considerations compel an affirmance of the Commissioner's determination. Any meaning we might give the tenure act, other than that a calendar year comprises any period of 365 days or 12 calendar months, would create an anomaly. Were we to follow appellant board's argument, a teacher, principal or superintendent employed only during the academic year as defined in N. J. S. A. 18:13-16, would acquire tenure by employment at the beginning of the fourth academic year (condition (b)), whereas one who had been employed on a 12-month year basis would have to serve a probationary period in excess of 36 months unless, perchance, his employment began on January 1. A statute will not be construed to reach an absurd or anomalous result. *Robson v. Rodriguez*, 26 N. J. 517, 528 (1958). As this court said in *Gannon v. Saddle Brook Tp.*, 56 N. J. Super. 76, 80 (1959):

"* * * The legislative mind is presumed to be consistent, and statutes should be construed to the end that their respective provisions will be consistent one with the other, thus giving effect to the true meaning, intent and purpose of the legislation as a whole. [citing cases] * * *"

And see R. S. 1:1-1, above.

The date, January 1, has no significant relevance to the operation and aims of the tenure statute. Boards of education usually hire teachers in the spring and early summer months, to begin service the following Septem-

ber. As we have already noted, if we were to adopt the January 1-December 1 period as the calendar year, persons so employed would have to serve until January 1 following appointment, before service credit on tenure would commence. Such persons would thus be required to serve for a period of 42 months before obtaining the protection afforded by *N. J. S. A.* 18:13-16, condition (a). This would deleteriously affect our educational system.

Three full years are a sufficient term within which a board of education may judge the competency of a teacher, principal or superintendent. It is also a reasonable period for one in the teaching profession to be expected to demonstrate his or her capacity before achieving tenure status. To interject an arbitrary requirement that this period must commence with January 1 is wholly without reason.

The tenure provisions are designed to aid in the establishment of a competent and efficient school system by providing teachers, principals and superintendents with a measure of security in the rank they hold after years of service. Such provisions should be given liberal support, consistent with legitimate demands for governmental economy. *Viemeister v. Prospect Park Board of Education*, 5 *N. J. Super.* 215, 218 (*App. Div.* 1949).

Affirmed.

78 *N. J. Super.* 90.

DOMINICK J. MASTRANGELO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK,
BERGEN COUNTY,

Respondent.

Decided by Commissioner of Education November 9, 1961.

DECISION OF THE STATE BOARD OF EDUCATION

Decision of the Commissioner of Education affirmed without written opinion.

April 3, 1963.

JOHN J. MULLEN,

Petitioner-Appellant,

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON,

Respondent-Respondent.

Decided by the Commissioner of Education April 28, 1961.

DECISION OF THE STATE BOARD OF EDUCATION

Petitioner-appellant (hereinafter called the "Appellant") was appointed Superintendent of Schools of the Township of Jefferson on April 9, 1957 and

a two-year contract was entered into providing for employment from July 1, 1957 to June 30, 1959. Before this latter agreement expired and on January 14, 1958 the local board cancelled it and issued a new contract under which appellant was to be employed from January 15, 1958 to January 15, 1961 at a salary of \$10,000. On June 30, 1960 a resolution was passed by the local board, whose personnel had changed due to an intervening election, whereby his contract was cancelled.

Appellant then appealed to the Commissioner of Education, a hearing was held on October 20, 1960 and while the Commissioner's decision was pending, the respondent Board moved to dismiss on the grounds that the appeal had become moot. Evidence was submitted at a hearing on February 3, 1961 which showed that the appellant had been employed since September 15, 1960 as Principal of the School District No. 9, Elmsford, New York at a salary of \$14,000 on a twelve months basis. Respondent Board contended that acceptance of this other employment constituted an abandonment by the appellant of his tenure rights. The Commissioner below denied the motion for dismissal, holding that even if it be assumed that appellant abandoned his claim as of September 15, 1960, when he began his employment in New York, there still remained a justiciable issue as to the period from July 1 to September 15. The Commissioner thereupon decided:

1. That petitioner had acquired tenure under the provisions of *N. J. S. A.* 18:13-16 by reason of employment for three consecutive calendar years.
2. He was entitled to be reinstated and paid his salary from the date of dismissal. However, the Commissioner further held that in order to assert this right he must be ready and able to resume his duties.
3. Failure to resume his duties immediately upon notice of the Commissioner's determination would constitute abandonment of his position as of the date of assuming employment in New York on September 15, 1960.
4. In such event, respondent Board is relieved of the duty to reinstate, and
5. Respondent Board is required to pay only the salary that appellant would have earned had he continued in his employment from July 1, 1960 to September 14, 1960.

