

State of New Jersey  
Department of Education  
225 West State Street  
Trenton, N.J. 08625

**NEW JERSEY  
SCHOOL LAW DECISIONS  
Indexed**

January 1, 1974, to December 31, 1974

**vol. 2**

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Department of Education  
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FRED G. BURKE  
COMMISSIONER OF EDUCATION



**West Milford Board of Education,**

*Petitioner,*

*v.*

**Township Council of West Milford,**

*Respondent.*

**CONSENT ORDER**

Petitioner, the West Milford Board of Education, West Milford, New Jersey, and Respondent, Township Council of West Milford, having conferred and agreed upon a determination of the amount necessary to be appropriated to provide a thorough and efficient system of schools in the District of West Milford for the school year 1974-1975, and such amounts as are necessary to be raised by taxation for said purpose, and it appearing to the Commissioner that said amounts, as hereinafter set forth, are fair and reasonable, and each of the parties, by and through their respective counsel having consented to the making and entry of this Order,

It is on this 12th day of July, 1974 ORDERED and DETERMINED that:

1. The total amount necessary to be appropriated to provide a thorough and efficient system of schools in the District of West Milford, in the County of Passaic and State of New Jersey for the school year 1974-1975 is:

Current Expenses	\$7,804,325.00
Capital Projects	165,760.00

2. The amounts necessary to be raised by taxation for the purposes described in Paragraph 1 above are:

Current Expenses	\$6,229,440.00
Capital Projects	154,455.22

3. The amounts set forth in Paragraph 2 above are hereby certified to the Passaic County Board of Taxation for inclusion in taxes to be assessed in and for the Township of West Milford, applicable to the years 1974 and 1975, and a true copy of this Order, containing the above certification, shall be duly filed with the Secretary of the Passaic County Board of Taxation within      days after the entry hereof.

This Order shall constitute a final determination of the matters set forth in the Petition of Appeal herein filed, and each of the parties hereto shall do and perform all things necessary to comply with the terms hereof.

**COMMISSIONER OF EDUCATION**

**Board of Education of the Borough of Haledon,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Haledon, Passaic County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Dominic Cavaliere, Esq.

For the Respondent, James V. Segreto, Esq.

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *N.J.S.A. 18A:22-37*, certifying to the Passaic County Board of Taxation a lesser amount of appropriations for school purposes for the 1973-74 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on January 25, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

At the annual school election held February 13, 1973, the Board submitted to the electorate proposals to raise \$594,369.68 by local taxation for current expenses and \$555.31 for capital outlay costs of the school district. These items were rejected by the voters, and the Board subsequently submitted its budget to Council for determination of the amounts necessary for the operation of a thorough and efficient public school system in the Borough of Haledon for the 1973-74 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A. 18A:22-37*.

After consultation with the Board, Council made its determinations and certified to the Passaic County Board of Taxation the amounts of \$564,950.18 for current expenses and \$555.31 for capital outlay. The pertinent amounts are shown as follows:

	<b>Current Expenses</b>	<b>Capital Outlay</b>
Board's Proposal	\$594,369.68	\$555.31
Council's Certification	<u>564,950.18</u>	<u>-0-</u>
Amounts Reduced	\$ 29,419.50	\$555.31

There was no reduction made in the capital outlay account.

The Board contends that Council's action was arbitrary and capricious and documents its need for the reductions recommended by Council and written

testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and that the Board has failed to sustain its burden of proving that Council's appropriation is insufficient to provide a thorough and efficient system of education in the school district.

Council denies that its reductions were arbitrary or capricious and avers that the amounts certified were made after deliberations with respect to the needs of the Board. Council asserts also that the remaining funds will be sufficient to operate and maintain a thorough and efficient system of public schools within the district.

After examining the record in its entirety and weighing the testimony of the witnesses, the hearing examiner finds that Council's reductions are neither arbitrary nor capricious. The hearing examiner recommends, therefore, that the Commissioner make his determination on the basis of the analysis of the supporting statements, documentation, and testimony about the specific budgetary items now in contention.

As part of its determination, Council suggested items of the budget in which it believed economies could be effected without harm to the educational program as follows:

#### CURRENT EXPENSES

Account	Item	Board's Budget	Council's Appropriation	Reduction
J110	Admin. Sals.	\$ 45,000	\$ 44,652.75	\$ 347.25
J120b	Contr. Servs.	4,050	3,700.00	350.00
J130	Admin. Exps.	4,450	3,775.00	675.00
J211, 213, 214, 215a	Instr. Sals	482,619	461,935.48	20,683.52
J220	Instr. Textbooks	8,000	7,371.27	628.73
J240	Teach. Supls.	11,000	9,315.00	1,685.00
J610	Oper. Sals.	36,900	35,700.00	1,200.00
J810a	Retire. Funds	9,500	8,650.00	850.00
J870	Tuition	39,000	36,000.00	3,000.00
	<b>TOTALS</b>	<b>\$640,519</b>	<b>\$611,099.50</b>	<b>\$29,419.50</b>

(Respondent's Resolution, unp)

The hearing examiner observes that the amounts shown, *ante*, as budgeted by the Board and appropriated by Council do not reflect the actual totals in Council's Resolution, paragraph 1, which reads as follows:

“\*\*\*1. The Current Expense local tax levy is hereby fixed at \$564,950.18, representing a reduction of \$29,419.50 from the local tax levy for Current Expenses provided in the school board budget in the amount of \$594,369.68.\*\*\*” (Respondent's Resolution, unp)

Nor does the document enumerating those line items, which was submitted by

the Board, reflect the totals in Council's Resolution, paragraph 1. However, the record shows that \$564,950.18 is the actual amount certified to the Passaic County Board of Taxation to be raised by local taxes (Council's Resolution) and the Board and Council agree that the budget was reduced by \$29,419.50.

At the hearing, Council moved to dismiss the Board's budget appeal for the following reasons:

(1) Council avers that the Board's "written testimony" was not verified by oath and such "testimony" is limited in use to the conference of the parties and not the hearing.

(2) The "written testimony" is hearsay and in an administrative, quasi-judicial hearing, the hearsay evidence can be used only to corroborate and add color to other competent testimony. (Respondent's Brief, at p. 2)

(3) The Board failed to prove that the appropriation made by Council was unreasonable and insufficient to provide a thorough and efficient system of education. (Respondent's Brief, at p. 4)

(4) The procedure adopted by the hearing examiner violated due process by "compelling" testimony by the Mayor, and at the same hearing, denying Council the opportunity to cross-examine Board witnesses. (Respondent's Brief, at pp. 11-12)

Before considering the merits of the line items of this budget which are now in contention, the hearing examiner finds that a review of the principles and guidelines for determining budget appeals is necessary for a better understanding of the budget, *sub judice*.

In *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 N.J. 94 (1966), the Court commented as follows:

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

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

\*\*\*the Commissioner in deciding the budget dispute here before him,

will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S. 18:7-83* [*N.J.S.A. 18A:22-38*] then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.\*\*\*" (*Emphasis supplied.*) (at p. 107)

It is well established that the Commissioner has the legal responsibility to review and settle budget disputes which are presented to him after governing bodies and boards are unable to resolve their differences. *East Brunswick, supra*. The Commissioner has developed, therefore, rules and procedures to be followed by the parties so that the budget hearings may be presented in a concise, orderly, and complete fashion. Both sides are required to reduce to writing the testimony and evidence they wish to offer in support of their respective positions. This requirement is now attacked by Council in a Motion to Dismiss, which was offered at the hearing, on the following grounds:

1. Petitioner has failed to sustain its burden of proof that the requested funds are necessary.
2. The offering of written testimony is unconstitutional.
3. The Board submitted an unverified statement about its budget.

Council avers that the Board is in violation of *N.J.S.A. 18A:6-24* which requires that written statements be verified by oath, and that due process has been denied pursuant to *N.J.S.A. 18A:6-20* which offers the right to be represented by counsel and to present witnesses to testify. Council avers also, that *N.J.A.C. 6:24-1.8* limits the use of written statements to the conference of parties and that absent full agreement at the conference of the parties as to a statement of material fact, a full hearing shall be afforded for the submission of oral testimony and documentary evidence. (Respondent's Brief, at pp. 1-3)

The hearing examiner notes that this budget appeal has been processed routinely, and scheduled for hearing in the same manner and using the same procedures that are used in all budget appeals that are presented to the Commissioner.

The Board does not deny that it failed to verify its written statement pursuant to *N.J.S.A. 18A:6-24*; however, under oath, the Superintendent of Schools swore to the truth of the written statement presented to the

Commissioner. Also, his testimony supplemented the written material offered by the Board and he was cross-examined by Council on the supplemental testimony; however, Council refused to question the Superintendent on the content of the Board's written statement which it held to be improper and illegal. (Respondent's Brief, at p. 9; Petitioner's Brief, at pp. 1-2)

Council avers that it was denied due process and the opportunity to cross-examine witnesses by the hearing examiner. At the hearing, the Superintendent offered direct testimony to support three specific budget items. (Respondent's Brief, at p. 9) The Board rested its case, and cross-examination on these three items was then elicited by Council; however, Council would not continue its cross-examination into budget areas covered only by the written testimony offered by the Board and admitted as evidence by the hearing examiner. It is Council's contention that such evidence may not be considered. (Respondent's Brief, at pp. 3-4)

Council issued subpoenas to the President and the Financial Chairman of the Board; however, he did not call on them to testify nor did he avail himself of the opportunity to cross-examine them on the basis of the Board's written testimony. He specifically stated that he would not call on these persons as witnesses. (Tr. 22-23) Council clearly had the opportunity to cross-examine the Board's witnesses and the record shows they were subpoenaed by Council.

The hearing examiner determined that Council's Answer to the Board's budget appeal, its Resolution, and documents supporting the budget reduction, would be admitted in evidence just as the Board's written testimony was admitted as evidentiary. (Tr. 48-49) On the basis of these rulings in which written documents were admitted in evidence by both sides, the hearing examiner permitted the cross-examination of the Mayor of the Borough of Haledon over the objection of Council's attorney.

Council asserts that it was also denied due process by the evidentiary rulings and the procedure followed by the hearing examiner. However, the record shows that Council was offered the same opportunity as the Board to call witnesses and elicit testimony, and that the Board did not offer an objection to having its witnesses testify under cross-examination about the written testimony admitted in evidence.

The hearing examiner recommends, therefore, that the Commissioner deny Council's Motion to Dismiss on the grounds that this budget appeal has been filed and processed in essentially the same manner as other budget appeals, and that the record does not support Council's charge that it has been denied due process pursuant to statute, or the rules of the Commissioner.

In regard to the evidence and testimony on the contested line items in the budget the record reveals the following:

*J110, J211, J213, J214, J215a Salaries-Administration, Instruction*

These combined line items involve administrative and instructional salaries.

The Board has advanced reasons for its requests and states that it arrived at these salary levels through negotiations and its need for additional staff.

Council essentially has limited salary considerations to a 3.5 percent raise and recommended the reassignment of a teacher, if required, rather than adding a second-grade teacher at a salary of \$9,800. (Respondent's Resolution, unp)

The hearing examiner notes that under the mandate of *Chapter 303, Laws* of 1968, now embraced in the provisions of *N.J.S.A. 34:13A-1 et seq.*, the Board must negotiate salaries with all of its employees as required by law.

Council, however, attempts to deny this right to negotiate and establish salary policy. Disputes of this kind have been addressed in other budget decisions, and it has been uniformly held that the right to make salary judgments for teaching staff members and others is that of the board of education. In *Board of Education of the Township of South Brunswick v. Township Committee of the Township of South Brunswick*, 1968 S.L.D. 168, the Commissioner said:

“\*\*\*It is clear that the funds necessary to the implementation of *salary policies* adopted by a board of education must be provided and are not subject to curtailment. *N.J.S. 18A:29-4.1* See also *Board of Education of Cliffside Park v. Mayor and Council of Cliffside Park*\*\*\*.” (*Emphasis supplied.*) (at p. 172)

The salary policies referred to, *ante*, are clearly to be provided for all of those personnel listed as full-time teaching staff members. This is plainly stated in *N.J.S.A. 18A:29-4.1*:

“A board of education of any district may adopt a salary policy, including salary schedules for *all full-time teaching staff members* \*\*\*. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the *governing body of the municipality* or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year.” (*Emphasis supplied.*)

The adoption of a salary policy by a board of education for its employees is not limited to teaching staff members, but extends also to all employees of a board of education eligible to negotiate their salaries pursuant to *N.J.S.A. 34:13A-1 et seq.*

In the hearing examiner's judgment, the Board had the authority to establish its salary policy on behalf of its employees. Council's reasons for reducing the aforementioned salary accounts fail to prove that the salary policies are excessive or improper. Nor does the record show that the Board violated Executive Order No. 11615.

Council has presented no convincing testimony nor argument to refute the need for the salaries that the Board has established. On the other hand, the

Board has presented clear and well-supported analyses of its needs which are entirely credible. Salary policies previously adopted are mandatory. *Board of Education of the City of Newark v. City Council and the Board of School Estimate of the City of Newark, Essex County, 1970 S.L.D. 197*

The record shows that a reassignment of teachers will eliminate the need for an additional second-grade teacher as requested. In addition, testimony elicited from the Superintendent indicated that \$275 should be restored under appropriations for the Child Study Team and that a \$425 reduction should be sustained. Under the Home Instruction category, the amount of \$1,250 as recommended by Council is shown to be adequate and the \$250 recommended economy should be sustained. Therefore, the hearing examiner recommends that moneys be restored to each of the line items, *ante*, with the exceptions of \$9,800 for the additional second-grade teacher, \$425 for the Child Study Team, and \$250 in the Home Instruction account. Specifically, a reduction of \$10,475 should be sustained and \$10,208.52 restored to the budget.

*J120b Contracted Services*

The Board documented its need for the budgeted amount and based its request on experience in prior years and current needs. The Board actually spent \$5,465.10 last year and budgeted only \$4,050 for the same services this year.

Council reduced the Contracted Services amount by \$350 without giving supporting reasons.

The hearing examiner recommends that the \$350 amount be restored.

*J130 Administration-Expenses*

The Board's expenditure for the four categories included in this line item was \$4,017.22 for the 1972-73 school year. The Board budgeted a total of \$4,450 for the 1973-74 school year which was reduced in the aggregate of \$675 by Council.

The Board grounds its need for the money on the following:

- 1) anticipated increases in printing costs;
- 2) a possible special referendum election for replacing the roof on the Kossuth Street School;
- 3) conversion to a new payroll system for which equipment has already been obtained;
- 4) Superintendent's office expenses which have already been budgeted below last year's expenditure;
- 5) money for three Board members' expenses to the annual School Boards' Workshop in Atlantic City.



Council has provided \$3,775 for these expenditures, reasoning that their determination is consistent with expenditures in prior years and recommending that two, rather than three, Board members attend the Workshop, *ante*.

The hearing examiner notes that the budgeted amount shows a modest increase over the prior year's actual expenditure; however, Council's specific recommendation reducing Board members' expenses from \$2,000 to \$1,825 should be granted. It is a desirable, but not necessary, item. The other expenditures have been sufficiently supported by the Board's evidence so as to warrant approval. The hearing examiner recommends, therefore, that \$500 be restored to the budget and \$175 not be restored.

#### *J220 Instruction Textbooks*

The Board spent \$6,334.19 in this account last year. Its proposed \$8,000 expenditure this year is based on experience in normal replacement of textbooks, its need to update 1966 mathematics textbooks, and its need to advance one grade to a previously adopted new textbook series.

Council's reduction of \$628.73 is based on a slightly declining pupil enrollment which figure was multiplied by the per capita cost per pupil to arrive at its recommended amount of \$7,371.27.

The record shows that, despite the recommended economy, Council has approved an expenditure in this account which is more than \$1,000 higher than the amount spent last year.

The hearing examiner recommends that Council's reduction be sustained.

#### *J240 Teaching Supplies*

The Board's expenditure in 1972-73 was \$11,259.71. Despite increased costs, avers the Board, it budgeted \$11,000 for this year. The Board states that these are all consumable supplies and they must be replaced.

Council's recommended economy is based on the total number of pupils multiplied by \$15 per capita which it states is a reasonable amount for teaching supplies.

The hearing examiner finds no basis to support Council's conclusion that \$15 per pupil is a "reasonable amount"; therefore, he recommends that the \$1,685 reduction be restored.

#### *J610 Operational Salaries*

The dispute in this line item is in regard to the use of summer help to relieve custodians during vacation periods.

The hearing examiner finds again that this may be a desirable, but not necessary, expenditure by the Board and that Council's recommended reduction of \$1,200 is reasonable.

*J810a Retirement Funds*

The Board concedes to the reduction of \$850 for this line item.

*J870 Tuition*

The Board's average estimated cost for tuition for thirteen pupils who have been classified by the Child Study Team is \$3,000 per pupil or \$39,000.

Council gave no reasons for its \$3,000 reduction in this line item.

The hearing examiner recommends that the \$3,000 be restored.

The following table summarizes the report, findings, and recommendations of the hearing examiner:

CURRENT EXPENSES		CURRENT EXPENSES		
Account Number	Item	Recommended Reduction	Restored	Not Restored
J110	Admin. Sals.	\$ 347.25	\$ 347.25	\$ -0-
J211, 213	Instr. Sals.	20,683.52	10,208.52	10,475.00
214, 215a				
J120b	Contr. Servs.	350.00	350.00	-0-
J130	Admin. Exps.	675.00	500.00	175.00
J220	Instr. Textbooks	628.73	-0-	628.73
J240	Teach. Supls.	1,685.00	1,685.00	-0-
J610	Oper. Sals.	1,200.00	-0-	1,200.00
J810a	Retire. Sals.	850.00	-0-	850.00
J870	Tuition	3,000.00	3,000.00	-0-
	<b>TOTALS</b>	<b>\$29,419.50</b>	<b>\$16,090.77</b>	<b>\$13,328.73</b>

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has carefully reviewed the entire record in the instant matter including the exceptions to the hearing examiner report as filed by both counsel pursuant to *N.J.A.C. 6:24-1.16*.

From the record before him, the Commissioner is convinced that there have been no procedural defects or deprivation of due process, to either party in the proceedings, that would in any way militate against a justiciable decision in the matter. In accord with this determination, the Commissioner denies respondent's Motion to Dismiss.

An inadvertent error on the second page of the hearing examiner report is noted and hereby corrected to show that Council's certification for capital outlay was actually \$555.31 and that the amount of reduction was \$ -0- .

The Commissioner further determines that the amounts as recommended

for restoration and those not recommended for restoration by the hearing examiner are such to insure a thorough and efficient program of education. Accordingly, and for the reasons set forth by the hearing examiner, he finds that the additional sum of \$16,090.77 must be added to the amount of \$564,950.18 previously certified by Council for current expenses.

Accordingly, the Commissioner hereby certifies to and directs the Passaic County Board of Taxation to raise the total amount of \$581,040.95 by local taxation for the Board of Education of the Borough of Haledon for current expenses for the 1973-74 school year.

COMMISSIONER OF EDUCATION

July 15, 1974

Pending before State Board of Education

Stipulation of Dismissal May 7, 1975

**Charles B. Bailey,**

*Petitioner,*

*v.*

**Board of Education of the Township of Fairfield, Cumberland County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**ORDER**

For the Petitioner, Charles B. Bailey, *Pro Se*

For the Respondent, Isaac I. Serata, Esq.