Appellant failed to resume his duties as ordered by the Commissioner and now appeals only from that part of the Commissioner's decision which limits his right to back pay to the period from July 1, 1960 to September 14, 1960. He here claims that he is entitled to back pay from July 1, 1960 to the date of the Commissioner's opinion, namely, April 28, 1961, even though during that period he was employed in New York.

Appellant's claim here amounts to a contention that he is entitled to receive the salary which he would have received in Jefferson Township if he had performed his services from September 15, 1960 to April 28, 1961. If successful he would thus be able to collect both from the New York School District where he actually received salary and from Jefferson Township for that period. To put it another way, the question to be resolved is whether or not appellant's claim for back salary is to be mitigated to the extent of monies which he earned in the New York District for the same period.

Appellant relies on *N. J. S. A. 18:5-49.1*, which reads as follows:

“Whenever any person holding office, position or employment with a local board of education or with the State Board of Education shall be illegally dismissed or suspended from his office, position or employment, and such dismissal or suspension shall upon appeal be decided to have been without good cause, the said person shall be entitled to compensation for the period covered by the illegal dismissal or suspension; *provided*, that a written application therefor shall be filed with the local board of education or with the State Board of Education, as the case may be, within thirty days after such judicial determination.”

He cites several cases in support of his contention, but concedes that all of said cases deal with a somewhat similar statute, *N. J. S. A. 40:46-34*, relating to the question of back salary for municipal employees who may have been illegally dismissed.

The question as to whether a claim for back pay is to be mitigated to the extent of monies earned by the employee from a different position has received attention from our courts. In *D’Elia v. Jersey City*, 57 *N. J. Super.* 466 (*App. Div.* 1959), the Court, in construing *N. J. S. A. 40:46-34*, held that it was the legislative intent that a person coming within the coverage of that statute is entitled to full back pay without mitigation for monies earned elsewhere in the event of his illegal dismissal. In *McGrath v. Jersey City*, 70 *N. J. Super.* 143 (*Law Div.* 1961), affirmed 38 *N. J. 31* (1962), the court again held that a municipal employee illegally dismissed was entitled to back pay without mitigation for sums which may have been earned (from other sources) during the period of illegal dismissal. The Court considered that it was bound by the Appellate Division decision in *D’Elia v. Jersey City*, *supra*.

However, in *McGrath* the Court adverted to *Lowenstein v. Newark Board of Education*, 35 *N. J. 94* (1961), wherein the Supreme Court made mention of the fact that the provisions of *R. S. 40:46-34* and those of the statute here involved, *i. e.*, *N. J. S. A. 18:5-49.1*, are somewhat different. So they are. Whereas *N. J. S. A. 40:46-34* provides for the recovery of “the salary” of his employment for the period of illegal dismissal, the instant statute adopts somewhat different language and says that “the teacher shall be entitled to *compensation* for the period covered by the illegal dismissal.” (Emphasis added.) The Supreme Court in *Lowenstein*, *supra*, adverted to this difference of language at 35 *N. J.*, at pages 123 and 124.

This case is one of first impression in the construction of *N. J. S. A. 18:5-49.1*. We consider that the Legislature, by adopting the language of that section in different terminology from that of the older statute, *N. J. S. A. 40:46-34*, intended to suggest a different meaning. “Compensation” implies the restoration of something that has been lost. If actually the employee has made more money during the period of illegal dismissal from some other source, then under ordinary concepts of damages he has not suffered any loss. Considering the fact that a statute such as this is in derogation of the common law and that it must be strictly construed, we hold that the right to recover “compensation” under *N. J. S. A. 18:5-49.1* is subject to mitigation to the extent of money earned during the same period from other sources. Such was the result reached by the Supreme Court in *Miele v. McGuire*, 31 *N. J. 339* (1960), wherein an employee of the Passaic Valley Sewerage

Commissioners sought back pay after illegal dismissal. The Court held that *N. J. S. A.* 40:46-34 did not apply to such employee and held that his right to back pay was subject to allowance for any sums which he may have earned or could have earned between his dismissal and reinstatement. 31 *N. J.* at 352. In that case the Supreme Court further refused to pass upon the decision of *D'Elia v. Jersey City*, *supra*, with respect to whether or not the right to back pay was subject to mitigation, saying that such issue was not presented to it in the *Miele* case, *supra* (31 *N. J.* at 352). In this case the issue is presented and we hold that the better policy would make such a claim subject to mitigation. We so construe the statute here involved.