This matter having been opened before the Commissioner of Education through a Petition of Appeal and Answer filed thereto; and

It appearing that Petitioner Bailey alleges, that the Board of Education of the Township of Fairfield, Cumberland County, hereinafter "Board," acted improperly on April 2, 1974 in its determination to remove him from membership on that Board; and

It appearing that the Board alleges petitioner's attendance at regularly-scheduled and specially-called Board meetings, since July 1973, has been poor; and

It appearing that the Board asserts Petitioner Bailey was removed from

membership on the Board for his poor attendance record and pursuant to the provisions of *N.J.S.A.* 18A:12-3 which provides, in pertinent part:

“\*\*\* any member [of a board of education] who fails to attend three consecutive meetings of the board without good cause may be removed [from membership] by it\*\*\*”; and

It appearing that the Commissioner, on prior occasions, addressed the responsibility of boards of education which found it necessary to implement their authority set forth in *N.J.S.A.* 18A:12-3; and

It appearing that in the matter of *Charles H. Van Nutt v. Board of Education of the Township of Rochelle Park and Henry J. Roes, Secretary, Bergen County*, 1966 *S.L.D.* 176, the Commissioner opined, at page 179:

“\*\*\* The Commissioner further believes that this power [set forth at *R.S.* 18:7-13; now *N.J.S.A.* 18A:12-3] to remove a board member under this statute should be exercised with restraint and only after good cause has been clearly established.\*\*\* The conclusion [in the matter of *Charles H. Van Nutt, supra*] is inescapable that petitioner was not given a full and fair opportunity to justify his three consecutive absences, and respondent Board did not meet the necessity to establish the fact that petitioner’s failure to attend was without good cause, as required by statute\*\*\*”; and

It appearing that in response to a letter dated June 4, 1974 by the Commissioner’s representative assigned to this matter, the parties herein agree that Petitioner Bailey was not afforded a hearing by the Board prior to its action of removing him from office; now, therefore,

The Commissioner finds and determines that the action taken by the Board of Education of the Township of Fairfield, Cumberland County, on April 2, 1974, by which Petitioner Bailey was removed from his office of membership to that Board, is fatally defective for failure of the Board to afford him a proper hearing. Accordingly, the Commissioner of Education hereby directs the reinstatement of Petitioner Bailey to membership on the Board of Education of the Township of Fairfield, Cumberland County, forthwith. Nothing contained herein, however, shall be construed to preclude this Board from proceeding properly against any member pursuant to the provisions of *N.J.S.A.* 18A:12-3.

COMMISSIONER OF EDUCATION

July 23, 1974

**Richard Glover,**

*Petitioner,*

*v.*

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

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, John Cervase, Esq.

For the Respondent, Victor A. DeFilippo, Esq., Barry A. Aisenstock, Esq.

Petitioner, a teacher employed by the City of Newark Board of Education, hereinafter "Board," claims tenure and seeks back pay together with reinstatement to his former position by alleging the Board acted illegally in terminating his employment. The Board denies that petitioner acquired a tenure status in its employ and further denies that its action terminating his employment was illegal.

Hearings in this matter were conducted on April 12, July 20, and September 26, 1973 at the office of the Essex County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. Briefs were filed by the parties prior to the hearing in regard to the Board's position that petitioner is barred from seeking relief through the application of the doctrine of equitable estoppel by laches, and subsequent to the last day of hearing, the parties filed respective summations. The report of the hearing examiner is as follows:

Petitioner was first employed by the Board during December 1964, as a "per diem" substitute teacher at the rate of \$27 per day. (Tr. III-99-100) Although petitioner asserts that thereafter, specifically as of September 1965, he was employed by the Board as a "long-term substitute" (Tr. III-101), an extract of the official minutes of the Board (C-3) discloses that petitioner was employed for the 1965-66 school year as a "per diem" substitute teacher at the rate of \$27 per day. The extract of the official minutes of the Board (C-3) is reproduced here in full regarding the employment of petitioner between the dates of December 18, 1964, and his appointment as a regular teacher for the 1960-70 school year:

\*\*\*\*1. Regular meeting of January 26, 1965:

**Substitute Assignment**

That the following teachers be assigned to the schools indicated at the rate of \$27.00 per diem. . . Richard S. Glover, 322 Hunterdon Street, (Eff. 12/18/64), Arlington Avenue School (Ment. Ret.)

“2. Regular meeting of September 29, 1965

Substitute Assignment

That the following teachers be assigned to the schools indicated at the rate of \$27.00 per diem. . . Richard Glover, (Eff. 9/9/65); 196 Central Ave., East Orange; Quitman Street-Scudder Homes (rec.).

“3. Regular meeting of August 23, 1966

Substitute Assignments

That the following teachers be assigned to the schools indicated at the rate of \$5500.00 per annum. . . Richard Glover, (Eff. 9/1/66), 196 Central Ave., Orange, Quitman Street-Scudder Homes (rec.).\*\*\*

“4. Regular meeting of August 22, 1967

Substitute Assignments

That the following teachers be assigned to the schools indicated at the appropriate annual rate. . . Richard Glover (eff. 9/1/67), 300 Beach Street, E.O., Elliot Street School (Recreation).

“5. Regular meeting of August 22, 1968

Substitute Assignments

The Superintendent recommends that the following teachers be assigned to the schools indicated at the appropriate annual rate. . . Richard Glover (Eff. 9/1/68); 285 Lincoln Ave., Orange; Elliot Street School (Rec.).

“6. Regular meeting of June 26, 1969

Temporary Appointments

The superintendent recommends that the following teachers be appointed to the position indicated, effective September 1, 1969. . .

*Recreation*

Richard S. Glover, 381 Broad Street, Apartment A2109, Newark, New Jersey, to Hawkins and Roosevelt Schools at \$7900. per annum, subject to filing no later than September 1, 1969 an official transcript of Bachelor's Degree credits and official evidence of 20 acceptable credits in Recreation. Newark Substitute - 4 years. Vacancy.

[signature]

---

Anthony De Franco  
Assistant Secretary”

Petitioner testified that when first appointed by the Board in December 1964, he did not hold an appropriate teaching certificate issued by the State Board of Examiners. (Tr. III-92) (See *N.J.S.A.* 18A:6-38 Powers and duties of the [State] board [of examiners]; issuance and revocation of certificate; rules and regulations.) Petitioner was issued a standard elementary school teacher's certificate by the State Board of Examiners during April 1968. (Tr. I-72) (Tr. III-92) Although not reflected in the extract of the Board's minutes (C-3, *ante*), petitioner was employed as a regular teacher for the school years 1969-70, 1970-71, and 1971-72 according to the testimony of the assistant superintendent of schools in charge of personnel, hereinafter "assistant superintendent." (Tr. II-85-86) Furthermore, the Board Secretary testified that while petitioner was placed on an annual salary, as opposed to a per diem rate, in September 1966, he was not enrolled as a member of the Teachers' Pension and Annuity Fund, hereinafter "TPAF," until October 1, 1969. In fact, the Board Secretary testified that, when the Board was notified by the TPAF to begin petitioner's deductions for his share of contribution (R-3), the effective date of his contribution was September 1969. (Tr. II-71-73)

Petitioner's employment with the Board was terminated on May 4, 1972 (Tr. I-10, 15, 21) (Tr. II-27, 85-86, 110), although the Board's official action in this regard was taken on May 23, 1972, as reflected in its minutes of that date (C-2). In pertinent part, those minutes read:

***"TERMINATION OF SERVICES***

"That the services of the following persons be terminated, effective dates noted:

Teacher	School	Date
***		
Richard Glover 381 Broad Street Newark, N.J. 07102 144-32-4691	Avon Avenue (Rec.)	May 4, 1972
***"		

Petitioner testified that, beginning in February 1970, and while he held employment with the Board, he was simultaneously employed by the East Orange Board of Education, hereinafter "East Orange Board," between the hours of 8:00 a.m. and 2:45 p.m. Upon completion of his duties with the East Orange Board, he would then report to his position with the Newark Board where he worked between the hours of 3 p.m. and 9 p.m. (Tr. I-15-16) However, in petitioner's view, a conflict of working times developed near the beginning of April 1972, when he filed a grievance against his principal in the East Orange School System. (Tr. I-16) Petitioner testified that, because he filed a grievance against the principal, he, the principal, "\*\*\*\* as a means of reprimand for the filing of the grievance\*\*\*\*" (Tr. I-17) required him, petitioner, to remain on duty until 3 p.m. Because his revised sign-out time of 3 p.m. at East Orange would



prevent him from reporting to his Newark position at 3 p.m., petitioner testified, he intended to resign his East Orange position. (Tr. I-18) However, he asserted, he was required to give the East Orange Board sixty days' notice. (Tr. I-18) It is not clear in the record precisely what date in April petitioner's schedule at the East Orange School was changed.

The Newark schools were closed for vacation during the period April 1 through April 9, 1972. (Tr. I-18) (School Calendar as set forth in the Agreement (P-6) between the Board and the Newark Teachers' Union) Petitioner testified that on April 10, 11, 12, 13, 14, 17, 18, and 19, 1972, he reported to his duties in Newark at the precise time of 3 p.m. (Tr. I-19) as reflected in the Teachers' Time Record (P-7) for that period. However, on subsequent days, beginning April 24 until May 4, 1972, the last day of his employment with the Board, his arrival time according to his testimony and as set forth in the Teachers' Time Records (P-7, P-8) is as follows:

April 24, 1972	3:15
April 25, 1972	3:20
April 26, 1972	3:17
April 27, 1972	3:21
April 28, 1972	3:22
May 1, 1972	3:26 (3:24)
May 2, 1972	3:30
May 3, 1972	3:26
May 4, 1972	3:12

While petitioner testified his last day of employment was May 3, 1972 (Tr. I-21), there appears a sign-in and sign-out time for May 4, 1972, following his name on the Teachers' Time Record. (P-8)

Petitioner admitted that his sign-in times between April 10, 1972, and May 4, 1972, are not in his handwriting; that he was signed in by the director of the after-school recreation program (Tr. I-20-21) who, according to petitioner, signed in all employees under his direction.

The assistant superintendent testified that the specific reason why petitioner was terminated from his employment with the Board was "\*\*\*\*faisifying the timesheet\*\*\*\*." (Tr. II-90) However, petitioner asserted that he had been the "\*\*\*\*victim of persecution by so-called community leaders who insisted upon his removal [termination] and the respondent [Board] yielded to the pressure applied\*\*\*\*." (Petition of Appeal, Fourth Count) In this regard, a meeting was held on April 19, 1972, and among those present were petitioner, the assistant superintendent, the Board's recreation director, a supervisor, the Avon School principal, and the recreation director of the Avon School. (Tr. I-47) Petitioner asserted that this meeting was called because of community complaints against him and because the community leaders wanted him transferred. (Tr. I-44) However, the assistant superintendent testified that he was asked to attend that meeting by the Board's recreation director:

"\*\*\*\*relative to charges that were leveled against him [petitioner] in



writing by the Principal of the school and the Director of Recreation. The charges that were filed against him were the charges of insubordination and failure to abide by Board Rules and Regulations. No parents' names were ever discussed with me at any time.\*\*\*" (Tr. II-88-89)

It was at this meeting of April 19, 1972, the assistant superintendent testified that he first learned petitioner held another position in the East Orange School District. (Tr. III-5) It is agreed that a suggestion was made to petitioner at this meeting that petitioner should request a transfer to another school, which he subsequently did by letter dated April 22, 1972. (P-4) (Tr. III-8) However, the suggestion was not made because of alleged community pressure as claimed by petitioner. It was suggested he request a transfer because there was "\*\*\*seemingly\*\*\* friction\*\*\* between him and his immediate superior. \*\*\* [H]is immediate superior felt \*\*\* that he [petitioner] was undermining his program.\*\*\*" (Tr. III-9)

Notwithstanding the meeting of April 19, 1972, and the complaints aired therein, the assistant superintendent testified that, when he learned at that meeting petitioner was consistently late and that he worked simultaneously in the East Orange School District, he "\*\*\* communicated by letter with the Principal of East Orange; and as a result of hearing from him, it became clear to me that he could not work in one school ending at three and signing-in at Newark at a time of three o'clock \*\*\*," (Tr. III-6) and therefore "\*\*\* he [petitioner] was fired\*\*\*. (Tr. III-10)

Petitioner contends that the Board discriminated against him by terminating his employment. Further, he contends that there were three other teachers employed simultaneously by both the Newark and East Orange Boards of Education (Tr. I-22) against whom no disciplinary action was taken. With respect to this allegation, the assistant superintendent testified that "\*\*\* they [the three other employees] were investigated by the Recreation Department [of the Newark Board of Education] and the Recreation Department reported back to me that the other men were reporting to work on time.\*\*\*" (Tr. II-101)

The hearing examiner has carefully weighed the testimony of the witnesses in this matter, and finds that the weight of the credible evidence fails to support a finding that petitioner was discriminated against by the Board.

Petitioner's claim that he acquired a tenure status will be discussed next. It is clear that petitioner was issued a standard elementary school teaching certificate by the State Board of Examiners during April 1968. This certificate was examined by the hearing officer during the course of the hearing. (Tr. I-72) Several statutes set forth the certification requirements which are prerequisites to the employment of teaching staff members.

*N.J.S.A.* 18A:26-2 provides as follows:

"No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach,

administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.”

*N.J.S.A. 18A:27-2*, which provides for the termination of employment when a teaching staff member does not hold a certificate, reads as follows:

“Any contract or engagement of any teaching staff member, shall cease and determine whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment notwithstanding that the term of such employment shall not then have expired.”

*N.J.S.A. 18A:28-4* provides in pertinent part as follows:

“No teaching staff member shall acquire tenure in any position in the public schools of any school district or under any board of education, who is not the holder of an appropriate certificate for such position, issued by the state board of examiners, in full force and effect \*\*\*.”

Applying the fact that petitioner first acquired his elementary school teacher's certificate during April 1968, to the above-cited statutory provisions, it is clear that petitioner could not have acquired a tenure status in the Newark School District during the period of his employment as a substitute teacher prior to April 1968.

The next item to be considered is petitioner's certification by the Newark School District's local Board of Examiners. The Newark School District is one of the few in the State which for many years has maintained a local Board of Examiners. The provisions for establishing such a local board of examiners are set forth in *N.J.S.A. 18A:26-3* which reads as follows:

“In each city school district there may be established by the board of education a district board of examiners consisting of the commissioner, ex officio, the superintendent of schools of the district, if there be one, and such persons having the necessary qualifications as the board of education shall appoint.”

*N.J.S.A. 18A:26-5* states the following regarding the function of a district board of examiners:

“A district board of examiners shall, under such rules as the state board shall prescribe, and under such additional rules as may be prescribed by the board of education of the district, issue certificates to teach, which shall be valid for all schools of the district.”

*N.J.S.A. 18A:26-6* is also relevant to this matter, and states:

“No teaching staff member shall be employed in any of the schools of a district having a district board of examiners unless he shall be issued a certificate by said board and holds an appropriate certificate issued by the state board of examiners or the county superintendent of schools of the county.”

In accordance with the provisions of *N.J.S.A. 18A:26-6*, petitioner became eligible to apply for a local certificate issued by the district Board of Examiners when he acquired his elementary school teacher's certificate during April 1968.

Petitioner asserts in his Brief filed subsequent to the hearing that he was issued a “provisional teaching certificate” during 1966 by the Newark Board of Examiners. No evidence was presented to support this allegation. Furthermore, the above-cited provisions of *N.J.S.A. 18A:26-6* preclude a local board of examiners from issuing a local certificate to a candidate who does not possess a certificate issued by the State Board of Examiners.

The Board states in its Brief that the rules in effect for issuing a local certificate, during the period of time petitioner was employed as a substitute teacher, required that each candidate pass a written, oral and physical examination. The Board states that the requirement of a written examination, the National Teachers Examination administered by Educational Testing Service, was waived for any candidate who had served for three years as a substitute teacher in the Newark School District. The Board also states that petitioner had taken the written examination during the period when he served as a substitute teacher, but he failed to achieve a satisfactory score. The assistant superintendent testified that, in accordance with the rules of the Newark Board of Examiners, petitioner was invited to take the oral examination on May 27, 1969, which he successfully passed. (Tr. II-84) (Tr. I-15) The assistant superintendent further testified that petitioner and others who passed the oral examination were subsequently appointed as regular teachers beginning the following September. (Tr. II-84) The official minutes of the Board (C-3) disclose that petitioner was appointed at the regular meeting held June 26, 1969, to a full-time position effective September 1, 1969, at the annual salary of \$7900. Petitioner was required to file an official college transcript indicating both the acquisition of twenty acceptable credits in recreation and a bachelor's degree. In his Brief, petitioner claims that from December 1964 to May 1972, he was filling a vacancy on the staff of the Newark Board and that his designation as a “substitute teacher” was a subterfuge used by the Newark Board to avoid having petitioner acquire a tenure status. In this regard petitioner relies on *Schulz v. State Board of Education*, 132 *N.J.L.* 345 (*E. & A.* 1945) wherein the Court opined:

“\*\*\* The courts have condemned evasions of the tenure statute and refused to countenance the subterfuge of designating a teacher as a substitute where the service rendered and intended to be rendered was that of a regular teacher.\*\*\*” (at p. 353)

Petitioner, in asserting that his employment by the Newark Board between December 1964 and September 1969, was, in fact, that of a “regular teacher”

which then would give him more than sufficient time to have acquired a tenure status pursuant to *N.J.S.A. 18A:28-5*, also relies on *Ruth Yanowitz et al. v. Board of Education of the City of Jersey City, Hudson County*, 1973 S.L.D. 57.

The Board in its Brief filed subsequent to the hearing argues that during the period December 1964 until September 1969, petitioner was employed as a “substitute teacher” albeit a “long-term substitute teacher.” In this regard, the Board relies on the testimony of the assistant superintendent related to the purposes of “long-term substitute teachers.”

“\*\*\*‘Long-term subs are appointed into positions where regular teachers are out for many different reasons. It could be on sick leave, it could be on pregnancy, child care; it could be on a leave—special leave for graduate study, it could be a special leave to work on a project. This is the purpose of a long-term sub’\*\*\*” (Tr. III-59-60) (Respondent’s Brief, at p. 7)

In support of its position that petitioner was employed as a substitute teacher from December 1964 to September 1969 and therefore that time did not count towards the acquisition of tenure, the Board also relies on *Schulz, supra*. The Board argues that for purposes of tenure, petitioner’s employment time began when he received both his certificate from the State Board of Examiners and from the local board of examiners.

The primary statute which sets forth the requirements for the acquisition of a tenure status is *N.J.S.A. 18A:28-5*. This statute reads as follows in pertinent part:

“The services of all teaching staff members including all teachers \*\*\* and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, *excepting those who are not the holders of proper certificates in full force and effect*, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:

“(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

“(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

“(c) the equivalent of more than three academic years within a period of any four consecutive academic years\*\*\*.” (Emphasis ours.)

In the case of *Zimmerman v. Board of Education of the City of Newark*, 38 N.J. 65 (1962) the New Jersey Supreme Court, speaking through Justice

Schettino, commented as follows regarding the provisions of the tenure statute:

“\*\*\* As we have already emphasized, teacher tenure is a statutory right imposed upon a teacher’s contractual employment status. In order to acquire the status of a permanent teacher under a tenure law and with it the consequent security of permanent employment, a teacher must comply with the precise conditions articulated in the statute. *Moriarity v. Board of Education of Garfield*, 133 N.J.L. 73 (Sup. Ct. 1945), affirmed 134 N.J.L. 356 (E. & A. 1946); *Ahrensfield v. State Board of Education*, *supra*; 78 C.J.S., *Schools and School Districts* § 180, p. 1014 (1952).  
(at p. 72)

Applying this law to the facts in this matter it is clear that petitioner could not have acquired a tenure status prior to April 1968 when he was first issued a certificate by the State Board of Examiners. There are no facts to support an assumption that petitioner held any type of State certificate whatsoever prior to April 1968. In view of this situation, it is difficult to understand by what authority he was employed as a teacher by the Newark Board of Education between December 18, 1964 and April 1968, even as a substitute.

In order to determine whether petitioner acquired a tenure status subsequent to his securing a teacher’s certificate from the State Board of Examiners in April 1968, the precise question to be answered is whether petitioner was regularly employed as a teacher by the Board from April 1968 until the date of his termination effective May 4, 1972. Assuming *arguendo*, that petitioner was a regularly employed teaching staff member, holding a proper certificate from the State Board of Examiners, during the aforementioned time period, the sole remaining question is whether the fact that petitioner did not meet the requirements of the local board of examiners until May 27, 1969, precludes him from meeting the precise requirements of N.J.S.A. 18A:28-5, and the acquisition of a tenure status.

These specific determinations, which will be dispositive of the instant matter, are referred to the Commissioner for his adjudication.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions, objections, and observations pertinent thereto filed by respective counsel. It is noted that petitioner’s principal objection is concerned with a finding by the hearing examiner that credible evidence educed at the hearing fails to support a finding that petitioner was discriminated against while the Board’s exception addresses the accuracy of petitioner’s attested arrival times at his Newark school. In the Commissioner’s judgment, these objections and exceptions are peripheral to the essential determination herein which, concisely stated, is whether in the month of May 1972, petitioner had attained a tenured status as an employee of the Board.

In this regard, the Commissioner finds the record to be clear. There is convincing proof that a tenure status had been acquired by petitioner at the time of his discharge by the Board in May 1972. The Commissioner so holds.

This determination is grounded on the uncontroverted facts with respect to the regular nature of petitioner's employment as a teaching staff member by the Board during the whole of the approximate six-year period from September 1966 to May 1972, and by the fact that, during the last four years and one month of that total period, his state certification was complete. While petitioner's certification by the local board of examiners postdated the receipt of his state certification by approximately one year, the Commissioner finds no significance adverse to petitioner in that fact since, at the time when statutory service requirements (*N.J.S.A. 18A:28*) had been met, petitioner possessed both certificates.

Even by the Board's own calculation, petitioner was a regularly certificated teaching staff member in the employ of the Board from September 1, 1969 through May 3 or 4, 1972, a period of approximately two years and eight months, and under such circumstances, the Commissioner holds that at least the prior period of approximately one year and one month, must be added thereto as a period of regular employment countable toward a tenure accrual. In considering similar circumstances, the Commissioner stated in *Yanowitz et al. v. Board of Education of the City of Jersey City*, *supra*, that:

“\*\*\* The periods of employment for each of the petitioners, with the sole exception of *per diem* substitute teaching, were full-time teaching assignments.\*\*\*” (at p. 76)

Thereafter, in *Yanowitz*, the Commissioner held that such service was clearly not that of a substitute. The holding herein is the same; since, during all of the 1968-69 school year, petitioner was regularly employed, paid a yearly salary, and possessed full state certification beginning in April 1968.

In considering the employment of a regularly assigned teacher as a “so-called substitute” in *Board of Education of Jersey City v. Wall et al.*, 119 *N.J.L.* 308 (*Sup. Ct.* 1938), the Court stated:

“\*\*\*The device adopted cannot defeat the purpose of the act, which was designed to give measure of security to those who served as teachers three consecutive academic years.\*\*\* Had the proofs not shown continuous employment for the statutory period, the result would have been otherwise \*\*\*.” (at pp. 308-310)

The State Board of Education said in *Juanita Zielenski v. Board of Education of the Town of Guttenberg, Hudson County*, 1970 *S.L.D.* 202, reversed State Board of Education, 1971 *S.L.D.* 664:

“\*\*\*These statutes [*N.J.S.A. 18A:27-1* and *N.J.S.A. 18A:28-4*] lead us to conclude that it was not intended to deny tenure to a teacher, otherwise



eligible, who taught continuously and performed all the duties of a regular teacher \*\*\*.” (at p. 668)

Such determinations have been affirmed in the recent decisions of the Commissioner. In *Nicoletta Biancardi v. Board of Education of the Borough of Waldwick*, 1974 S.L.D. 360, the Commissioner stated the following:

“\*\*\* Applying the principles set forth in these decisions to the instant matter the hearing examiner finds that petitioner has indeed earned the ‘measure of security’ which tenure affords to those who meet the precise conditions which are necessary for its accrual. *Ahrensfield v. State Board of Education*, 126 N.J.L. 543, 19 A. 2d 656 (1941) Such finding is buttressed by other decisions of the Commissioner and the Courts that hold that a wide range should be given to the applicability of the tenure law to confer a tenure status on the basis of duties performed, *Barnes et al. v. Board of Education of the City of Jersey City, Hudson County*, 1961-62 S.L.D. 122; *Quinlan v. Board of Education of the Township of North Bergen, Hudson County*, 1959-60 S.L.D. 113; *Giannino v. Board of Education of Paterson, Passaic County*, 1968 S.L.D. 160; *Brunner v. Board of Education of Camden, Camden County*, 1959-60 S.L.D. 155; *Sullivan v. McOsker*, 84 N.J.L. 380 (E. & A. 1913), and there can be no question herein about the duties performed by petitioner during all of the period \*\*\*. They were clearly the duties of a regular teaching staff member employed by the Board, and this clear fact is not tarnished in any way by the Board’s nomenclature for the work or the rewards it offered when the work was performed.

“Thus, having completed an employment ‘\*\*\* of more than three academic years within a period of four academic years \*\*\*’ (N.J.S.A. 18A:28-5), petitioner was complied with the statutory prescription and is ‘under tenure.’\*\*\*” (at p. 365)

Similarly herein, even if the 1966-67 and 1967-68 academic years of petitioner’s employment by the Board are removed from consideration, the Board had an opportunity to evaluate petitioner’s regular employment as a teaching staff member for a period of at least four years and one month during which time he held an appropriate state certificate for the work he performed. If such circumstances are to be afforded a “wide range” of applicability, the resultant conclusion is, as stated *ante*, that petitioner has complied with the statutory prescription (N.J.S.A. 18A:28-5) and has acquired a tenure status. The statute’s requirement of an employment of:

“\*\*\* (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year \*\*\*”

has been met. As the Commissioner stated in *Cornelius T. McGlynn v. Board of Education of the Township of Lumberton*, 1972 S.L.D. 28:

“\*\*\* When *service* of a teaching staff member has been rendered for the complete period required by statute a tenure status is accrued at the

precise moment when the requisite period has expired. From that time forward, in the Commissioner's view, the teaching staff member has tenure.\*\*\*" (*Emphasis supplied.*) (at p. 33)

Having determined that petitioner was a tenured employee of the Board when the Board purportedly dismissed him on May 3, 1972, the Commissioner finds that such dismissal was *ultra vires*, and that petitioner is entitled to be made whole retroactive to that date. Accordingly, it is ordered that the Board reinstate petitioner to his position forthwith and afford him retroactively all the salary and other benefits to which he is entitled, mitigated only by the amount of his earnings, if any, during the period beginning May 3, 1972, and ending June 30, 1974. Nothing contained herein, however, shall limit the Newark Board of Education from exercising its authority, if it chooses, pursuant to the Tenure Employees Hearing Law.

COMMISSIONER OF EDUCATION

July 26, 1974

**In the Matter of the Tenure Hearing of James Lowery, School District  
of the City of Englewood, Bergen County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Complainant Board of Education, Sidney Dincin, Esq.

It appearing that the Board of Education of the City of Englewood, hereinafter "Board," having filed eleven charges of conduct unbecoming a school janitor against James Lowery, hereinafter "respondent"; and

It appearing that the Board asserts such charges would be sufficient, if true in fact, to warrant his dismissal; and

It appearing that the Board properly certified said charges to the Commissioner of Education on September 7, 1973; and

It appearing that service of said charges by the Board was attempted unsuccessfully, by certified mail, to respondent's home address on September 6, 1973; and

It appearing that a further service of said charges was made to respondent at his home address by the Commissioner's representative assigned to this matter on September 10, 1973; and

It appearing that respondent did not and has not filed his Answer to the charges herein; and



It appearing that all attempts by the Division of Controversies and Disputes to communicate with respondent have been unsuccessful; and

It appearing that counsel for the Board filed a Notice of Motion for Summary Judgment in its favor on November 6, 1974, based on the eleven charges certified to the Commissioner, with Affidavit of Service upon respondent to the following addresses:

20 Depew Street  
Dumont, New Jersey

Veterans Hospital  
Loop Road  
Tuscaloosa, Alabama

100 Vail Avenue  
Hueytown, Alabama

and

It appearing that respondent has failed to file an objection to the Board's Motion; and

It appearing that annexed to the Board's Motion is a copy of respondent's application to the Public Employees Retirement System for withdrawal of his total accumulative pension contributions; and

It appearing that on August 23, 1973, respondent was issued a check from the Public Employees Retirement System based on his application; and

It appearing that the eleven charges as certified by the Board against respondent, absent a denial thereto, must be assumed to be true and sufficient in scope to warrant his dismissal; now therefore

IT IS ORDERED on this 26th day of July 1974, that James Lowery, be hereby dismissed as a janitor under tenure in the School District of the City of Englewood, Bergen County, effective as of September 5, 1973, the date of his suspension.

COMMISSIONER OF EDUCATION

**Greta Chappell, individually and as guardian of Muriel Chappell,  
an infant, Lloyd S. Kelling and Helen T. Kelling, individually and as  
guardians of Stephen Kelling, an infant, Roger Mazzella, individually  
and as guardian of Joyce Mazzella, an infant,  
Jersey City Education Association, Hillside Education Association,  
Plainfield Education Association, and Flory Naticchia,**

*Petitioners,*

*v.*

**Commissioner of Education,**

*Respondent.*

## **COMMISSIONER OF EDUCATION**

### **DECISION**

For the Petitioners, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Mary Ann Burgess, Attorney at Law

This matter comes before the Commissioner of Education as a sequel to one similarly titled and similarly concerned with the first year of the State's Educational Assessment Program, hereinafter "E.A.P." Specifically, however, the concern herein is with the second year of the program and with the release of test data derived therefrom. In petitioners' view such release should be delayed beyond a date already established as August 7, 1974 by resolution of the State Board of Education. They demand a judgment to this effect by the Commissioner.

Oral argument with respect to this principal plea was heard on June 26, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The parties to the matter controverted herein ground their arguments with respect to the second phase of the E.A.P., at least in part, on the sequence of events related to the first phase. Accordingly, some brief discussion of the total program, its historical aspect, is necessary as a preliminary to any recital of the arguments presented at the hearing.

The E.A.P. is two years old and, in essence, it consists of tests of basic minimal skills in reading and mathematics. These tests were designed by companies which are expert in test development, in conformity with specifications determined to be appropriate by the State Department of Education, and were administered throughout the State of New Jersey in each of the school years 1972-73 and 1973-74.

Specifically, in the 1972-73 school year, the tests were administered

statewide during November 1972, and such administration was duplicated at approximately the same time during the school year 1973-74.

As originally mandated by rules of the State Board of Education (*N.J.A.C.* 6), the results of the first test were to be disseminated during the same school year in which they were administered. However, petitioners herein brought suit before the Commissioner against such dissemination on the principal grounds that the tests were both invalid instruments and an unnecessary duplication of local effort. It was further maintained that the dissemination of such results, in the planned manner, would result in invidious and harmful comparisons and should be restrained.

A hearing on the merits of those complaints was conducted by a hearing examiner during the months of March and April 1973, and ultimately, on November 2, 1973, the Commissioner determined that the tests were valid and that the test results should be disseminated according to the rules of the State Board of Education.

The dissemination of the test results was delayed while petitioners sought to enjoin the dissemination by appeal through the Courts of New Jersey and ultimately to the United States Supreme Court. All such appeals met with failure, however, and the test results derived from the November 1972 tests were subsequently released to local school districts during March 1974 and to the public during May 1974, pursuant to the rules of the State Board of Education.

At this juncture, the State Department of Education again proposed to disseminate test results derived from the test program administered in the fall of 1973. This test program was concerned with the same subject matter as the 1972 program, but the tests were administered at the fourth, seventh, and tenth grade levels instead of grade levels four and twelve only. Again, petitioners seek a decision by the Commissioner to stay such dissemination of data. Their arguments in this regard, and the arguments of counsel to the State Board of Education, will now be set forth.

Petitioners' essential argument herein for a stay of a release of data from the second series of tests is based upon the fact that their first Petition of Appeal is still before the Courts for judicial scrutiny with respect to the merits of their contentions. They aver that final briefs are due before the Superior Court, Appellate Division, in late July and that, until a decision has been rendered by this Court or by another Court or Courts on appeal, the Commissioner should not release a second series of results as proposed.

They assert that the specific merits of their original complaint which are of particular concern, and which require judicial scrutiny, are those pertinent to the amount and kind of interpretive correlative data to be released. They call attention to the fact that the hearing examiner originally found the proposals with respect to such data to be vague, and they aver that subsequent delineation by the Commissioner has not resulted in a more acceptable proposal. They further maintain that the present planned release of such data cannot be justified in the context of the rules of the State Board of Education which are contained

in the Administrative Code. *N.J.A.C.* 6 They sum up their position by saying "the evils that we urged before we urge again."

Finally, petitioners argue that the 1973 E.A.P. is a new and different program from the previous one of 1972, and therefore its details are unknown to petitioners, and to the hearing examiner. Consequently, they argue, the problem herein is a nebulous one and release of the controverted data cannot be justified, particularly in view of the fact that to date there has been no definitive analysis of the consequences emanating from the dissemination of the 1972 E.A.P. test results.

Respondent, the State Board of Education, asserts that the principal plea herein, for a stay in the planned dissemination of the 1973-74 test results, was precisely the issue before the Courts with respect to the 1972-73 test program. Therefore, respondent avers that the matter herein is *res judicata* since the Courts have already rejected this same plea and such rejection was also rendered while the merits of petitioners' complaints were still on appeal. In respondent's view, therefore, a grant of a stay now is not warranted and will cause damage to the public.

Respondent further asserts that petitioners have not proven any special circumstances or stated any reasons to distinguish the matter, *sub judice*, from the 1972 matter. Respondent avers that interpretive materials are available to petitioners and the general public alike, and that the regulations do represent an orderly presentation of data in the public interest.

While petitioners argue that the matter is not *res judicata* since the controverted test program of the E.A.P. was not exactly the same in each of the 1972 and 1973 years, respondent disputes the argument, but maintains that even assuming this is true, petitioners are barred in the present appeal by the doctrine of *collateral estoppel*.

The issues herein for determination by the Commissioner are thus clearly delineated within the parameters of the argument. The principal issue, concisely stated, is whether or not the pending appeal on the merits of the Commissioner's decision of November 2, 1973, which is now before the Courts, is reason to stay release of the 1973 test results and interpretive data pertinent thereto.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the replies thereto which have been filed by respective counsel. These replies state that the hearing examiner's report is an accurate summary of either fact and/or argument although in each of the replies there is a reiteration or elaboration of previously stated positions.

It is clear that the basic issue for determination herein is whether or not the doctrines of *res judicata* and/or *collateral estoppel* apply herein to bar the

relief which petitioners seek; namely, a stay by the Commissioner of the release of 1973 test results from the E.A.P. pursuant to rules of the State Board of Education. (*N.J.A.C.* 6:39)

The Commissioner determines that such doctrines do apply in this instance since the relief sought herein, a stay of the publication of test results, is exactly the same relief which was sought and finally denied after extensive litigation concerning the release of 1972 test results, and the testing program controverted herein has not been essentially altered in the interim. The tests of the E.A.P. which were administered in 1973 were, as they were in 1972, tests of minimal basic skills in reading and mathematics. The planned release of 1973 test results does not differ in its principal aspects from the 1972 release. Both the 1973 planned release of test results and the release of 1972 results are, and were, pursuant to published rules of the State Board of Education. (*N.J.A.C.* 6:39) Petitioners have failed to show that the release of the 1972 test results were harmful in any way.

How then can it be argued that there is reason for the Commissioner to intervene and impose a stay when such a stay, in similar circumstances, was refused as the result of prior litigation before the New Jersey Superior Court, Appellate Division, by the New Jersey Supreme Court and by the United States Supreme Court? The Commissioner holds that such argument is groundless and, therefore, there is no reason for his intervention at this juncture.

Accordingly, the Petition is dismissed and the Commissioner directs that the results of the State testing program administered in 1973 to pupils in grades four, seven and ten be released on August 7, 1974, as ordered by resolution of the State Board of Education.

COMMISSIONER OF EDUCATION

July 30, 1974  
Pending before State Board of Education

Donald P. Sweeney,

*Petitioner,*

*v.*

Henry Komorowski,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Donald P. Sweeney, *Pro Se*

For the Respondent, DeLorenzo and DeLorenzo (William DeLorenzo, Esq., of Counsel)

Petitioner, a resident of the Borough of Bogota, Bergen County, alleges that Henry Komorowski, a member of the Board of Education of the Borough of Bogota, hereinafter "Board," is married to a substitute teacher employed by the Board and as such is in a position of conflict of interest in violation of *N.J.S.A. 18A:12-1*. Respondent denies that his membership on the Board, while married to a substitute teacher, constitutes a conflict of interest or is in any way improper or illegal.

The facts in the matter are agreed upon by the parties, thus obviating the need for a plenary hearing. Respondent, on May 30, 1974, filed a notice of Motion for Summary Judgment before the Commissioner of Education. Briefs were submitted and oral argument were heard by a representative of the Commissioner at the Department of Education, Trenton, on June 20, 1974.

The facts in the instant matter are set forth succinctly as follows:

Respondent has served as an elected member of the Board since February 1973. Prior to February 1973 and thereafter to the present, respondent's wife has served as an occasional per diem substitute teacher for the Board. From February 1973 to the present, no salary adjustments have been voted by the Board for substitutes; nor are substitutes issued contracts, nor involved directly with the Board in negotiation of salaries. However, a salary scale for substitutes is contained in the negotiated agreement between the Board and the Bogota Education Association of which respondent's wife is not a member.

Petitioner asserts that respondent's family income is enhanced through his wife's salary as a per diem substitute teacher and that, regardless of the amount of remuneration, such income represents a conflict of interest and is violative of *N.J.S.A. 18A:12-2* which provides that:

"No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."

In this regard, petitioner asserts that respondent, as a member of the Board, must be involved in the process of negotiations and the preparation of and voting for the budget, all of which control and provide for substitutes' salaries. Petitioner contends that respondent cannot legally function in these important matters because of prejudice resulting from the alleged conflict of interest.

Petitioner further cites the Commissioner's recent decision *In the Matter of the Election of Dorothy Bayless to the Board of Education of the Lawrence Township School District, Mercer County*, 1974 S.L.D. 595 wherein it was determined that a conflict of interest exists when:

“\*\*\* a local school board member whose spouse is an employee of the board is forced to make decisions with a double impact — on a school system as a whole and on the one with whom he or she is joined in a \*\*\* partnership’\*\*\*.” (at p. 604)

Additionally, petitioner alleges that another indication of respondent's conflict of interest was his negative vote on a resolution before the Board during December 1973 which would have required the investigation by the Superintendent of the distribution of an unsigned letter (Exhibit A) purportedly from educators living and teaching in Bogota and favoring certain candidates in the then-forthcoming annual Board election. Petitioner argues that this negative vote was indicative of bias, and condoned through inaction a violation of *N.J.S.A. 18A:14-97*, which provides that printed matter distributed in connection with any election must bear upon its face the name of the person(s) causing it to be printed, copied, or published.

For the foregoing reasons, petitioner prays that the Commissioner order the removal of respondent from his seat on the Board and require that a special election be held to fill the vacancy.

Respondent holds that such interest as he may have in his wife's occasional per diem employment is not such as would disqualify him from serving as a member of the Board or justify his removal from office. In this regard, he cites respondent's Brief on Motion, at page 8, the opinion of the Court in *Van Itallie v. Franklin Lakes*, 28 N.J. 258 (1958):

“\*\*\* Local governments would be seriously handicapped if every possible interest, no matter how remote or speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. \*\*\*” (at p. 269)

Respondent further asserts that he has not contract with or claim against the Board within the intendment of *N.J.S.A. 18A:12-2* and that in no instance has he voted or otherwise acted in any way to change the remuneration or employment of his spouse. Respondent further cites *Nichols et al. v. Board of Education of the Township of Pemberton*, 1938 S.L.D. 48 (1932) wherein the Commissioner determined that:



“\*\*\* the husband has no control over his wife’s earnings and cannot therefore, legally have a pecuniary interest in them. \*\*\*” (at p. 50)

Respondent maintains in his Brief that when and if a conflict of interest does arise, his course of action is to refrain from voting, as in a similar case (Tr. 8) wherein the proper procedure was enunciated by the Court in *Schear v. City of Elizabeth et al.*, 41 N.J. 321, 328 (1964) as follows:

“\*\*\* Where a conflict of interest arises, the dual officeholder is disqualified to act in the particular matter and must withdraw from the scene. No other choice is open to him. \*\*\*”

Respondent further contends that the instant matter is importantly distinguished from *Bayless, supra*, in regard to the circumstances giving rise to possible conflict of interest.