We therefore decide that the decision of the Commissioner in allowing back pay only for the period from July 1, 1960 to September 14, 1960 is affirmed.

Dated: March 6, 1963.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued November 4, 1963—Decided Nov. 9, 1963.

Before Judges Goldmann, Kilkenny and Collester.

Mr. John A. Wyckoff argued the cause for appellant (*Messrs. James and Wyckoff*, attorneys; *Mr. Wyckoff*, on the brief).

Mr. Joseph R. Valentino argued the cause for respondent (*Mr. Joseph J. Maraziti*, attorney; *Mr. Valentino*, on the brief).

The opinion of the court was delivered by GOLDMANN, *S. J. A. D.*

The question for determination here is whether a person holding a position with a local board of education is entitled to full payment of salary for the entire period of his illegal dismissal, without mitigation, under *N. J. S. A.* 18:5-49.1. The matter is one of first impression.

Upon recommendation of the State Commissioner of Education, the State Board of Education on May 4, 1956 approved a superintendency for the school district of Jefferson Township, Morris County, the district having met all the requirements of the rule governing such approvals. Respondent board of education appointed appellant superintendent of schools of Jefferson Township on April 9, 1957, and a two-year contract was entered into providing for his employment from July 1, 1957 to June 30, 1959. Before the expiration of this agreement, respondent, by resolution adopted January 14, 1958, voted to cancel it and to issue a new contract under which appellant was to be employed from January 15, 1958 to January 15, 1961, at a salary increase from \$8,500 to \$10,000. The reason given for this action by its proponents was to insure continuity of administration during the ensuing period when school plan expansion would be a matter of major concern. The contract called for by the resolution was duly executed and appellant continued to carry on his duties as township superintendent of schools.

A change in the membership of respondent board ensued, with the result that at a special meeting held June 30, 1960 the board adopted a resolution cancelling the January 15, 1958 contract. When appellant informed the

board that he was available for work and intended to continue in his employment, it passed a motion ordering him to vacate his office, and on July 1, 1960 actually changed the locks on the administration office. On July 6, 1960 appellant received a registered letter from the secretary of the board advising him of the foregoing action. Appellant was paid his salary to and through June 30, 1960. He promptly appealed to the State Commissioner of Education, under *R. S. 18:3-14*, to hear and determine the legality of respondent's action, praying that its cancellation of his contract be declared void and of no effect and that it be directed to reinstate him as superintendent of schools with full payment of salary from July 1, 1960.

The State Commissioner of Education held a full hearing on October 20 following. At this hearing appellant failed to disclose that he had been employed since September 15, 1960 by the board of education of School District No. 9, Elmsford, New York, as district principal at a salary of \$14,000 on a 12-month basis. Respondent learned of this employment after the hearing and immediately moved to dismiss the appeal on the ground that the issue had become moot. The motion was argued February 3, 1961, at which time evidence was received disclosing appellant's Elmsford employment.

The Commissioner handed down his decision on April 28, 1961. He denied the motion to dismiss, holding that even if it were assumed that appellant abandoned his claim as of September 15, 1960, when he began his employment in Elmsford, there still remained a justiciable issue as to the period from July 1 to September 15. He thereupon decided that (1) appellant had acquired tenure under the provisions of *N. J. S. A. 18:13-16*, having continued in employment for three consecutive calendar years; (2) he was entitled to be reinstated in his position and paid his salary from the date of dismissal, but in order to assert this right he must be ready and able to resume his duties; (3) appellant's failure to resume his duties immediately upon notice of the Commissioner's determination would constitute an abandonment of his position as of the date of assuming employment in New York, September 15, 1960; (4) in such event, respondent would be relieved of any duty to reinstate appellant as superintendent of schools; and (5) respondent would be required to pay appellant only the salary he would have earned had he continued in its employment from July 1 to September 14, 1960.