Additionally, respondent asserts that the negative vote cast by respondent, *ante*, or the reasons why such a vote was cast, is not subject to the review of the Commissioner and is improperly set forth as a cause of action herein.

Finally, respondent states that the Commissioner lacks authority to remove from office a member of the Board who otherwise meets the standards and qualifications set forth in Title 18A and has been duly elected to office.

The Commissioner deals first with respondent’s contention that the Commissioner lacks jurisdiction or authority to make a determination with regard to the right of a Board member to hold office. It is true that such matters are frequently the subject of review by the courts. However, *N.J.S.A.* 18A:6-9 states that:

“The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, *all controversies and disputes arising under the school laws* \*\*\*.” (*Emphasis supplied.*)

The present matter has arisen under the education laws as a dispute and has been properly brought before the Commissioner who has jurisdiction. The Commissioner so holds. Such review by the Commissioner is not without precedent. *Nichols, supra*; *Marguerite W. Decker and Arthur C. Langenberg v. Board of Education of the Township of Berkeley*, 1959-60 *S.L.D.* 57 (1959); *Bayless, supra*

It is noted that petitioner’s charge that respondent’s vote against a resolution to require the Superintendent to conduct an investigation into an alleged violation of *N.J.S.A.* 18A:14-97 was indicative of bias. The Commissioner has previously said in *Boult and Harris v. Board of Education of the City of Passaic*, 1939-49 *S.L.D.* 7 (1946), affirmed State Board of Education 1939-49 *S.L.D.* 15, 135 *N.J.L.* 329:

“\*\*\* it is not the function of the Commissioner \*\*\* to substitute his



judgment for that of the board members on matters which are by statute delegated to the local boards.\*\*\*” (at p. 13)

In accord with this often-enunciated principle, the Commissioner will not, in the instant matter, presume to pass judgment with respect to respondent's vote, *ante*, or the votes of other board members who, for whatever reason, voted for or against the resolution. The votes of board members are at the very core of the decision-making process and may be made with or without the enunciation of reasons as to why they were cast at the discretion of board members themselves. To hold otherwise would be improper and would encumber the free exercise of discretion which board members must have and is statutorily conferred. In any event, the controverted resolution was passed by the Board requiring that an investigation be conducted. This being the case, there is no further cause of action requiring the attention of the Commissioner in this forum.

Petitioner argues that the instant matter is controlled by *Bayless, supra*. The Commissioner disagrees. *Bayless* is, in numerous points, clearly distinguishable. Therein it was stated:

“\*\*\* [I]t is illegal and contrary to the statutory prescription *N.J.S.A. 18A:12-2*, for either a man or a woman to serve as a member of a local board of education *while his or her spouse is by contract, a full-time employee of the same board.*\*\*\*” (*Emphasis supplied.*) (at p. 604)

Respondent's wife has no contract or other guarantee of employment, nor is she employed full time by the Board, such facts importantly distinguishing the two cases.

The Commissioner further stated in *Bayless, supra*, that:

“\*\*\* The pervasive and continuing nature of the possible conflicts in the instant matter appear to be evident. The possible conflicts extend not only through clearly discernible employer-employee relationships - the awarding of salary - but to a myriad of peripheral but important subjects: insurance, coverage of many kinds, sick leave policy, the way thermostats are set, the apportionment of money for supplies, a vacation leave plan, working hours and reporting schedule \*\*\*.” (at p. 604)

In the instant matter, the Commissioner finds that respondent is not required as a board member to be regularly faced with those considerations enumerated in *Bayless* and described as being of a “pervasive and continuing nature.” Likewise, there is no showing that substitutes are involved in the lengthy and recurrent negotiations for salary and other benefits. The schedule of substitutes' per diem rates of pay is included in the negotiated agreement for the convenience of, but not negotiated by, the education association.

A school board member, by the very nature of his qualifications as a member, may never be totally free of potential conflict of interest. The board member must be a resident. In this capacity he is called upon to vote on school

referenda and budgets that will affect the property tax or rent that he must pay. A board member who is the head of a family must vote to approve a school calendar that may affect the family's vacation schedule. Such conflicts of interest do not preclude a board member from serving. Similarly, in the instant matter, the Commissioner determines that in those limited and occasional matters wherein the Board must discuss and vote upon issues concerning its substitute teachers, respondent is not in such conflict of interest as to disqualify him from further service as a board member. Rather, he should follow the procedure as enunciated by the Court in *Scheer, supra*, to temporarily and voluntarily "withdraw from the scene" when such a matter arises.

For the foregoing reasons, the Commissioner determines that the conflict of interest herein controverted is not of such magnitude, nor will it appear with such frequency as to disqualify respondent from continuing to serve as a member of the Board. In accordance with this determination, the Motion for Summary Judgment as filed by respondent is granted. The Petition is dismissed.

COMMISSIONER OF EDUCATION

July 31, 1974

**In the Matter of the Annual School Election Held in the  
School District of the Township of Madison, Middlesex County.**

COMMISSIONER OF EDUCATION

**DECISION**

For the Complainant Gerard Kennedy, Philo, Sawyer and Newman  
(Sidney I. Sawyer, Esq., of Counsel)

For John Damato, Alfonso, Grossman and Alfonso (Louis J. Alfonso,  
Esq., of Counsel)

A letter of complaint (P-1) dated February 19, 1974, was filed, solely on his own behalf, by Gerard Kennedy, a member of the Board of Education of the Township of Madison, hereinafter "Board," alleging irregularities in the form of certain electioneering practices prior to and during the annual school election held February 13, 1974 by or on behalf of Candidate John Damato who was elected to a full three-year term as a member of the Board.

An inquiry was conducted by a hearing examiner appointed by the Commissioner of Education on March 4, 1974 at the Middlesex County warehouse, Roosevelt Park, Metuchen.

Counsel for John Damato moved to dismiss the matter on grounds that the Commissioner does not have jurisdiction. (Tr. 20) This he predicated on the

undisputed fact that the complaint was filed by a single individual rather than ten registered voters (Tr. 21) and was filed by a person other than a defeated candidate in the election (Tr. 22) as required by *N.J.S.A.* 18A:14-63.1 through 18A:14-63.14. *N.J.S.A.* 18A:14-63.12 reads as follows:

“Upon written request within 5 days of the announcement of the result of an election by any defeated candidate, or, in the case of a question, proposition or referendum, upon petition of 10 qualified voters at any school election, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election.”

The hearing examiner notes that the complaint was not properly filed pursuant to the above-cited statute; nor was it filed in the required manner pursuant to *N.J.S.A.* 18A:6-9 which provides that:

“The Commissioner shall have jurisdiction to hear and determine \*\*\* all controversies and disputes arising under the school laws, \*\*\* or under the rules of the state board or the Commissioner.”

However, in consideration of the important issues that are raised herein, it is recommended that the Commissioner proceed on his own motion to a final determination pursuant to *N.J.S.A.* 18A:6-9.

The first allegation is that, in violation of *N.J.S.A.* 18A:14-81 and 18A:14-85, on February 13, 1974, campaign posters supporting John Damato were posted within 100 feet of the Miller School, one of ten polling places in Madison Township.

The statutes read in pertinent part:

“If a person shall distribute or display any circular or printed matter \*\*\* within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person.” *N.J.S.A.* 18A:14-81

and

“No person shall display, sell, give or provide any political badge, button or other insignia to be worn at or within 100 feet of the polls \*\*\* on any day upon which an election is held\*\*\*.” *N.J.S.A.* 18A:14-85

Testimony by Robert Stutts, Board Secretary, conclusively established that such a campaign poster favoring John Damato was affixed to a tree located exactly 73 feet and 11 inches from the nearest entrance to the Miller School and 243 feet and 11 inches from the entrance to the all-purpose room of the school (P-3) which was the polling place. He further testified that, when informed of the existence of the poster, he removed it about two minutes after the polls opened. No witness was able to identify the person responsible for its placement, and John Damato denied prior knowledge of such placement. (Tr. 104)

The hearing examiner finds herein no violation of *N.J.S.A. 18A:14-85* which deals solely with displaying, selling, or handing out political insignia within 100 feet of the polling place on election day. No testimony was given in regard to such activity.

However, it is found that the controverted poster was positioned within 100 feet of one of the outside entrances to the building which contained the polling place. That it was posted in excess of 100 feet of the building entrance nearest the polling place is of no moment. The statute does not address itself to such a distinction, and, in accordance with the well-defined principle of law, a statute is to be given its ordinary meaning. It is found, therefore, that the posting was in violation of *N.J.S.A. 18A:14-81*, but there is no finding that John Damato was personally responsible for its improper placement.

The second allegation is that in contravention of *N.J.S.A. 18A:42-4* and *N.J.S.A. 18A:14-97*, a PTA Newsletter, printed by John Damato, which contained an invitation to attend a John Damato campaign rally, was distributed by the Cheesequake School PTA within the Cheesequake School to pupils who in turn took the Newsletter home.

An examination of the February 1974 Cheesequake PTA Newsletter (P-2) contains on page one the following:

“\*\*\* MR. JOHN DAMATO would like to cordially invite our P.T.A. members and any other interested parties to THE DORIAN MANOR FEB. 11 8 P.M. for FREE beer, pretzels, coffee, and cake. The purpose of this rally is to ask for your support for his re-election (sic).

and,

“\*\*\* LET’S NOT PLAY MUSICAL CHAIRS with the three available seats on the Board of Education. Let’s make sure that Cheesequake P.T.A. is the deciding factor as to which candidates will sit on the throne and rule SUPREME. Wednesday Feb. 13th Election Day is also the day we voters (wealthy and prosperous as we are) will decide how much more overtaxed we would like to be.\*\*\*”

The principal of the Cheesequake School testified that the February Newsletter was indeed distributed to pupils in the school with the instruction that they, in turn, deliver it to their parents. (Tr. 90) She further testified that this was normally done, as in this instance, without her screening the contents thereof for material that might be improper or contrary to school policy. (Tr. 90) She stated that the first time she learned of the controversial material was through a memorandum (P-5) dated February 22, 1974, addressed to her from the Superintendent of Schools which states:

“\*\*\* The article appearing on page 2, paragraph 2 of the February, 1974 issue of the Cheesequake P.T.A. Newsletter, which specifically relates to the solicitation of support for the reelection of a board of education

candidate is, indeed, a conflict and violation of Board of Education Policy #831.22 (Prohibition of distribution of certain materials).

"May I strongly caution you to screen all materials, circulars, literature, etc., before permitting the children to take them home, thereby, preventing children from being exploited.\*\*\*"

Board Policy #831.22 states in pertinent part:

"The Board of Education prohibits the use of schools for the distribution of \*\*\*campaign literature\*\*\*. Campaign literature on material promoting a candidate for the Board of Education \*\*\* shall not be distributed through the schools by students\*\*\*." (P-4)

Likewise, *N.J.S.A.* 18A:42-4 limits the distribution of campaign literature by the pupils of the public schools wherein it states:

"No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election \*\*\* shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home\*\*\*."

Undeniably, there was a serious violation of *N.J.S.A.* 18A:42-4, as well as the Board's policy. It remains to determine who was responsible for this illegal act.

The president of the Cheesequake PTA and the editor of the PTA Newsletter testified that they, together, were solely responsible for the offending paragraphs (Tr. 59, 71), and that they had caused them to be inserted into the text of the February Newsletter which was thereafter stenciled by a committee of three PTA members. It was further testified by the PTA president that the stencils were then taken to John Damato's place of business (Tr. 60) where he duplicated them on paper provided by the PTA on the PTA's mimeograph machine which he had there for repair. She testified further that John Damato had made no request that such an invitation be printed in the Newsletter (Tr. 66), and her testimony was corroborated by the editor of the Newsletter. (Tr. 72)

John Damato testified that he had been unaware of the presence of the offending paragraph and was in no way responsible for its composition or incorporation into the February Newsletter. (Tr. 106) In this connection he stated:

"\*\*\* I didn't read them and all that took place \*\*\* took place in about two and a half or three hours, \*\*\* I just ripped it off, ran it off and brought it right back to them in a box. I never got a chance to read it.\*\*\*"

He further denied any knowledge of the manner of distribution of the Newsletter by pupils to their homes. (Tr. 106) This testimony was not controverted at the inquiry.

The hearing examiner finds that the president and committee chairwomen of the Cheesequake PTA were responsible for the incorporation of the electioneering material favoring the incumbent Candidate Damato. The Newsletter was thereafter distributed in the customary manner utilizing the unwitting assistance of pupils in contravention of *N.J.S.A. 18A:42-4*.

There is, however, no clear showing of a violation of *N.J.S.A. 18A:14-97* which requires that printed matter used in elections show the source of payment and the printer. The February Newsletter clearly bears the name of the Cheesequake PTA, and the public would rightly assume that this PTA was responsible for the costs of its printing. Additionally, it must be recognized that the offending paragraphs constitute but a fraction of the five-page Newsletter. (P-2) However misguided its action in including the offending material, it may reasonably be assumed that the PTA did not think of its Newsletter as primarily an electioneering vehicle.

Finally, with respect to the second allegation, it should be noted that the Cheesequake PTA serves only the Cheesequake School with a pupil enrollment of 13,000 in Madison Township. Cheesequake School is one of the seventeen schools maintained by the Board. There is no evidence that the offending material was carried in the PTA literature of other schools or distributed by their pupils.

The third allegation is that John Damato delivered to and displayed a campaign poster at the Board's Administration Building in violation of *N.J.S.A. 18A:42-4*.

An examination of the facts in regard to the provision of the statute fails to reveal any violation. In any event, it was established by testimony at the inquiry that the length of time of such posting was but a matter of minutes and may well have been in jest. (Tr. 17) The poster could not have been seen by more than a handful of voters at most.

The fourth and final allegation is that during a campaign rally in a public place John Damato held an unlicensed raffle, the proceeds of which were to benefit a fund-raising project of a school organization in violation of *N.J.S.A. 18A:14-92* through 97.

It was testified by Madeline Volpe, the president of the Cedar Ridge Concert Choir Parents, that she requested of John Damato that he allow the raffle of a "cheer basket" to be conducted at his rally for reelection to benefit the fund being raised to send the Concert Choir to Romania. (Tr. 101) Mr. Damato testified that he agreed to allow the unlicensed raffle but denied that it was for the purpose of insuring that votes be cast for him in the forthcoming election. (Tr. 108-109)

The hearing examiner finds that *N.J.S.A. 18A:14-92* through 96 define and establish penalties for certain illegal acts involving the offering of or receipt of gifts, employment, bribes, and other inducements for the procurement of votes in school elections. He is unable to conclude from the evidence herein that

the controverted unlicensed raffle was held for such a purpose. He leaves it to the Commissioner to comment on the propriety of a Board member standing for reelection engaging in such activity. It appears that *N.J.S.A. 18A:14-97* has no pertinence whatever to the aforementioned matter.

It remains for the Commissioner to determine what effect, if any, the statutory and other violations herein admitted or otherwise found to be true in fact shall have upon the announced election results or upon the individuals responsible for such infractions.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions filed thereto pursuant to *N.J.A.C. 6:24-1.16*.

One exception filed by counsel for Candidate Damato challenged the Commissioner's authority to hear this matter because it was not filed pursuant to *N.J.S.A. 18A:14-63.1* and *63.2*, nor was it filed pursuant to *N.J.S.A. 18A:6-9 et seq.* The hearing examiner noted that the complaint was not filed in accordance with these statutes; however, he correctly determined that the issues in contention were serious in nature and recommended that the Commissioner proceed on his own motion to a final determination pursuant to *N.J.S.A. 18A:6-9*. The Commissioner has broad statutory authority to see that the school election laws are faithfully discharged; therefore, when allegations of irregularities are presented which could affect the outcome of this past school election, the Commissioner is constrained, when he deems it necessary, to conduct an inquiry into such alleged school law violations. *N.J.S.A. 18A:14-63.1* through *63.14* and *18A:6-9 et seq.*

In the instant matter, the request for an inquiry did not include a prayer for relief, but asked for an investigation of alleged irregularities. Such irregularities, considered *in toto*, constitute sufficient grounds for an inquiry. The hearing examiner's recommendation to proceed to a final determination in this matter is, therefore, adopted, and Candidate Damato's Motion to Dismiss is denied.

Regarding petitioner's allegation of an irregularity in the posting of campaign literature closer than one hundred feet of the polling place or room, in violation of *N.J.S.A. 18A:14-81* and *85*, the testimony shows that the disputed poster was removed no more than two minutes after the polls were opened. In fact, the Board Secretary testified that he was not even sure that the polls were open at the time he removed the poster. (Tr. 87) This testimony is unrefuted.

In the Commissioner's judgment, *N.J.S.A. 18A:14-81* is sufficiently definitive in explaining how the one hundred feet distance to the polling place should be measured. The statute states in pertinent part that:



“If a person shall distribute or display any circular or printed matter \*\*\* within a distance of 100 feet of the outside entrance to such polling place or room\*\*\*.” (Emphasis supplied.)

Exhibit P-3 indicates clearly that the poster was only 73’ 11” from the school building; however, it was in excess of “\*\*\* 100 feet of the outside entrance of such polling place or room\*\*\*.”

The Commissioner, therefore, revises the finding in the hearing examiner’s report which indicated that the poster was improperly placed and determines that there was no statutory violation by such placement. However, even if it could be stated that the poster was improperly placed in violation of the governing statute, it was removed no later than two minutes after the voting began. Therefore, it is doubtful that any electioneering benefit accrued for Candidate Damato during that short period of time which could have improperly influenced the outcome of the election.

The Commissioner adopts that portion of the hearing examiner’s report which states that the Cheesequake PTA was responsible for the language in its Newsletter which was hand-carried home by the pupils of the Cheesequake School. Using pupils in this manner is clearly a violation of *N.J.S.A. 18A:42-4*, and cannot be condoned. It is also a violation of Board policy. (P-4) The Commissioner commented on the use of pupils for electioneering purposes in *Lucca v. Lower Camden County Regional High School District #1, Camden County*, 1968 *S.L.D.* 166, as follows:

“\*\*\* the letter does promote and favor the approval of \*\*\* [a candidate] before the voters, and its distribution by the pupils of respondent’s school is, therefore, inconsistent with the law. \*\*\*” (at pp. 167-168)

The Cheesequake School principal was correctly reprimanded by the Superintendent of Schools for permitting this distribution of literature through its pupils. The Commissioner directs the Board to further notify all of its teaching staff members regarding the statutory restrictions set forth in *N.J.S.A. 18A:42-4* and its own policy in that regard.

The Commissioner concludes from an examination of the record herein that Candidate Damato was unaware of the contents of the Newsletter which he gratuitously duplicated on the PTA duplicator.

With respect to the allegation that there was violation of *N.J.S.A. 18A:14-97*, the Commissioner finds that there was substantial compliance and that such minor violation as existed with respect to the printing of the controverted Newspaper is insufficient of itself to overturn the results of the election.

The Commissioner finds no violation of any statute in the charge of displaying a campaign poster in the Board’s Administration Building. The record shows that the poster was displayed in jest at a negotiations session between the

Board and the Cheesequake Teachers Association. The only persons present at that meeting were five members of the Association, four Board members, the Superintendent of Schools, and Board counsel. Shortly after it was displayed it was destroyed, and it was not seen by persons other than those mentioned above. (Tr. 14-19, 114)

Regarding the allegation of an unlicensed raffle held in violation of statutes *N.J.S.A.* 18A:14-92 through 97, the Commissioner finds that such a raffle was held and that no license was issued authorizing the raffle. He therefore directs that the transcript of the inquiry of March 4, 1974, be sent to the office of the New Jersey Attorney General for review and determination as to whether or not a misdemeanor was committed. Violations of these particular statutes, *N.J.S.A.* 18A:14-92 through 97, require criminal penalties which can be set only by a court of law. *In the Matter of the Annual School Election Held in the School District of the Township of Mt. Olive, Morris County*, 1972 *S.L.D.* 260; affirmed State Board of Education, 1972 *S.L.D.* 265, affirmed New Jersey Superior Court Appellate Division, Docket No. A-840-72, April 11, 1973; *Buren v. Albertson*, 54 *N.J.L.* 72 (25 *Vr.* 1891)

Although the Commissioner cannot condone irregularities which occur during an annual school election, he finds nothing in the record before him which would lead to a conclusion that the circumstances of these irregularities resulted in the will of the voters being thwarted. All citizens possess the right to participate fully in the electoral process, but no one has the right to act in a manner contrary to the letter and intent of statutory prescription.

However, it is well established that an election will be given effect, and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *Love v. Board of Chosen Freeholders*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *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) There has been no such showing herein. Therefore, the Commissioner will not vitiate the election.

Accordingly, the Commissioner finds and determines that the results of the annual school election held in the School District of the Township of Madison will stand as announced.

The allegations of irregularities are hereby dismissed.

COMMISSIONER OF EDUCATION

August 1, 1974

**In the Matter of the Annual School Election Held in the  
School District of the Township of Holland, Hunterdon County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Gold, Gold, Morland & Pittore (Michael Gold, Esq., of Counsel)

The announced results of the balloting for candidates for three seats on the Board of Education of the Township of Holland, Hunterdon County, at the annual school election held on February 13, 1974, were as follows:

	At Polls	Absentee	Total
Richard Varga	242	-0-	242
Ann M. Moninghoff	213	-0-	213
Jack Pascale	204	4	208
Carol Martinez	203	4	207
Mary Ann Ruggiero	206	-0-	206
Robert A. Hitch	74	4	78

Following the election and pursuant to a letter request dated February 14, 1974 from Candidate Martinez, the Commissioner of Education directed that a representative conduct an inquiry with respect to the election. Such inquiry was held on March 5, 1974 in the Township Municipal Building, Holland Township. The report of the Commissioner's representative is as follows:

It is noted at the outset, in order that the irregularities of this election may be put in proper perspective, that a total of only seven votes separates Candidate Ruggiero from Candidate Moninghoff and that Candidate Ruggiero, Martinez, and Pascale have vote totals only one or two votes apart. Thus, the tallies for candidates for the second and third seats on the Holland Township Board of Education are extremely close ones.

It is noted, too, that all of these named candidates, as well as Candidate Varga, had their names imprinted on the machine ballot but that Candidate Hitch was a write-in candidate. It was the write-in vote which posed the principal difficulty herein. (Tr. 9-10)

This difficulty was clearly set forth at the inquiry, *ante*, through the testimony of voters who had attempted to vote for write-in candidates. This testimony, in essence, was that:

1. Voters had great difficulty in opening the slots provided on the voting machines for the casting of votes for write-in candidates. (Tr. 9-10, 16, 23)
2. The paper roll, on which write-in votes are recorded, ran out on one occasion and had to be replaced. (Tr. 10, 15, 17, 20)

3. A delay of one-half hour ensued during which time the polling place was closed. (Tr. 21)
4. There was a lack of understanding with respect to the casting of write-in votes. (Tr. 19, 27)
5. The paper roll did not move forward properly. (Tr. 25-26)

While there was no testimony from anyone that voting levers for regular candidates whose names were imprinted on the ballot were inoperable, there was testimony that difficulty with write-in votes and the paper roll seriously impeded the whole electoral process. As a result of such difficulty, there were long lines of voters. (Tr. 13-19) The resultant delay caused some persons to leave the polling place without voting. (Tr. 19) Emergency measures which were invoked by election officials jeopardized the secrecy of the ballot. (Tr. 12)

Election officials also testified at the hearing, and their testimony confirmed the fact that there was great confusion and difficulty at this election. They said that two machines had been available for use in the election but that one of the machines failed to operate properly after only three votes had been cast (Tr. 32), and, after repair, it had been used for only 30 votes before it was closed down again for the day. (Tr. 35) The time of this second closing was evidently late afternoon and thus at that juncture only one machine was operable.

However, an election official testified that this machine also had to be closed at 7:50 p.m. to enable a repairman to insert a new paper roll, and it remained closed for approximately one-half hour. (Tr. 38) During this time it was testified that three persons in line to vote “\*\*\* turned their cards back in to the secretary\*\*\*” and left the polling place. (Tr. 38)

The voting machine technician stated that the paper roll was not turning properly on the machine that had to be closed down early and it could not be repaired. (Tr. 46) He further said with respect to the second machine which ran out of paper:

“\*\*\* I had no inkling there was going to be this huge write-in. Had I known at that time, I would have probably put a new paper roll in at that time.\*\*\*” (Tr. 47)

and:

“\*\*\* The only fault was with the write-ins.\*\*\*” (Tr. 47)

Other witnesses testified that there was a piece of adhesive tape across one of the names imprinted on the ballot (Tr. 53), and it appears that such names had been typed on separate pieces of paper and taped to the ballot strip as a cost-saving device. (Tr. 54)

The Commissioner's representative has considered such testimony and finds it to be true in fact that:

1. The election controverted herein was marred by mechanical failure of the voting machines and by a human failure to insure that there was an ample paper roll available for use by write-in voters.
2. The results of such failures were confusion, long waiting lines, uncalled-for delay while a paper roll was inserted, and, most importantly, the denial of a full franchise to some voters who wished to vote for a write-in candidate.
3. The number of voters denied a full franchise with respect to the casting of write-in votes may be estimated on the basis of testimony at the inquiry, *ante*, as approximately five to ten persons.
4. The tally for regular candidates whose names were imprinted on the ballot appears to be a proper one and evidence to the contrary is conjectural in nature; namely, testimony that persons who were compelled by personal circumstance to leave waiting lines might have changed the announced result, that a more orderly election would have produced a different tally.

However, the Commissioner's representative can find no concrete evidence herein that even one voter's franchise with respect to regular candidates was not exercised properly or was denied in the voting booth *per se*. To the contrary the evidence attests to the validity of a judgment that the tally for Candidates Ruggiero, Pascale, Varga, Moninghoff, and Martinez was correct, and should remain undisturbed. The evidence with respect to the tally for Candidate Hitch is that it was properly in error; that as many as five or six persons were denied by irregularities an opportunity to vote for him as a write-in candidate (Tr. 8, 14, 22, 44, 54), and that another three or four voters may have been indirectly prevented from exercising their franchise to cast a vote on his behalf. (Tr. 18, 30)

However, it must be noted that not even a total of 10 or 11 votes for Candidate Hitch would have appreciably changed the announced results since his total of 78 votes was more than 120 votes removed from the next highest tally.

The issue posed for the Commissioner's determination is whether the evident irregularities and confusion of this election should invalidate the announced results.

\* \* \* \*

The Commissioner has reviewed the entire record of the instant matter including the exceptions filed by counsel pursuant to *N.J.A.C. 6:24-1.16*. He finds herein no statutory violation or fraudulent intent to improperly influence or affect the results of the school election. Instead, he finds that those inconveniences that caused a small number of persons to leave the polls without

voting, and that may have influenced certain persons not to vote for write-in candidates, were the result of inadvertent human error and faulty mechanical equipment.

Such inadvertent delays and inconveniences are unfortunate and should be assiduously avoided but, absent intentional statutory violation, are not sufficient reasons to negate the expressed will of the electorate who did vote. The Commissioner has recently spoken regarding a similar situation *In the Matter of the Special School Election Held in the School District of the Township of Frankford, Sussex County*, 1973 S.L.D. 680. In view of the above-stated finding, the Commissioner determines that the annual school election held in the Township of Holland, on February 13, 1974, was legal and valid, and that Candidates Richard Varga, Ann Moninghoff, and Jack Pascale were legally elected and may serve on the Board of Education for their respective terms.

COMMISSIONER OF EDUCATION

August 9, 1974

**In the Matter of the Tenure Hearing of Ronald Puorro,  
School District of the Township of Hillside, Union County.**

COMMISSIONER OF EDUCATION

**DECISION**

For the Complainant Board of Education, Goldhor, Meskin & Ziegler  
(Sanford A. Meskin, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of  
Counsel)

Respondent is a teacher with a tenure status employed in the School District of the Township of Hillside. Charges were filed against him by the President of the Board of Education, hereinafter "Board," and the Superintendent of Schools, and thereafter certified to the Commissioner of Education pursuant to the Tenure Employees Hearing Act (*N.J.S.A. 18A:6-10 et seq.*) by resolution of the Board dated May 24, 1973. Respondent was suspended without pay pending a determination of the charges which the Board avers will be sufficient, if true in fact, to warrant dismissal or reduction of salary.

A hearing on the charges was conducted on January 17 and April 1, 1974 in the office of the Union County Superintendent of Schools, Westfield, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

Respondent, a high school teacher of health and physical education, was

also certified and assigned as a driver education teacher. In addition to these teaching duties, he served as the head wrestling coach and as an assistant football coach. He has taught in the complainant Board's school district for six years apparently without any serious incident relating to his employment. However, on May 24, 1973, two charges were filed against respondent. They are reproduced, *seriatim*, in pertinent part as follows:

#### CHARGE NO. ONE

“\*\*\* On information and belief, that on May 2, 1973, at about 10:00 a.m. on Long Avenue, near Liberty Avenue, Hillside, New Jersey, said Ronald Puorro, being then and there the teacher employed by said Board of Education on the Township of Hillside, in the County of Union, in charge of the instruction of a group of students of its said Hillside High School in driver education, wrongfully and without authority left and abandoned said group of students in the motor vehicle being then and there used or intended to be used in such instruction and wrongfully and without authority absented himself from said students and said motor vehicle for at least 20 minutes, leaving said students in said motor vehicle unsupervised during all of that time. [Signed] Robert Parker, President of The Board of Education”

Respondent denies that he wrongfully abandoned a group of pupils on May 2, 1973, as charged; however, he admits leaving them alone in the driver education car (Tr. II-16), but avers that his absence was for a reasonable period of time connected with the business of the school, and in accordance with prior directives given him by proper school authorities. (Tr. II-12)

A former Board member, the three pupils who were in the car at the time of the incident, *ante*, and respondent testified in regard to Charge No. One. The hearing examiner finds no dispute over the fact that respondent did leave the pupils in the car and go into a store to buy a paper. Corroboration of this fact is found in the testimony of respondent and the three pupils. However, there is disagreement on the length of time respondent remained in the store. The former Board member testified that he remained in the store “no less than twenty minutes.” (Tr. I-65) The three pupils testified that he remained in the store between five and fifteen minutes. (Tr. I-13, 32, 46, 48) Respondent testified that he remained in the store “thirteen or fourteen minutes.” (Tr. II-32)

The regular class day was divided into eighteen-minute segments called “modules.” (Tr. II-27) The length of a class was determined by the number of modules assigned to that class; *e.g.*, a three-module class would last fifty-four minutes. None of the witnesses could recall the number of modules assigned to the class on that day in question; however, the record shows that a pupil drove the driver education car containing respondent and two classmates one and one-half to two miles to the store where the incident embodied in Charge No. One occurred. Respondent testified that he remained in the store thirteen or fourteen minutes; therefore, the travel time (estimated by the hearing examiner as more than two minutes), plus the time in the store admitted by respondent to



be “thirteen or fourteen” minutes, accounted for most of the time allotted for one module.

In the judgment of the hearing examiner, the salient issue in Charge No. One is not the precise length of time spent in the store, but whether or not the teacher’s absence during this time can be justified.

Respondent testified that, as they passed the store, he told the driver to turn the corner and park so that he could go in and get a paper. (Tr. II-16) Respondent testified that stops to get a newspaper, a pouch of tobacco for a supervisor, or to run an errand to the Post Office were routine. He testified further that he had made at least fifty to seventy stops over the years on requests of his supervisors, so that his stop on this day was not different from the accepted practice. (Tr. II-12) Once inside the store respondent saw three friends who were coaches for a Pop Warner (little league) football team. A conversation ensued about football in which respondent told his friends that he had been assigned by the head football coach to prepare a booklet (showing plays, formations, strategy) and that this booklet should be used by the Pop Warner team so as to make the younger players familiar with the high school’s system of football. (Tr. II-18-19) The nature of respondent’s conversation with his friends was corroborated by one witness, and the Board has not challenged the subject matter of their conversation. This finding is important because it is this very conversation upon which respondent relies to support his defense that his absence from his driver education pupils was connected with the business of the school. (Tr. II-103-105)

The hearing examiner cannot agree. Teachers have the primary responsibility to instruct in the area of their expertise during the time allotted for that instructional offering. In the instant matter, three pupils were deprived of driver education instruction for approximately one module while respondent admittedly was discussing football (strategy, plays, formations) with Pop Warner team coaches. His argument that this discussion was connected with school business is specious; however, even if their discussion involved school business, it was improper to hold such a meeting during a driver education module while pupils waited for his return.

The hearing examiner recommends, therefore, that the Commissioner find that Charge No. One is essentially true.

#### CHARGE NO. TWO

“\*\*\* On information and belief, that on May 8, 1973, at about 3:30 p.m. at the gymnasium of the High School, 1085 Liberty Avenue, Hillside, New Jersey, said Ronald Puorro being then and there a physical education teacher as aforesaid committed an assault and battery upon the person of one [J], he being then and there a pupil of the said The Board of Education of the Township of Hillside, in the County of Union, and the school district of the Township of Hillside and a member of the varsity baseball team of said Hillside High School engaged in baseball practice, and struck, pushed, and hip-rolled the said [J] throwing said [J] to the floor

and causing his head and diverse other parts of his body to strike the floor injuring the said [J], the said Ronald Puorro thereupon falling upon said [J]. [Signed] Anthony J. Avella, Superintendent of Schools”

Respondent admits that an altercation occurred with the named pupil, *ante*; however, he asserts that his actions were reasonable and pedagogically proper. (Respondent’s Answer, unp)

The record shows that on the afternoon in question, respondent was in the athletic director’s office which was located near one corner of the gymnasium. He left that office and began walking toward the coaches’ office, which was located near the corner diagonally across the gymnasium from the athletic director’s office. (In sketching a floor plan, the athletic director’s office would be located near the lower left-hand corner of a rectangular gymnasium, and the coaches’ office would be located near the upper right-hand corner.) Three of the high school baseball team pitchers were somewhat evenly spaced across the upper end of the gymnasium and were pitching to three catchers located sixty feet away and evenly spaced across the lower end of the gymnasium. In baseball parlance this type of exercise is called battery practice.

In order to reach the coaches’ office without walking around the battery practice, respondent had to walk through the three batteries. The testimony of the pitcher who was working out in the last battery, nearest the coaches’ office, and the testimony of the other witnesses disclose that the following incident occurred:

Respondent approached the first battery and was waved through by the pitcher. He was similarly waved through the second and third batteries; however, when he was directly in the line of a pitched ball in the third battery, the pitcher threw a fast ball which narrowly missed respondent’s head. (Tr. II-52)

The testimony indicates that the pitch was a fast ball and that it missed respondent by one-half inch, or less. (Tr. II-52)

The record does not disclose any evidence of animosity between the pitcher and respondent; therefore, the hearing examiner finds that the reason for the pitch, which was deliberate, must be attributed to a practical, but dangerous, joke.

Testimony was adduced that reveals the following scenario: three coaches were standing to the rear and to the office side of the pitcher, and one of them said, “Don’t throw yet,” as respondent approached the third battery (Tr. II-52); as he stepped in the line of the battery, one of the coaches said “Now,” in jest (Tr. II-52); after the ball was thrown, the startled respondent turned and walked toward the pitcher, pushed him in the chest and grabbed him by the arms and said, “\*\*\*What did you do a stupid thing like that for, who [are] you throwing the ball at and as I said that I sorta (sic) just, you know, gave him a little push, a little shove.” (Tr. II-53)

Respondent testified that the pitcher grabbed him under the arms. He

testified that he did not know why the boy had thrown the ball, and he could not tell whether his being grabbed by the pitcher was further physical attack upon him. He then flipped [J] over his leg to the floor and fell to the floor over the pitcher. Then, “\*\*\*[S]omeone said to [J], what did you do a stupid thing like that [for], you almost hit him and [J] said, I could have hit him if I wanted to, I saw him [and] I didn’t hit him.\*\*\*” (Tr. II-55)

Testimony by other witnesses corroborates this scenario in its essential points. However, there is one major area of disagreement which should be mentioned. Respondent asserts that as he and the boy fell to the floor the boy’s head was cradled in his arm, and it did not strike the floor. (Tr. II-55, 66) Another witness testified that he saw and heard the pitcher’s head hit the floor. (Tr. II-101-102)

Nevertheless, nothing further occurred at that instant to worsen this potentially explosive scene. The record shows that there was no further attempt by respondent to physically punish the pitcher.

Battery practice continued for a few minutes and the six boys then went into the hallway and ran wind sprints (a physical conditioning exercise consisting of short dashes by the participants and designed to build stamina and muscles in athletes). Practice was then terminated. (Tr. II-79)

The boys then went to the locker room to shower and go home. While changing clothes they noticed that [J] was upset, crying, and complaining that he could not remember certain things. (Tr. I-158) [J] was taken to the hospital that same evening (May 8, 1973 at 5:30 P.M.), examined, and diagnosed as having a cerebral concussion. He was discharged “around noon” on May 10, 1973. (Tr. I-187) [J] neither admits nor denies any part of the incident related herein. He testified that he does not recall anything at all that occurred on the day of May 8, 1973.

The record shows, however, that the incident did occur essentially as reported, *ante*.

In summarizing, the hearing examiner finds that the record essentially supports both charges. Respondent did leave his pupils unsupervised (Charge No. One), and he did commit an assault and battery on [J] (Charge No. Two), which can be designated as corporal punishment of a pupil.

Respondent offered unrefuted testimony that he was directed by his supervisors to make routine trips in the driver education car to different places for apparently trivial reasons. The hearing examiner finds this contention to be fact and recommends that the Commissioner direct the Board to take whatever action it deems necessary to stop the practice of using instructional time allotted to pupils to run trivial, but convenient, errands for teaching staff members. The hearing examiner further recommends that the Commissioner take this routine practice under consideration and compare the practice with the offense (Charge No. One) when exacting a penalty, if any, against respondent.

Regarding Charge No. Two, the hearing examiner notes that corporal punishment has never been condoned by the Commissioner. *In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County*, 1969 S.L.D. 159, 172, affirmed State Board of Education 1970 S.L.D. 449; affirmed *New Jersey Superior Court, Appellate Division*, 1972 S.L.D. 662, the Commissioner commented as follows:

“\*\*\* The Commissioner finds in the incidents found to be true by the hearing examiner a pattern of conduct on the part of respondent that demonstrates a disposition of resort to unlawful physical force and to harsh and abusive treatment of those whose conduct he found offensive. While the Commissioner understands the exasperations and frustrations that often accompany the teacher’s functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A. 18A:6-1*) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren*, 1966 S.L.D. 185, 186 The Commissioner said further, *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 S.L.D. 160, 162, remanded State Board of Education 1963 S.L.D. 251, decided by the Commissioner 1964 S.L.D. 142, affirmed State Board of Education 1966 S.L.D. 225, reversed and remanded 93 *N.J. Super.* 404 (*App. Div.* 1967), decided by the Commissioner 1967 S.L.D. 215,

“\*\*\* that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that ‘it was one of those things that just happen’\*\*\*. While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.’

“Thus, when teachers resort ‘to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty. *In the Matter of the Tenure Hearing of Frederick L. Ostergren, supra.* \*\*\*”

“In the *Fulcomer* case, *supra*, it was the Commissioner’s ultimate determination that the single established incident of improper conduct was

insufficient to warrant dismissal of the teacher from his position. (1967 *S.L.D.* 215, 219) In the instant matter, however, it has been established that there were many instances of unbecoming conduct, covering a period of years. In *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (*Sup. Ct.* 1943), affirmed 131 *N.J.L.* 326 (*E. & A.* 1944), it was held that

“\*\*\* Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.’\*\*\*”

The Commissioner reaffirmed his opposition to corporal punishment *In the Matter of the Tenure Hearing of Mary Worrell, School District of the Township of Lumberton, Burlington County*, 1970 *S.L.D.* 378. Appleby was dismissed as a tenured teacher by the Commissioner; Worrell was reinstated. Thus, the hearing examiner observes that a penalty, if warranted, is set by the Commissioner after considering not only the truthfulness of the charges, but the mitigating circumstances leading to the incidents.