Appellant failed to resume his duties as ordered by the Commissioner. Instead, he took an appeal to the State Board of Education from that part of the Commissioner's determination which limited his right to back pay for the period from July 1 to September 14, 1960. His claim before the State Board was that he was entitled to back pay from July 1, 1960 to the date of the Commissioner's determination, April 28, 1961, even though during that period he was employed in Elmsford, N. Y. In the brief filed with the State Board, appellant stated that he "does not intend to resume his position as superintendent of schools of Jefferson Township."

The arguments made by appellant before the State Board of Education are essentially those projected in this court. The State Board concluded that the right to recover "compensation" under *N. J. S. A. 18:5-49.1* is subject to mitigation to the extent of money earned during the same period from other sources.

N. J. S. A. 18:5-49.1, enacted in 1948 (*L. 1948, c. 241*) provides:

“Whenever any person holding office, position or employment with a local board of education or with the State Board of Education shall be illegally dismissed or suspended from his office, position or employment, and such dismissal or suspension shall upon appeal be decided to have been without good cause, the said person shall be entitled to *compensation* for the period covered by the illegal dismissal or suspension; provided, that a written application therefor shall be filed with the local board of education or with the State Board of Education, as the case may be, within thirty days after such judicial determination.” (Italics ours)

The narrow issue before us is whether the “compensation” referred to in the statute means full salary during the period of illegal dismissal before the right to reinstatement accrued to appellant, or such salary reduced by the wages he received in his Elmsford position during that period. In support of his claim that “compensation” should be interpreted to mean full salary without mitigation, appellant urges consideration of other statutes prior and subsequent to the 1948 enactment of *N. J. S. A. 18:5-49.1*, deemed by him to be *in pari materia*.

Appellant first refers us to *N. J. S. A. 40:46-34*, originally enacted by *L. 1918, c. 139* and thereafter amended in certain aspects not deemed significant. That statute reads:

“Whenever a municipal officer or employee, including any policeman or fireman, has been or shall be illegally dismissed or suspended from his office or employment, and such dismissal or suspension has been or shall be judicially declared illegal, he shall be entitled to recover the *salary* of his office or employment for the period covered by the illegal dismissal or suspension; * * *.” (Italics ours)

We pass, for the moment, the fact that this statute is not one relating to education. *Title 18, “Education,”* of the *Revised Statutes* is where one would naturally look for statutory enactments relating to the organization and administration of our school system on the state or local levels, school officers and employees as well as their rights and duties, and like matters.

Appellant points out that under *N. J. S. A. 40:46-34* it has consistently been held—in amelioration of the common law rule—that an illegally dismissed municipal employee is entitled to his full salary during the period of dismissal, “whether he worked for it or not, whether he earned money outside or not, and whether the work he would have done if not so excluded, was or was not done by some *de facto* substitute.” *Ratajczak v. Board of Education, Perth Amboy*, 118 *N. J. L.* 311, 312 (*Sup. Ct.* 1937), affirmed 119 *N. J. L.* 433 (*E. & A.* 1938) (school janitor); *D’Elia v. Jersey City*, 57 *N. J. Super.* 466 (*App. Div.* 1959) (welfare investigator); *McGrath v. Jersey City*, 70 *N. J. Super.* 143 (*Law Div.* 1961), affirmed 38 *N. J.* 31 (1962) (plumber).

Appellant further refers us to *section 6* of the Tenure Employees Hearing Act, *L. 1960, c. 136* (*N. J. S. A. 18:3-23 to 30*). That act provides for the determination by the State Commissioner of Education of charges preferred by a local board of education against a tenure employee. *Section 6* (*N. J. S. A. 18:3-28*) declares that if the charges are dismissed, the employee “shall be reinstated immediately *with full pay*” as of the time of his suspension. (Italics

ours) This section was considered in *Lowenstein v. Newark Board of Education*, 35 N. J. 94 (1961), where the court held invalid the dismissal of a teacher by the local board of education, but did not determine the question of back pay. Justice Hall, who wrote the majority opinion emphasized (at page 123) that N. J. S. A. 18:5-49.1 spoke of "compensation," as distinguished from "full pay" mentioned in N. J. S. A. 18:3-28. He then said:

"* * * [W]e might call attention to the discussion of the various aspects of the problem of back pay in our recent opinion in *Miele v. McGuire*, 31 N. J. 339, 347-352 (1960), particularly with reference to the question of reduction of the amount thereof by sums which were actually earned during the period (possibly less appellant's costs and attorney's fees of the litigation) in the light of the actual language of and legislative intent evidenced by N. J. S. A. 18:5-49.1 and 18:3-28 (if substantively applicable since enacted after this controversy arose). Compare *R. S. 40:46-34*, as amended."