The instant matter is distinguishable from *Appleby, supra*, in that there is no “series” of incidents involved; rather, two completely separate incidents involving respondent which occurred within six days in May 1973.

The hearing examiner finds that respondent’s actions (Charge No. Two) while improper, are not totally without mitigating circumstances. It must be pointed out that the danger of being hit in the head by a pitched hardball is so great that a person so struck could be killed or permanently injured. Fortunately, respondent was not hit, but his surprise and his reaction were rather predictable. The record shows that he admonished the pitcher because he narrowly escaped serious injury. (Tr. II-53)

After considering all of the circumstances and facts in the matter, *sub judice*, the hearing examiner recommends that dismissal of respondent would be too harsh a penalty for the Commissioner to impose.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the entire record in the instant matter including the exceptions filed by counsel for respondent pursuant to *N.J.A.C.* 6:24-1.16 and he concurs with the findings set forth by the hearing examiner.

In particular the Commissioner observes that it has been found that respondent inflicted corporal punishment on a pupil and such punishment resulted in a concussion and temporary amnesia. Such a finding is indeed a serious one and the narrow margin by which disaster was averted in this instance attests to the wisdom of the century old ban on corporal punishment in New Jersey schools. *N.J.S.A.* 18A:6-1 This law requires that all employees in the

public schools of the State must exercise great emotional and physical control in times of provocation. The tendency to instant blind reaction must be sublimated to the need for reasoned response.

In such a context it is clear that the practical joke which served as the provocation in the instant matter must be shunned, and that those who engage in such practice, or urge it, should be dissuaded from a repetition of these practices in the future. Accordingly, the Commissioner directs the Board to take such actions as it deems advisable to insure this result.

Similarly, the Commissioner finds it reprehensible for any teaching staff member to leave his assigned post of duty, and those pupils entrusted to his care, without a proper authorization and for trivial reasons. The scheduled curricular offerings of every school system deserve the highest priority and may not with impunity be set aside to perform errands, to pick up newspapers or tobacco, or to perform menial tasks of other kinds.

In the context of such findings of fact deserving censure, it remains to determine what penalty if any should be assessed. The Commissioner has considered this matter and determines that, in the context of respondent's record, the penalty of dismissal would be unduly harsh but that a lesser penalty is required. Accordingly, the Commissioner directs the Board to:

- (a) restore respondent to his tenured position effective September 1, 1974;
- (b) restore to respondent the salary which was withheld from him during the time of his suspension without pay, subject only to mitigation, except for the sum of one month's salary which is affixed as a penalty; and
- (c) continue respondent's employment from September 1, 1974 forward at a rate of compensation commensurate with his education and experience, without loss of the annual increment to which he may be entitled, and to afford him other appropriate emoluments which are his due.

COMMISSIONER OF EDUCATION

August 20, 1974

Pending before State Board of Education

**In the Matter of the Tenure Hearing of Ronald Puorro,  
School District of the Township of Hillside, Union County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, August 20, 1974

For the Complainant Board of Education, Goldhor, Meskin & Ziegler  
(Sanford A. Meskin, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of  
Counsel)

The application for stay of the decision of the Commissioner of Education  
is denied.

November 6, 1974

**In the Matter of the Tenure Hearing of Anna Simmons, School District  
of the Borough of Eatontown, Monmouth County,**

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioner, Stafford W. Thompson, Esq.

For the Respondent, Zager, Fuchs, Leckstein & Kauff (Abraham J. Zager,  
Esq., of Counsel)

This matter having been brought before the Commissioner of Education  
by Stafford W. Thompson, Esq., attorney for petitioner, as the sequel to a  
Decision of the Commissioner dated December 28, 1973 wherein the  
Commissioner rejected certain changes made by the Board of Education of the  
Borough of Eatontown, hereinafter "Board," against petitioner and directed that  
she be "restored forthwith to her position as a teacher"; and

It appearing that petitioner was thereafter restored to a position entitled  
"permanent substitute teacher"; and

It appearing that petitioner, in fulfilling such assignment, was afforded the  
proper compensation and other emoluments to which she was otherwise entitled  
but was assigned throughout the period as an itinerant teacher; and



It appearing that her duties throughout the period did not embrace those duties customarily performed by a regular assigned classroom teacher but instead those of a substitute teacher; and

It appearing that the assignment of petitioner as a “permanent substitute teacher” is scheduled again for school year 1974-75; and

It appearing that the “. . . Mere combination of another word with ‘teacher’ does not necessarily extend the classification of ‘teacher’ so as to include the addition . . .” *Schulz v. State Board of Education*, 132 N.J.L. 345, 355 (E. & A. 1945); and

It appearing that petitioner’s present classification is not that of a regular classroom teacher and thus is in violation of the Commissioner’s Decision which restored her to her position; therefore,

IT IS ORDERED on this 21st day of August 1974 that petitioner be restored by the Board to her position as a regular classroom teacher without further delay.

COMMISSIONER OF EDUCATION

Pending before State Board of Education

**In the Matter of the Tenure Hearing of Anna Simmons,  
School District of the Borough of Eatontown, Monmouth County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decision of the Commissioner of Education, December 28, 1973

Order of the Commissioner of Education, August 21, 1974

For the Petitioner-Appellee, Zager, Fuchs, Leckstein & Kauff (Abraham J. Zager, Esq., of Counsel)

For the Respondent-Appellant, Stafford W. Thompson, Esq.

The application for stay of the Order of the Commissioner of Education is denied.

October 2, 1974

**Max Levenson,**

*v.*

*Petitioner,*

**Board of Education of the Scotch Plains-Fanwood Regional School District,  
Harold Mercer, Fernand J. Laberge, Raymond Schnitzer, Union County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Max Levenson, *Pro Se*

For the Respondent, Johnstone and O'Dwyer (Jeremiah D. O'Dwyer, Esq.,  
of Counsel)

Petitioner, the father of a pupil who was enrolled in the Scotch Plains-Fanwood High School, alleges that the Board of Education of the Scotch Plains-Fanwood Regional School District, hereinafter "Board," allowed three of its teaching staff members to unlawfully discriminate against his son in regard to his membership on the Scotch Plains-Fanwood High School football team. Petitioner demands judgment of the Board and its three employees in the form of a signed admission of their complicity in such alleged unlawful discrimination. The Board denies the allegations as set forth herein and avers that petitioner has failed to state a cause of action upon which the Commissioner of Education could grant any relief.

The Board filed a Motion to Dismiss with supporting Brief, and petitioner filed a Memorandum with supporting documents in opposition to the Board's Motion. The entire record of this matter, including the pleadings, exhibits, and Memoranda of the respective parties are before the Commissioner for his determination on the Board's Motion to Dismiss.

The points raised in the Petition are set forth in a letter (P-1) dated February 29, 1972, sent by petitioner to the high school principal which reads in pertinent part as follows:

\*\*\*\* I [petitioner] am making a complaint against Coach Harold Mercer. (sic) The Head Football Coach at the high school [and a named respondent herein].

"My complaint is that he played \*\*\*["G.A."] whose father is a member of the Scotch Plains-[Fanwood] Board of Education, ahead of my son Abner, at the Center position. He did so after pressure was applied from the outside directed by Mr. Anderson to play \*\*\* [his son] because [he, Mr. Anderson] \*\*\* is on the Board \*\*\*."

The Commissioner observes that the complaint set forth in petitioner's letter (P-1) is in regard to the 1971 high school football season, and that

petitioner's son was graduated from high school during June 1972. The Commissioner has reviewed petitioner's letter (P-1) in full and finds the remaining assertions therein not relevant to the instant matter. Specifically, petitioner asserts that his son should have been selected as the starting center on the football team because during the first scrimmage game of the 1971 season his son was told he did a "good job." Petitioner states that the coach knew the selected pupil's father, Mr. Anderson, was a member of the Board, even though the coach told the principal he did not discover this fact until the week of September 13, 1971. Petitioner also asserts that his review of the films taken of the 1970 football season games demonstrated to him that the starting center in those games played poorly.

Although petitioner's letter complaint (P-1) is dated February 29, 1972, he first consulted with the Superintendent of Schools (a named respondent herein) in regard to these allegations on September 20, 1971. The Board asserts that, subsequent to this conversation, the Superintendent discussed petitioner's allegation of political interference, regarding the selection of the pupil to be the starting center on the football team, with the high school principal and with the coach, both of whom denied petitioner's allegations. In fact, the coach stated that his selection of the football team's center was based "\*\*\*\*solely on ability and [he] denied that any pressure had been exerted on him.\*\*\*" (Board's Brief, at p. 1)

After petitioner was informed by the Superintendent that there was no evidence of improper behavior on the part of the coach, another meeting was held on April 24, 1972 among the Superintendent, the high school principal, the coach and petitioner. Petitioner personally presented his grievance at this meeting and, he asserts, questioned the coach as to why, after his son was told he did a "good job" in the first scrimmage game of the 1971 football season, he was not played regularly thereafter. (Petitioner's Memorandum, at p. 2) Furthermore, petitioner asserts that in anticipation of this April 24 meeting he sent a letter dated April 10, 1972 (P-2), in which he advised the Superintendent to consult with other coaches in regard to his son's ability to play football and the promise allegedly made by the coach that his son would play the center position. Petitioner claims in his Memorandum that the Superintendent did not follow the suggestions set forth in petitioner's April 10 letter (P-2) and, therefore, petitioner received no satisfactory explanation at the April 24 meeting. (Petitioner's Memorandum, at p. 2) After reviewing petitioner's letter (P-2) of April 10, 1972 to the Superintendent, the Commissioner concludes that the suggestions contained therein are based upon conjecture and subjective conclusions reached by a parent whose estimate of his son's athletic prowess was significantly higher than the coach's estimate. Petitioner was influenced, at least in part, to reach such conclusions by an encouraging statement made by the coach, *e.g.* that petitioner's son did a "good job" during one practice game.

In any event, following the conference held April 24, 1972, *ante*, the Superintendent notified petitioner by letter dated April 26, 1972 (R-1), that no evidence had been found to support the allegation of discrimination.

Petitioner contends that prior to the April 24 meeting another meeting

had been held on December 9, 1971, among the principal, the coach, the school's athletic director (a named respondent herein), and petitioner. According to petitioner, during this meeting of December 9 the coach made the statement that he was unaware of Mr. Anderson's membership on the Board until the week of September 13, 1971. (P-3) (Petitioner's Memorandum, at p. 1) Petitioner asserts the coach had that knowledge prior to September 13, 1971. Petitioner supports his conclusion by offering a statement (P-4) of a person who asserts that the coach's wife said her husband knew Mr. Anderson was a Board Member. This conversation allegedly took place between the coach's wife and petitioner while she was in petitioner's paint and wallpaper store on May 17, 1971.

The Commissioner holds that the contents of the written statement (P-4) is not persuasive proof of petitioner's allegation that the coach deliberately misled petitioner regarding the time he, the coach, first had knowledge of Mr. Anderson's Board membership.

Petitioner was afforded the opportunity to present his allegations to the Board on October 16, 1972, and the Board subsequently determined that petitioner had presented no evidence to support his claim.

Petitioner now asserts that the Board violated the law, acted in bad faith, and abused its discretion by acting in a shocking manner. Furthermore, it is claimed by petitioner that his son's civil rights were violated by the failure of the Board to provide him an equal opportunity to become the starting center on the football team.

The Board grounds its Motion to Dismiss on the argument that the pleadings set forth above contain no justiciable issue upon which the Commissioner may exercise his quasi-judicial authority, relying upon the Commissioner's prior holding in *Joy and Edward Calhoun v. Long Branch Board of Education, Monmouth County*, 1968 S.L.D. 187. The Board argues that the Legislature has vested local boards of education with broad authority to adopt policies for the operation of its schools and, absent a showing that a board acted illegally, improperly, or abused its discretionary authority, the Commissioner is without authority to substitute his judgment for that of a local board of education. *Boult and Harris v. Board of Education of the City of Passaic*, 1939-49 S.L.D. 7, affirmed 135 N.J.L. 329 (Sup. Ct. 1947) and *Thomas v. Morris Township Board of Education*, 89 N.J. Super. 327 (App. Div. 1965)

Finally, the Board contends that the instant Petition must be dismissed because petitioner's son graduated from the high school during June 1972, thus rendering the matter moot. In this regard the Board relies on *Paul E. Polskin v. Board of Education of North Plainfield, Somerset County*, 1968 S.L.D. 217 in which the Commissioner stated:

“\*\*\* it being well established that the Commissioner of Education, consistent with the policy of the Courts, will not hear and decide controversies which are moot \*\*\*.” (at p. 218)

Petitioner asserts in his Memorandum that the matter is not moot, even

though his son has graduated from high school, because the experience of not being selected as the starting center on the football team has deeply and adversely affected his son. Petitioner states that the letter he requests from the three employees, in which they would admit their complicity in selecting the Board member's son instead of petitioner's son, would help petitioner's son in "\*\*\*\*getting his life together \*\*\*\*." (Petitioner's Memorandum, at p. 1)

The Commissioner points out that local boards of education are vested with broad authority for the operation of their schools. *N.J.S.A.* 18A:11-1 provides, *inter alia*, as follows:

"The board shall —

- "a.. Adopt an official seal;
- "b. Enforce the rules of the state board;
- "c. Make, amend and repeal rules, not inconsistent with this title [*N.J.S.A.* 18A, *Education Law*] or with the rules of the state board [as set forth in the *New Jersey Administrative Code (N.J.A.C.)*, Title 6], for its own government and the transaction of its business and for the government and management of the public schools \*\*\* and for the employment, regulation of conduct and discharge of its employees\*\*\*."

Local boards of education have discretionary authority to establish interscholastic athletic programs. Such programs are conducted in accordance with the rules of the State Board of Education set forth in *N.J.A.C.* 6:29-6.1 through 6.4.

In the instant matter, petitioner asserts that his son was not selected by the football coach to be the starting center because of political interference by the father of the pupil who was selected. The coach, the athletic director and the Board deny this allegation, and the record is void of any proof to substantiate it.

The Commissioner finds and determines that petitioner's stated cause of action is groundless, and his contentions are without merit. It may also be stated that, since petitioner's son has graduated from high school, this entire matter has been rendered moot.

Accordingly, the Motion to Dismiss filed by the Scotch Plains-Fanwood Board of Education is hereby granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 27, 1974

Pending before State Board of Education

**Donald P. Sweeney,**

*Petitioner,*

*v.*

**Mary Ashley, Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Donald P. Sweeney, *Pro Se*

For the Respondent, DeLorenzo and DeLorenzo (William DeLorenzo, Jr., Esq., of Counsel)

Petitioner, a resident of Bogota, alleges that respondent, who was elected to the Board of Education of Bogota, hereinafter "Board," may not properly sit as a member of the Board within the intendment of *N.J.S.A. 18A:12-2*, because of a conflict of interest.

Respondent denies that a conflict of interest exists which would prevent her from continuing to serve as a member of the Board.

This matter was brought before the Commissioner of Education in the form of Briefs and oral argument on a Motion for Summary Judgment by respondent, before a representative of the Commissioner, at the State Department of Education on June 20, 1974.

Petitioner alleges that respondent, as a member of a representative teachers' association, and as a teacher in a neighboring school district, is in a position of furthering favorable teachers' contracts while on the Board, which she may thereafter turn to her own advantage if she chooses to enter the Bogota school system as a teacher. Petitioner further argues that respondent has demonstrated bias, prejudice, and an inconsistent interest in the welfare of the community when, as a member of the Board, she voted for a teachers' contract with a higher salary guide. Petitioner alleges that further evidence of bias was shown when respondent opposed a resolution before the Board which would require that the Superintendent conduct an investigation into the allegedly illegal distribution by teachers of a letter promoting certain candidates for the February 1974 school election in contravention of *N.J.S.A. 18A:14-97*.

Petitioner argues that, for the foregoing reasons, respondent is in conflict of interest pursuant to *N.J.S.A. 18A:12-2* which reads:

"No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."

Therefore, petitioner prays that the Commissioner will declare petitioner's seat on the Board vacant and order a special election to fill the vacancy.

Respondent contends that neither her employment as a teacher in a school district other than Bogota, nor her membership in a representative teachers' organization, establishes a conflict of interest which may bar her from serving on the Board to which she was elected. In support of this position she cites *Jones et al. v. Kolbeck et al.*, 119 N.J. Super. 299 (App. Div. 1972) which states:

“\*\*\* There is neither constitutional nor statutory prohibition against an individual at one and the same time holding and exercising the office of member of the board of education of one public school district, and holding and performing the duties of the position or employment of teacher in the schools of a different public school district. \*\*\*[T]he provisions of N.J.S.A. 18A:12-2 contains no such proscription, expressly or impliedly.\*\*\*” (at p. 300)

Respondent further contends with respect to the negative vote she cast in the matter of the board resolution, *ante*, that:

“\*\*\* how a school board member votes is within the sole purview of the judgment of such school board member and is not something which may be reviewed by the Commissioner of Education for any purpose.\*\*\*” (Respondent's Brief on Motion for Summary Judgment, at p. 7)

Respondent asserts that any attempt on the part of the Commissioner to interfere with the judgment of a public official would be improper in the light of *DelVecchio v. South Hackensack Township*, 49 N.J. Super. 44, 50 (App. Div. 1958) and *Bellings v. Denville Township*, 96 N.J. Super. 351 (App. Div. 1967) wherein it was said by the Court:

“\*\*\* The wisdom of the course chosen by the governing body, as distinguished from its legality, is reviewable only at the polls.\*\*\*” (at p. 356)

Finally, respondent holds that the Commissioner lacks authority or power to remove from office a member of a board of education who has been duly elected to office.

The Commissioner agrees with respondent that *Jones, supra*, speaks directly regarding respondent's right to teach in one school district and serve on the board of education of another school district. *Jones* is likewise specific with respect to respondent's membership in a representative teachers' organization which negotiates salaries and other benefits and has access to the resources such as state and national data and information. With respect to such membership, *Jones* states:

“\*\*\* Nor does mere membership in the New Jersey Education Association disqualify a person from membership on a local board of education — any more than membership in any other professional or labor organization constitutes a disqualification. While the law demands complete honesty



and integrity in the exercise and performance of the duties of every public office, position or employment, that requisite does not necessitate or contemplate a severance of all ties and associations with persons and organizations that may espouse a particular philosophy or position. \*\*\*.”  
(at p. 301)

The Commissioner finds that while *Jones, supra*, speaks directly, *N.J.S.A. 18A:6-8.4* which was enacted into law effective September 7, 1972, is fully dispositive of the matter. It provides that:

“No person employed by a public educational system or institution in a position which requires a certificate issued by the State Board of Examiners \*\*\* shall be disqualified by reason of such employment from holding any elective or appointive State, county or municipal office excepting as member of the board or body by which he is employed.”

Respondent may serve as a member of the Board. To hold otherwise would be counter to statutory provision.

Nor will the Commissioner review the reasons why respondent or any other member of the Board cast either a negative or affirmative vote on the controversial resolution, *ante*. Members of local boards of education are responsible for the wisdom of their actions to their constituents and not to the Commissioner of Education. *Boult v. Board of Education of Passaic*, 136 *N.J.L. (E. & A.* 1948)

Finally, in the absence of any evidence of a conflict of interest in violation of *N.J.S.A. 18A:12-2*, and based upon a finding that respondent's vote on the resolution before the Board, *ante*, may not be the subject of a review of analysis, the Commissioner determines that respondent may legally continue to fulfill the duties of office as a member of the Board. With such a determination it is unnecessary to speak to respondent's charge that the Commissioner lacks the authority to remove a member from office. Nor is it necessary to treat petitioner's contention that, in the event of a declaration that a vacancy exists, a special election may be ordered to fill the vacancy. Suffice it to say, statutory provision is already made to fill such a vacancy: *N.J.S.A. 18A:12-7; N.J.S.A. 18A:12-15; N.J.S.A.; 18A:12-17; N.J.S.A. 18A:13-11*.