In *Miele* the Law Division reinstated a river inspector employed by the Passaic Valley Sewerage Commissioners, but refused him back pay. 53 N. J. Super. 506 (1959). On appeal the Supreme Court held (31 N. J. 339) that he was the holder of a position of employment, rather than an office, and that on common law principles he was entitled to back pay and interest for the period between his wrongful dismissal and reinstatement, mitigated by the amount he actually earned or could have earned during such period, but including the benefit of normal increments he would have received during the period of his wrongful discharge. N. J. S. A. 40:46-34 was held not applicable to persons employed by the Passaic Valley Sewerage Commissioners. The court discussed *De Marco v. Bergen County Board of Chosen Freeholders*, 21 N. J. 136 (1956) (recovery of salary denied a county detective for the period he was under suspension and performed no services); *Winne v. Bergen County*, 21 N. J. 311 (1956) (recovery of salary denied a county prosecutor for the portion of his term during which the Attorney General, at the request of the county board of freeholders, had prosecuted the criminal business of the court); and *Ross v. Hudson County Board of Chosen Freeholders*, 90 N. J. L. 522 (E. & A. 1917) (county jail guard held entitled to back pay during period of his wrongful dismissal, with mitigation of damages). It then noted that elsewhere in the nation "courts have similarly recognized that a public employee's claim for back pay may justly be subjected to mitigation in the amount the employee actually earned or could have earned, and quoted with approval from *State ex rel. Wilcox v. Woldman*, 157 Ohio St. 264, 105 N. E. 2d 44, 47 (Sup. Ct. 1952):

"But no matter whether public employment is treated as *ex contractu* or *ex lege*, most of the cases declare that a public employee, even though he holds his position under civil service, is subject to the rule that earnings either actual or which he had the opportunity to receive during the period of wrongful exclusion from public employment should be allowed as an offset against the amount of compensation claimed on account of such wrongful exclusion. [Citing cases]"

And see the later comment by the court in *McGrath v. Jersey City*, above, 38 N. J., at page 32, that "It is worthy of note that, in furtherance of the public interest, Congress and many state legislatures have made suitable provision for

mitigation and this court has repeatedly suggested that legislation dealing comprehensively with the subject should be considered by the New Jersey Legislature. [Citations omitted]"

We do not interpret the language in the *Lowenstein* case, above, 35 *N. J.*, at pages 123-4, as a direction by the court that *N. J. S. A.* 18:5-49.1 should be interpreted in the light of *N. J. S. A.* 18:3-28, as appellant urges. As we view the discussion in that part of *Lowenstein*, the court was calling attention to its views in *Miele* regarding mitigation of salary due for illegal separation from service, in the light of the actual language and legislative intent evidenced by the statutes.

It also seems reasonably clear that cases like *McGrath v. Jersey City* and *D'Elia v. Jersey City*, decided under *N. J. S. A.* 40:46-34, are not dispositive of the issue before us. The difference in language between "compensation" in *N. J. S. A.* 18:5-49.1 and "salary" in *N. J. S. A.* 40:46-34 appears to provide a sufficiently distinguishing feature.

Courts must give effect to words used by the Legislature according to the clear and plain meaning they ordinarily import. *Matthews v. Irvington Board of Education*, 31 *N. J. Super.* 292, 296 (*App. Div.* 1954); *R. S.* 1:1-1. While the word "compensation" has certain chameleon-like characteristics, it is commonly understood as having the essential meaning of making whole. *Webster's New International Dictionary* (3d ed. unabridged, 1961); *Black's Law Dictionary* (4th ed. 1951). To "compensate" does not carry with it authority to award more damages than actually sustained. We would equate that word with the commonly understood words "compensatory damages."