The Commissioner grants respondent's Motion for Summary Judgment on grounds petitioner's cause of action is without merit. The Petition is dismissed.

COMMISSIONER OF EDUCATION

August 27, 1974

**Leslie M. Shenkler,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Ho-Ho-Kus, Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Leslie M. Shenkler, *Pro Se*

For the Respondent, Carpenter, Bennett & Morrissey (Arthur M. Lizza, Esq., of Counsel)

Petitioner, father of a child five years of age, hereinafter identified as "E.S.," avers that the Board of Education of the Borough of Ho-Ho-Kus, hereinafter "Board," has denied E.S. an opportunity to enroll in the Board's first grade program in September 1974, and that such denial is grounded in an arbitrary, unreasonable, and unlawful admission policy. He demands judgment to this effect. The Board admits that E.S. has been denied the opportunity to enroll in first grade, but avers that its policy with respect to such enrollment is a proper exercise of discretion and is pursuant to law.

The matter is submitted to the Commissioner for Summary Judgment on an agreed set of stipulated facts and on Briefs of Counsel. The stipulated facts are as follows:

\*\*\*\* (a) Petitioner's son has successfully completed a year's work in a private but State accredited kindergarten program and will be six years old on October 16, 1974;

"(b) Subsequent to the completion of such program petitioner attempted to enroll the boy in the first grade program of the Ho-Ho-Kus public schools but was refused such enrollment by the Board of Education;

"(c) The basis of the refusal was a policy of the Board which provides that;

'Children shall be admitted to the first grade in September of each year if they are or will be six years of age before October 1.'

"(d) The issue before the Commissioner is whether or not such rule and the refusal of the Board to enroll petitioner's son pursuant thereto, is a proper exercise of the Board's discretion or, as petitioner charges, an arbitrary, capricious, unreasonable and unlawful act.\*\*\*\*" (Stipulation of Facts)

In support of his view that the Board's policy is unreasonable under these circumstances, petitioner states he can offer proof that a repetition of a kindergarten program will be harmful to his child. (Note: he offers affidavits to this effect.) However, the Board avers it can produce counterproof in this regard, and so there is no stipulated fact for purposes of the judgment herein. Nor is one required since the matter is basically one of law. The Commissioner so holds.

In petitioner's argument, the Board's policy with respect to the admission of pupils is illegal, and his Brief in support thereof is constructed around four principle avowals:

1. The Board's rule is in violation of Amendment XIV, Section I to the United States Constitution and Article I, Paragraph 5 of the New Jersey State Constitution;
2. The Board's rule is not related to an educational goal and thus violates the Board's authority to manage or govern its schools, which authority is conferred on the Board by *N.J.S.A. 18A:11-1*;
3. E.S. will be harmed if he is forced to repeat a course of study he has already completed;
4. The Board's rule is not internally consistent with other policies.

While admitting that the statute *N.J.S.A. 18A:11-1* provides the authority for local boards of education to "make rules" for school management, petitioner avers that such authority is not unlimited. In his view, "\*\*\*\* it cannot be argued that such rulemaking power may be exercised in clear violation of the provisions of either the New Jersey or United States Constitution.\*\*\*\*" (Petitioner's Brief, at p. 5) The "provisions" of reference are Amendment XIV, Section I of the U.S. Constitution and Article I, Paragraph 5 of the N.J. State Constitution.

In this regard petitioner avers the Board's rule fails because, pursuant to its terms, pupils are grouped for educational purposes by chronological age alone. He maintains that such grouping does not insure the forming of homogeneous groups but "\*\*\*\* in fact inhibits educational progress because it has the effect of excluding children (born after the cut-off date) who possess the capabilities to profit from the first grade instruction\*\*\*\*" (Petitioner's Brief, at p. 11), and is thus constitutionally deficient. Further, petitioner argues that the Board's rule fails to afford E.S. equal protection since pupils who have completed a kindergarten program in public school are allowed to enter the first grade the following year, but that E.S., who has completed a private school kindergarten program, is denied the entitlement.

Such denial, petitioner claims, is 'unnecessary since the Board employs persons with "\*\*\*\*the expertise in the testing and evaluation of children to permit such evaluation and testing \*\*\* *directly related to qualities and abilities requisite to successful first grade performance* so as to be constitutionally permissible.'" (Petitioner's Brief, at p. 14) (*Emphasis petitioner's.*) In petitioner's

view, a testing program, as one criterion for first grade entrance, would impose no financial burden. To the contrary, he avers that a testing program “\*\*\* would result in an economic saving to Respondent since Respondent would not bear the costs of an entire additional \*\*\* year of schooling in the public school system.\*\*\*” (Petitioner’s Brief, at P. 17)

Further, petitioner avers that the Board’s rule serves no educational purpose and is not grounded on relevant criteria. He states that the rule should therefore be rejected and that similar rules have been rejected in other States. He cites: *Fogel v. Goulding*, 51 Misc. 2d 641, 273 N.Y. 2d 554 (1966); *Matter of the Appeal of Marvin and Fern J. Lazar*, 7 N.Y. Ed. Dept. Rep. 7661 (1966); *Board of Education v. John S. Bolton*, 851 St. App. 92 (1899); *People v. Board of Education*, 26 Ill. App. 476.

Additionally, petitioner avers that his son will be psychologically damaged if forced to repeat kindergarten. This is so, he asserts, since E.S. has completed three years of social experience (including two years of nursery school) and is ready to engage in work beyond that required in the kindergarten program.

Finally petitioner cites the Board’s rule with respect to first grade placement. He states it is inconsistent with another section of the rule which states:

“Children transferring from other schools (above the first grade). Children new to the Ho-Ho-Kus Schools will tentatively be placed at the grade level recommended by their previous schools. After a period of observation and testing, grade placement will be determined by the Superintendent.”

(Petitioner’s Brief, at p. 29)

The Board advances a series of arguments in rebuttal to those of petitioner. It denies that its promotion policy is unconstitutional and avers, instead, that such policy is a proper and valid exercise of authority by the Board. Additionally in the Board’s view, the issue herein is a narrow, legal one and therefore “\*\*\*the question of whether petitioner’s child could be psychologically damaged by repeating kindergarten is irrelevant\*\*\*.” (Board’s Brief, at p. 12)

In defense of its policies with respect to promotion and grade placement, the Board cites *N.J.S.A. 18A:11-1* and *N.J.S.A. 18A:4-24*. Such statutes, in the Board’s view, confer on the Board authority for the “government and management” of the schools of its district and entitle it to “prescribe its own rules for promotion.” The Board also cites the determinations of the Commissioner in *Dorothy Boulogne v. Board of Education of the City of Jamesburg, Middlesex County*, 1964 *S.L.D.* 107 in support of its position.

The Board further states that “classification by age for admittance to first grade is not arbitrary” (Board’s Brief, at p. 9), and, thus, that the Board’s policy must be found constitutional. In support of the avowal, the Board cites *Wiesenfeld v. Secretary of H.E.W.*, 367 *F. Supp.* 981, 987 (*D.N.J.* 1973):

“\*\*\* If a statute is based on an ‘inherently suspect’ classification such as race, alienage, or national origin, as it concerns a ‘fundamental interest’ such as the right to vote, the right to appeal a criminal conviction, or a right to interstate travel, it is subject to strict or ‘close judicial scrutiny’ and will be held invalid in absence of a countervailing ‘compelling’ governmental interest. *In all other circumstances*, under the traditional equal protection standard *a legislative classification must be upheld unless it is patently arbitrary and bears no ‘rational relationship’ to a legitimate governmental interest.*” (Board’s Brief, at p. 9) (*Emphasis the Board’s.*)

The Board further states that its promotion policies, *ante*, are flexible “\*\*\*and provide for placement of such a child in first grade at any time during the school year if it has been demonstrated that such placement would be desirable.\*\*\*” (Board’s Brief, at p. 10)

It follows then, in the Board’s view, that there is no constitutional validity in petitioner’s argument since petitioner’s objection “\*\*\* is not whether but when \*\*\*” it may be determined that E.S. is prepared to enter the first grade.

The Commissioner has reviewed such arguments in the context of the undisputed facts, *ante*, and determines that the issue herein is a simple one; namely, whether or not the Board’s first grade pupil placement policy is or is not a lawful exercise of the Board’s discretion. The Commissioner determines that it is.

This determination is grounded in certain general powers conferred on local boards of education in New Jersey by statutory prescription and in particular on the provisions of *N.J.S.A. 18A:4-24* which specifically sets forth that “each district” has a “right” to “prescribe its own rules for promotion.”

The statute *N.J.S.A. 18A:4-24* states a broad mandate to the Commissioner of Education to “inquire into” and “ascertain” the “efficiency of operation” of schools within the State. The statute in its entirety reads as follows:

*N.J.S.A. 18A:4-24*

“The commissioner shall, by direction or with the approval of the state board, whenever it is deemed to be advisable so to do, inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state and of any grades therein by such means, tests and examinations as to him seem proper, and he shall report to the state board the results of such inquiries and such other information with regard thereto as the state board may require or as he shall deem proper, but *nothing in this section shall affect the right of each district to prescribe its own rules for promotion.*” (*Emphasis supplied.*)

Thus the rules for the promotion of pupils within local school districts are established without the discretion of the Commissioner and at the discretion of

the local board of education. The responsibility for the formulation of such rules has resided with local school districts since 1912 when the Legislature for the first time explicitly tempered the authority of the State Board of Education and the Commissioner in this regard. (*L. 1912, c. 365 § 1, p. 641*) The 1912 amendment, which has continued in effect virtually intact to the present day, said:

“Nothing herein contained shall impair the right of each district to prescribe its own rules for promotion.”

The general statutes which confer broad discretionary authority on local boards of education are *N.J.S.A. 18A:10-1, 11-1* which are recited in their entirety as follows:

*N.J.S.A. 18A:10-1* Constitution of boards of education; conduct of schools

“The schools of each school district shall be conducted, by and under the supervision of a board of education, which shall be a body corporate and which shall be constituted and governed, as provided by this title, for a type I, type II or regional school district, as the case may be.”

*N.J.S.A. 18A:11-1* General mandatory powers and duties

“The board shall —

“a. Adopt an official seal;

“b. Enforce the rules of the state board;

“c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title II, Civil Service, of the Revised Statutes<sup>1</sup>; and

“d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.”

1. Section 11:1-1 *et seq.*

Furthermore, such statutes have been uniformly interpreted by the Commissioner in past decisions to mean that policies of local boards similar to the one herein controverted are proper and legal. A local board of education may promote or place pupils enrolled in the public schools for its district

according to the prescription of its own rules. *Dorothy Boulogne v. Board of Education of the City of Jamesburg, supra*; *Wilcox v. Board of Education of the Borough of Oceanport, Monmouth County*, 1954-55 S.L.D. 75; *Frederick Staats v. Board of Education of Montgomery Township, Somerset County*, 1938 S.L.D. 669 (decided February 20, 1914, reversed on other grounds, State Board of Education April 4, 1914)

In *Boulogne, supra*, the Commissioner was concerned with a policy of a local board of education which required that pupils be six years of age on or before December 31 in order to qualify for entrance to first grade. Such policy was consistent with another Board policy with respect to qualifications for entry to kindergarten. The Commissioner said:

“\*\*\* It has long been held that it is the right and responsibility of the local board of education to establish rules for the promotion of pupils from grade to grade. In 1914, the State Board of Education in reversing the decision of the Commissioner in *Staats v. Board of Education of Montgomery Township*, 1938 S.L.D. 669, 671, said:

‘The State Board of Education holds that a local board of education has authority to prescribe its own rules for promotion. It is given that express right by statute.’\*\*\*”

“More recently, in the case of *Wilcox v. Board of Education of Oceanport*, 1954-55 S.L.D. 75, the Commissioner directed the admission of a child on transfer from a private kindergarten, concluding, at page 77, with the statement:

‘The Board of Education of the Borough of Oceanport, Monmouth County, will determine in its discretion the grade in which the child shall be placed. (See R.S. 18:11-1.)’

“That a board of education may give consideration to age as a factor in determining promotion policies is set forth in the statutes. R.S. 18:11-1 requires boards of education to provide suitable school facilities and accommodations for the education of the children who reside in the district. Such facilities

‘\*\*\* shall include \*\*\* courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years.’\*\*\*”

“In fulfillment of its duty to provide suitable school facilities, the board has no obligation under the law to employ formal testing procedures to determine a child’s fitness to enter a particular grade. The statutes specifically reserve to the local school district the right to prescribe its own rules for promotion. R.S. 18:3-16 [now N.J.S.A. 18A:4-24] empowers the Commissioner to ‘ascertain the thoroughness and efficiency of any or all public schools and any or all grades therein, by such means, tests, and



examinations as seem proper to the Commissioner,' but after giving such power, the statute concludes:

'Nothing contained in this section shall impair the right of each district to prescribe its own rules for promotion.'

"While the board may use tests for grade placement purposes, it is not required to do so. In the case of *Gutch and Fugger v. Board of Education of Demarest, Bergen County*, decided by the Commissioner March 13, 1963 [1963 S.L.D. 85], affirmed State Board of Education May 1, 1963 [1963 S.L.D. 89], one of the questions was whether a board of education could make psychological testing a prerequisite to early admission to kindergarten. On this question the Commissioner said:

\*\*\* 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.\*\*\* If, on the other hand, respondent desires such guidance in the exercise of its 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.'

"In the instant matter, *respondent could have directed that petitioner's child be tested* to determine qualifications for admission to first grade. *That it did not so direct does not constitute a denial of any right.* Petitioner admits that her daughter did not qualify for *admission to first grade on the basis of age under respondent's policy.*

"The Commissioner finds no evidence of arbitrary or discriminatory action in the board's modification of its policy to make children born on or before December 31, 1957, eligible for admission to the first grade if they had satisfactorily completed the kindergarten program in its own or a suitable private kindergarten. Such a *modification was obviously* necessary to avoid inconsistency with its own rules. Petitioner lost no rights thereby which she had previously enjoyed.\*\*\*" (1964 S.L.D., at pp. 108-109) (*Emphasis supplied.*)

Thus, the Commissioner of Education and the State Board of Education have had occasion to interpret the pertinent statutory prescription, recited above, on prior occasions. While such interpretations are not binding on the Commissioner and/or the Courts, they may not with impunity be set aside. The uniform administrative interpretation of a statute over a considerable length of time will be afforded respect. *Safeway Trails, Inc. v. Furman*, 76 N.J. Super. 90 (Law Div. 1962); *Hudson County National Bank v. Provident Institution for Savings in Jersey City*, 80 N.J. Super. 339 (Chan. Div. 1963)

In the instant matter, the above-stated interpretation is not overturned by petitioner's constitutional argument that his son is being denied equal protection of the law. While the age criterion which the Board has utilized is not that which petitioner deems appropriate, there is no allegation nor evidence that such

criterion was not uniformly applied by the Board with respect to petitioner's son and all other similarly situated pupils.

The findings in the matter, *sub judice*, are similar to those of *Boulogne, supra*. The Commissioner finds no arbitrary nor discriminatory action on the part of the Board. The Board has done nothing it was not empowered to do. It is well established that absent a clear showing of unlawful action or abuse of discretion, the Commissioner will not interfere in a matter lying wholly within the discretionary authority of a local board of education. *Thomas v. Morris Township Board of Education*, 89 N.J. Super. 327 (App. Div. 1965); *Boult and Harris v. Passaic Township Board of Education*, 1939-49 S.L.D. 7, 13, affirmed State Board of Education 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947), affirmed 136 N.J.L. 521 (E. & A. 1947); *Pepe v. Livingston Board of Education, Essex County*, 1969 S.L.D. 47

Accordingly, for the reasons stated, the Petition is dismissed.

COMMISSIONER OF EDUCATION

August 27, 1974

Pending before State Board of Education

“W.G.,” a minor,

*Petitioner,*

*v.*

Board of Education of the Township of Ocean, Monmouth County,

*Respondent.*

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioner, David Resnikoff, Esq.

For the Respondent, Thomas F. Shebell, Esq.

This matter having been brought before the Commissioner (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes) by David Resnikoff, Esq., attorney for petitioner, “W.G.,” on a Motion for Relief, *pendente lite*, requesting temporary reinstatement pending adjudication of the Petition of Appeal and Peter Shebell, Esq., appearing for the Board of Education of the Township of Ocean; and

It appearing that on April 22, 1974, petitioner was suspended from school as a result of allegedly possessing and transferring or selling marijuana in the Ocean Township High School; and

It appearing that a hearing was conducted on May 8, 1974 by the Board which resulted in the expulsion of petitioner; and

It appearing that the expulsion was made in consideration of the allegedly admitted incident of April 22, 1974, *ante*, and a previous allegedly admitted incident of smoking marijuana in the school parking lot during January 1974; and

It appearing that the Board’s hearing of May 8, 1974, *ante*, provided petitioner with the required due process as set forth in *R.R. v. Board of Education of Shore Regional High School District*, 109 N.J. Super. 337, 350 (1970); and

It appearing that the Board did not exercise the extreme action of expulsion of a pupil lightly, but in consideration of its responsibility to protect the pupils enrolled in its school from further repeated exposure to dangerous controlled drugs; and

It appearing that the Board’s action to expel petitioner is consistent with its announced drug policy; and

It appearing that the Board’s action to expel petitioner was taken pursuant to *N.J.S.A. 18A:37-2* and *N.J.S.A. 18A:37-5*; and

The arguments of counsel having been heard regarding the allegation by petitioner that irreparable harm may result if petitioner is denied immediate reinstatement as a pupil in the Ocean Township High School; and

The Commissioner having carefully considered the possibility of irreparable harm by the continuation of petitioner's aforementioned expulsion weighed against the Board's responsibility to protect its pupils from repeated exposure to dangerous controlled substances; and

The Commissioner having concluded that the Board's decision in the instant matter was a sound exercise of discretion; therefore

IT IS ORDERED that petitioner's request for relief, *pendente lite*, is denied.

Entered this 7th day of June 1974.

COMMISSIONER OF EDUCATION

"W.G.,"

*Petitioner,*

v.

Board of Education of the Township of Ocean, Monmouth County,

*Respondent.*

COMMISSIONER OF EDUCATION

#### DECISION

For the Petitioner, David Resnikoff, Esq.

For the Respondent, Peter Shebell, Esq.

Petitioner, a pupil enrolled in the eleventh grade in the Ocean Township High School, was expelled on May 8, 1974 by the Board of Education of the Township of Ocean, hereinafter "Board," for the alleged possession and sale of marijuana in the Ocean Township High School. Petitioner charges that the Board's action was arbitrary, capricious, unreasonable, excessive, and violative of due process. He prays that the Commissioner of Education set aside the expulsion, expunge any notation of the incident from his permanent record, and reinstate him as a pupil. The Board denies any improper action on its part.

Oral argument on a Motion for Relief, *pendente lite*, brought by petitioner was heard by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton, on June 5, 1974. An interlocutory Order of the Commissioner denied petitioner's reinstatement to school at that time on a

showing that the Board had afforded due process to petitioner and acted within the authority conferred upon it by statute. The matter is now before the Commissioner for direct Summary Judgment in the form of Memoranda presented by the litigants, there being no controverted facts. A succinct statement of those facts is recited as follows:

1. Petitioner was suspended for five days in January 1974 for admittedly smoking marijuana in a car in the school parking lot during the school day. He was at the time warned by the vice-principal against the use and possession of marijuana on school property.
2. On April 22, 1974, a teacher observed petitioner in a school lavatory while in the act of selling to another pupil a packet of less than twenty-five grams of marijuana for \$25.00. Both petitioner and the other pupil admitted to the sale. The resulting investigation revealed that petitioner had on his person a second package of similar size, sufficient to make approximately twenty cigarettes.
3. Petitioner was notified by the Board in writing of an expulsion hearing which was held on May 8, 1974. He was represented by counsel, given opportunity to state his version of the matter, cross examine witnesses, and present evidence on his own behalf.
4. Petitioner was expelled by the Board following the hearing. Thereafter, he requested that the Board allow him to re-enroll in September 1974. This request was denied by the Board on June 13, 1974.