One must presume that when the Legislature enacted *N. J. S. A.* 18:5-49.1 in 1948 it was aware of the provisions of *N. J. S. A.* 40:46-34, which specified that a municipal officer or employee was entitled to recover his salary for the period of his illegal dismissal, and that it knew of the construction which courts had given that statute, namely, that by using the word "salary" the Legislature intended that there should be no mitigation for sums earned or that could have been earned by the person dismissed. By adopting the word "compensation," rather than the word "salary" used in the older statute, the Legislature must be taken as having meant that all claims made by illegally dismissed persons under *N. J. S. A.* 18:5-49.1 be subject to the common law rule of mitigation of damages, in light of the plain meaning carried by the word "compensation."

The facts of this case vividly illustrate the unreasonable result of construing *N. J. S. A.* 18:5-49.1 so as to preclude mitigation. Appellant's salary at the time he was illegally dismissed by the township board of education was \$10,000 a year. What he is asking this court to do is to award him, in addition to the salary for the period from July 1 to September 14, 1960, that portion of his annual salary as superintendent of schools for the period September 15, 1960 to April 28, 1961—some 7½ months, amounting to about \$6,250. He asks this for work never performed for respondent board, and for a period of time when he was gainfully employed at \$14,000 a year as district principal at Elmsford, N. Y.—all in the face of his admission before the State Board of Education that he did not intend to return to his position of superintendent of schools of Jefferson Township. To allow appellant "compensation" for the period when he was working at his new position at a higher salary would be

to give him a windfall. Such an interpretation of *N. J. S. A.* 18:5-49.1 is unreasonable and would be inconsistent with the principle that the Legislature must always be presumed to favor the public interest as against any private one.

Accordingly, we hold that the conclusion reached by the Commissioner and, on appeal, by the State Board of Education, was correct.

Affirmed.

81 *N. J. Super.* 151.

NICHOLAS P. REALE,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE,
SOMERSET COUNTY,

Respondent-Respondent.

Decided by the Commissioner of Education September 11, 1962.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from the decision of the Commissioner of Education dated September 11, 1962, wherein he affirmed the action of the respondent Board of Education on February 6, 1962, in removing petitioner-appellant from office as a member of the Board of Education of the Borough of Manville. The grounds of the said removal were that petitioner-appellant had failed to attend more than three consecutive regular meetings of the Board without cause. The removal was based on *R. S.* 18:7-13, which reads as follows:

"A member of a board who shall fail to attend three consecutive regular meetings of the board, without good cause, may be removed by the board. The vacancy thus created shall be filled in the same manner as other vacancies."

In his decision the Commissioner based his affirmance upon a review of the entire record and found that the removal of petitioner-appellant was not without good cause. He further found, for reasons more particularly stated in his decision, that the resolution of removal was not invalid.

For the reasons stated in the opinion below, it is recommended that the decision of the Commissioner be affirmed.
January 9, 1963.

Appeal dismissed by Superior Court, Appellate Division, May 2, 1963.

JOSEPH VICARI,

Appellant,

v.

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

Respondent.

RUPERT MEIER,

Appellant,

v.

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

Respondent.

Decided by the Commissioner of Education December 18, 1961.

DECISION OF THE STATE BOARD OF EDUCATION

This is a consolidated appeal from the Commissioner's decision by two petitioners to the Commissioner of Education against the Board of Education of the City of Jersey City. We affirm the decision of the Commissioner and we adopt the statement and finding of facts and conclusions set forth in the decision of the Commissioner.

In addition to the aforesaid statements of facts and conclusions in the decision of the Commissioner, we learned at oral argument before the Legal Committee of the State Board of Education that petitioners were appointed as "regular" teachers by the respondent Board in 1947. Since they did not present the claims herein until July 3, 1956, some nine years thereafter, we hold that they are barred by principles of laches and estoppel. *VanHoughten v. City of Englewood*, (Sup. Ct. 1940) 124 N. J. L. 425. See also: *Miller v. Board of Chosen Freeholders*, (1952) 10 N. J. 398; *Long v. Board of Chosen Freeholders* (1952) 10 N. J. 380.

The action of the Commissioner of Education in dismissing the petitions is hereby affirmed.

November 6, 1963.

Pending before Superior Court, Appellate Division.