Petitioner, while admitting the sale of marijuana on April 22, 1974, denies that it was for profit but alleges it was merely a cost transaction as an ill-advised "favor" for a fellow pupil. He contends that continuation of the expulsion is harsh and excessive in that it denies him the opportunity to complete his public school education, thus effectively barring him from his goal of college enrollment.

Petitioner further argues that this isolated incident of misconduct does not warrant indefinite expulsion, since expulsion is intended to be used only in cases of continued or habitual misconduct. Petitioner alleges that:

“\*\*\* The isolated incident of misconduct does not warrant the meted out punishment of this board, especially the indefinite term of expulsion.\*\*\*”

In support of this contention, petitioner cites (Memorandum on Behalf of Petitioner, at p. 11) *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 93 N.J. Super. 404 (App. Div. 1965) and *Hymanson v. Board of Education of the Borough of Saddlebrook, Bergen County*, 1967 S.L.D. 23.

Petitioner asserts that the Board's act to expel him for an indefinite period

is a negative type of punishment. *Scher v. Board of Education of the Borough of West Orange, Essex County*, 1968 S.L.D. 92 Finally, petitioner maintains that, having learned his lesson, he is in no way a threat to the well-being of other pupils and that his reinstatement would not interfere with the discipline of the school.

The Board, however, asserts that petitioner did exhibit a pattern of continued and willful disobedience in that he disregarded the warning of the vice-principal in January 1974, *ante*, and, a mere three months later, illegally brought to the school and sold a controlled dangerous substance. The Board contends that it must exercise the:

“\*\*\* power of expulsion where the activity which is the subject of expulsion materially and substantially interferes with the requirements of appropriate discipline in the operation of the school. See *R.R. v. Board of Education of Shore Regional High School District*, 109 N.J. Super. 237 (Ch. Div. 1970). School authorities must have such a right where such is reasonably necessary for the students’ physical or emotional safety and well-being \*\*\*. Certainly the control of dangerous controlled substances in the schools is related to the safety and well-being of all students.\*\*\*” (Memorandum on Behalf of the Respondent, at pp. 3-4)

The Board asserts that its action to expel petitioner was not in error having been taken only after carefully weighing petitioner’s statements and other evidence presented at the hearing, *ante*, against its responsibility to protect the pupils enrolled in its school against further repeated exposure to dangerous controlled substances.

The Commissioner has carefully considered the respective positions of the parties as set forth in the entire record of the instant matter. He rejects petitioner’s representation that the admitted illegal sale and possession of a dangerous controlled substance on April 22, 1974, may be viewed as an “isolated incident of misconduct.” The facts are clear that petitioner, on at least two separate occasions only three months apart, was in illegal possession of marijuana. On at least one of those occasions he had procured the material from sources outside the school and engaged in its sale to another pupil in the school. Whether or not such sale was for profit in no way ameliorates the offensiveness of these illegal acts of procurement, distribution, and use.

Petitioner was initially suspended for a brief period and given a stern warning by a school official that there must not be a repeated offense. In utter disregard thereof, petitioner persisted in repeating the offense and involved another pupil in an illegal sale. He was aware of the Board’s drug policy as printed within the Student Handbook of Ocean Township High School which reads as follows:

“\*\*\* The Township of Ocean Board of Education has established a policy regarding student possession, use, or sale of drugs while on school property. Students may be subject to expulsion if found to be involved in possession of, using or selling drugs while on school property.\*\*\*” (P-2, at p. 45)

Such disregard of the Board's announced policy and of the admonition of the vice-principal may only be viewed as "continued and willful disobedience" within the intendment of *N.J.S.A.* 18A:37-2. The Commissioner so holds.

The Board, in the face of such continued and willful disobedience has acted to expel petitioner from its school. The Commissioner finds no evidence that the Board has acted in a capricious, arbitrary or unreasonable manner. It is evident that the Board was obliged to act in a decisive manner. The Commissioner has previously said, and here reaffirms, that:

“\*\*\* Offenses involving the abuse of drugs are a serious menace to the mental health of our society, and the introduction and abuse of drugs in the public schools must be dealt with swiftly, in order to prevent their further introduction to other students.\*\*\*” (*E.E. v. Board of Education of the Township of Ocean, Monmouth County*, 1971 *S.L.D.* 97, 101)

The Commissioner has also said in upholding the Board's action in *Gustave M. Wermuth and Sylvia Wermuth, as Natural Parents and Guardians for Marsha Wermuth, A Minor Under the Age of 16 v. Julius C. Bernstein, Principal of Livingston High School, and Board of Education of the Township of Livingston, Essex County*, 1965 *S.L.D.* 121:

“\*\*\* An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct.\*\*\*” (at p. 129)

In the instant matter the Board has exercised its discretion to impose what it regards as a necessary deterrent against future drug abuse. Such authority is statutorily conferred and, absent a showing of arbitrary, capricious or illegal action by the Board, will not be upset by the Commissioner. In this regard the Commissioner reaffirms that which was said in *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327 (*App. Div.* 1965):

“\*\*\* We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.\*\*\*”

Nor will the Commissioner in this instance substitute his discretion for that 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.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948)

The Commissioner finds in the entire record no evidence that petitioner



was denied due process nor was such allegation pressed in petitioner's Memorandum.

Regarding petitioner's prayer for expunction of his permanent record, the Commissioner is constrained to act in accord with the direction given in the previous case, "*E.E.*", *supra*. Accordingly, it is directed that no notation be placed on petitioner's transcript of permanent record and that only such record as may be necessary be maintained by the school. In this way petitioner's indiscretion will not follow him interminably. To this limited extent the prayer of petitioner is granted.

In all other respects the Petition is dismissed.

COMMISSIONER OF EDUCATION

August 30, 1974

Mrs. John Engle et al.,

*Petitioners,*

*v.*

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

*Respondent.*

COMMISSIONER OF EDUCATION

**ORDER**

For the Petitioners, Edward Kucharski, Esq.

For the Respondent, Sauer and Kervick (James F. Kervick, Esq., of Counsel)

This matter having been brought before the Commissioner of Education (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes) by Edward Kucharski, Esq., attorney for petitioners on a Petition of Appeal and Request for Restraining Order dated June 4, 1974, requesting temporary restraint against the Board of Education of the School District of the Township of Cranford to prevent said Board from proceeding to award and execute contracts for two additional elementary school principals for the school year 1974-75; and

John F. Kervick, Esq., appearing for the School District of the Township of Cranford; and

The arguments of counsel having been heard regarding the allegation by petitioners that irreparable harm may result if respondent Board is not restrained

from proceeding with the aforementioned execution of contracts for two additional principals for the forthcoming school year, pending the final determination by the Commissioner of the Petition of Appeal; and

The Commissioner having considered the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint (*United States v. Pavenick*, 197 F. Supp. 257, 259-60 (D.N.J. 1961) and *Communist Party of the United States of America v. McGrath*, 96 F. Supp. 47, 48 (D.D.C. 1951)); and

The Commissioner having considered the affidavit by the Board's Superintendent of Schools that it is the intention of the Board to appoint two additional elementary principals to its present staff of four elementary principals *regardless of the outcome of the present matter before the Commissioner*; and

The Commissioner having considered the arguments of counsel regarding the statements and documents issued by the Board prior to February 1974; and

The Commissioner having balanced the interests of petitioners, the interests of the Board, and the interests of the pupils and residents of the community at large; and

The Commissioner having found that no irreparable harm will result by permitting the Board to continue with its plan to hire two additional elementary school principals which the Board has determined to be in the public interest and which action is entitled to a presumption of correctness (*Thomas v. Board of Education of Morris Township*, 89 N.J. Super. 327 (App. Div. 1965); *Pasquale Maffei v. Board of Education of the City of Trenton et al.*, Commissioner's Decision on Motion, unp, September 29, 1972); therefore

IT IS ORDERED that petitioners' request for restraining order, *pendente lite*, is denied; and

IT IS ORDERED that this matter proceed to final determination as expeditiously as possible.

Entered this 17th day of June 1974

COMMISSIONER OF EDUCATION

**Mrs. John Engle et al.**

*Petitioners,*

*v.*

**Board of Education of the Township of Cranford, Union County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Edward Kucharski, Esq.

For the Respondent, Sauer and Kervick (James F. Kervick, Esq., of Counsel)

Petitioners are residents of the Township of Cranford and members of CAUSE (Citizens Association Urging Sound Education). They allege that the Board of Education of the Township of Cranford, hereinafter "Board," acted capriciously and in bad faith and abused its discretionary powers by ordering the closing of its Cleveland and Sherman Elementary Schools effective July 1, 1974.

The Board maintains its resolution to close the schools was proper, taken in good faith, within the parameters of discretion conferred upon it by statutory prescription, and in the best interests of the school district.

A hearing in this matter was conducted on April 23, 24, 25, 1974, and continued on May 2, 1974 by a hearing examiner appointed by the Commissioner of Education at the office of the Union County Superintendent of Schools, Westfield. The report of the hearing examiner is as follows:

Petitioners' principal allegations are herein grouped as five charges by the hearing examiner which are set forth and dealt with *seriatim* at the conclusion of a factual recital of conditions and events which precipitated this dispute.

The Board, on December 18, 1973, adopted by a vote of 7-2 a resolution to deactivate, effective July 1, 1974, its Cleveland and Sherman Elementary Schools, which are two of its eight neighborhood elementary schools. Each of the two schools exceeds 55 years of age. Attendant upon the deactivation, the Board planned to relocate pupils enrolled in grades K-5, who would have attended these schools, to five of its other elementary schools. The Board also plans to relocate the two sixth-grade classes from Sherman and Cleveland Schools as well as nine other sixth-grade classes from four of its other six elementary schools to its two junior high schools. Thus, the Board would maintain five sixth-grade classes at only two of its remaining six elementary schools. The reorganized Board, on April 16, 1974, voted 7-2 to reaffirm the decision formerly made on December 18, 1973, *ante*.

In anticipation of a determination to close the two schools the Board, in

June 1973, announced in its newsletter a first step to phase out the Cleveland and Sherman Schools by partially redistricting 302 pupils, nearly fifty percent of the former enrollment of the Cleveland and Sherman Schools. These pupils thereafter attended other nearby elementary schools. (P-15; Tr. I-164)

Accompanying the Petition herein dated January 24, 1974, was a request for a summary proceeding for injunctive restraint to prevent the Board from proceeding with its annual school election scheduled for February 13, 1974. Relief was sought on the grounds that the budget proposed by the Board presumed the closing of the Cleveland and Sherman Schools and was thus inadequate in its provisions to maintain the two schools in the event of an order by the Commissioner that they remain open. The restraint was denied on the ground that there was no showing that irreparable harm would result from the Board's proposed plan. *N.J.S.A. 18A:14-3 et seq.* provides that a special election to raise additional revenues may be held by the Board at a time following the determination of the merits of the Petition and a decision by the Commissioner.

A further motion for Injunctive Restraint was denied in an Order of the Commissioner dated June 14, 1974. Petitioners therein sought to restrain the Board from increasing its staff of elementary principals from four to six, an inherent part of the Board's plan to reduce the number of its elementary schools from eight to six. The restraint was denied on the showing that the Board plans to add two elementary principals regardless of the Commissioner's ruling in the instant matter and absent a showing that the Board's proposed action would result in any irreparable harm to the educational system or the residents of Cranford.

The Board has experienced a decline in pupil enrollment in grades K-12 from 6,402 in 1969-70 to 5,907 in 1973-74. During the same period Cranford's K-6 elementary enrollment has declined by 480 pupils from 3,288 to 2,808. Thus it is shown that the decline in pupil enrollment is the result of fewer pupils entering the elementary schools of Cranford than was the case in previous years. This decline was indicated in the following chart of 1973-74 class enrollments as of February 28, 1974.

#### CHART I

K - 388	7 - 481
1 - 346	8 - 478
2 - 393	9 - 523
3 - 372	10 - 538
4 - 452	11 - 524
5 - 429	12 - 512
6 - 405	
Sp. Classes K-6 - 23 (R-21)	7-12 Sp. Classes - 43

The following chart sets forth the February 28, 1974 enrollment by schools, the functional capacity of existing buildings, and the proposed

enrollment as set forth in the Board's redistricting plan which includes the closing of Sherman and Cleveland Elementary Schools.

# CHART II

	Functional Capacity	Actual Enrollment 2/28/74	Proposed Reorganized Enrollment 9/1/74*
Bloomington Ele.	325	305	279
Roosevelt Ele.	500	479	421
Brookside Ele.	550	506	519
Livingston Ele.	450	381	383
Walnut Ele.	375	348	329
Lincoln Ele.	<u>525</u>	<u>454</u>	<u>453</u>
Subtotals "A"	(2,725)	(2,473)	(2,384)
Cleveland Ele.	450	149	-0-
Sherman Ele.	<u>449</u>	<u>186</u>	<u>-0-</u>
Subtotals "B"	(899)	(335)	-0-
Hillside Jr. High	913	720	766
Orange Jr. High	<u>913</u>	<u>783</u>	<u>888</u>
Subtotals "C"	(1,826)	(1,503)	(1,654)
Cranford High	<u>1,650</u>	<u>1,596</u>	<u>1,607</u>
TOTALS K-12	6,201	5,907	5,645

\* Using Kindergarten enrollment as of 4/5/74 which may be expected to increase

During June 23, 1970, a referendum which proposed a \$4,000,000 bond issue to expand the Cranford High School was approved by the voters. News releases of the Board at that time showed that its intention was to convert from a K-6-4-2 plan to a K-6-3-3 plan of organization. This plan was implemented in September 1973 with the relocation of the tenth grades from the two junior high schools to the high school. (P-7)

During October 3, 1972, a referendum which proposed the addition of eight classrooms at each of two elementary schools was defeated by the voters. In connection with this referendum, the Board has plans to close the Cleveland and Sherman Elementary Schools and redistrict the eight neighborhood elementary attendance areas into six. (P-3; Tr. I-106, 110)

At the annual election on the school budget held February 13, 1974, the voters approved the current expense portion of the budget but defeated the capital outlay portion of \$70,000, of which \$60,000 was designated for the demolition of the Sherman Elementary School. The Township Committee, however, certified the entire \$70,000 for capital outlay to the County Board of Taxation.

Petitioners' charges are herewith set forth succinctly with the Board's responses thereto and accompanied by the respective findings of the hearing examiner:

*CHARGE NO. 1*

The Board abused its discretionary powers in an arbitrary and capricious manner and showed bad faith in the adoption of the December 18, 1973 and April 16, 1974 resolutions to close the Cleveland and Sherman Elementary Schools, without due regard to community sentiment, thus threatening irreparable harm to the Cranford educational system and overcrowding certain educational programs.

Petitioners allege that the Board's plan to transfer eleven of its sixth-grade classes to the two junior high schools is contrary to the Board's previously announced plan to establish a K-6-3-3 system of education as set forth in connection with the referendum approved by the voters June 23, 1970. This referendum provided over 100,000 square feet of additional space at Cranford High School at a cost in excess of \$4,000,000 and enabled the Board to transfer the tenth grades to the high school in September 1973. Petitioners assert that this policy change by the Board to now incorporate sixth-grade classes in the junior high schools, thus creating four-year junior high schools, is capricious, demonstrates evidence of bad faith on the part of the Board, and is unresponsive to the electorate it represents.

Additionally, petitioners maintain that the defeat of the October 3, 1972 referendum, which called for the abandonment of the Cleveland and Sherman Elementary Schools and construction of additions to two other elementary schools (P-3), was a voter mandate requiring the Board to retain the two schools (Tr. I-118) and to maintain the neighborhood elementary school concept. (Tr. I-150) Petitioners assert that the Board is now ignoring the expressed wishes of the voters.

The hearing examiner finds that the Board did indeed inform the public with respect to the two referenda as petitioners allege. He leaves to the Commissioner the determination whether the present Board is bound by the voters' expressions in the referenda, *ante*, to maintain a K-6-3-3 educational housing pattern or to continue to operate all eight of its elementary schools.

Petitioners further allege that the Board's plan to close the two schools would both continue and accentuate present conditions of overcrowding in the elementary schools. Such concerns are embodied in the statement by a present member of the Board who, after a tour of the Cranford schools on December 18, 1973, expressed her opinion to the Board as follows:

“\*\*\* I was impressed with \*\*\* the ingenuity of those people in the buildings to make use of every available nook and cranny. For that is exactly what they have to do. *Improvise*. While classrooms are seemingly comfortable, additional space for special services is not.\*\*\*

“Another area of concern to me is the supplemental instruction. \*\*\* Some of these accommodations, (sic) I view personally, as very undesirable places for instruction. Namely, storage closets and book rooms that are cold and poorly lighted. Not a very likely place for a handicapped child to learn.

“Corridors are also used by volunteer tutors, and while this could be very beneficial to the student, it may also brand that child as deficient to any one passing by \*\*\*.” (P-18)

The Board, however, asserts that the implementation of its proposed plan would render the remaining six elementary schools less populous than they were during 1973-74, and still have the junior high schools substantially below their functional capacity as shown in Chart II, *ante*.

The hearing examiner, after a thorough review of the testimony and documentation herein, finds that the Board has scrupulously adhered to its guidelines for class size in its elementary grades. In no instance did the Board allow a class to exceed the established maximum range (P-31) for its given grade level during the 1973-74 academic year. (Tr. III-165) Of 100 regular classes from grades one through six, sixty-seven were within or below the Board's adopted desired range and twenty-two were above the desired ranges of class enrollment. (Tr. III-165) Analysis of the Board's projected enrollments leads to a conclusion that substantially the same size classes will be maintained if the Board's plan is implemented for the 1974-75 academic year. (Tr. III-160; P-30) While the April 1973 kindergarten enrollment totals will probably increase substantially, there is ample provision in numbers of classes for such an eventuality.

The hearing examiner also finds that provisions made by the Board were substantially less adequate for special services instruction than for regular academic class instruction during the 1973-74 academic year. The use of a single facility for simultaneous instrumental music and physical education instruction (P-20) (Tr. III-6); the use of inadequately heated and ventilated book rooms and storage rooms for supplemental instruction (Tr. I-187, 205; Tr. II-187; P-28); the use of a cart to transport art supplies to classrooms in certain buildings (P-25); the use of corridors for volunteer tutoring; all testify to crowded conditions with respect to certain of the schools' accommodations for special services instruction. This conclusion is based on the testimony of several teachers of art, music, speech, and supplemental education. (Tr. II-163, 170, 187, 198)

Although these less than optimum conditions exist, they are not uniform throughout the Cranford Elementary Schools. Nor is there reason to believe that these conditions would worsen if the Board's plan were implemented during 1974-75. The proposed transfer of 280 sixth-grade pupils to the junior high schools (P-30) would offset the transfer of 292 pupils from Cleveland and Sherman Schools to the remaining six elementary schools. (R-21) (R-22) The resultant enrollments at the remaining six schools would not be substantially altered. (Chart II) While the Board's tentative chart of organization purports to show that a limited number of rooms would remain free for special instruction, the hearing examiner does not find that provisions for supplemental instruction,



tutoring or special services would be either substantially improved or altered for the 1974-75 academic year by the adoption of the Board's plan. Nor does he find that housing provisions for regular classes would be substantially altered. He does find, however, that the pupils from the Sherman and Cleveland Schools would be housed in renovated and more modern buildings equipped with mechanical means of ventilation and other appurtenances found in newer schoolhouses.

Petitioners also charge that certain statements made by members of the Board are evidence of bad faith and abuse of discretion on the part of the Board. A member of the Board testified with regard to such statements attributed to the 1972-73 President of the Board as follows:

“\*\*\* [He] said that if a referendum for portables does not pass, \*\*\* we could close the two schools and jam the kids in. Because no expenditures will ever pass so long as those buildings are open.

“And, I was shocked at him saying that because it was a public meeting. And here he is suggesting that we close the buildings and jam the kids in.

“And, I said, ‘Well, that sounds like blackmail.’ And, he said, ‘Yes. \*\*\* Our responsibility is to the children, not to the voters.’\*\*\*” (Tr. I-167)

Other testimony with regard to the alleged statement (Tr. III-12, 121) including testimony of the then Board President himself (Tr. III-125) establishes the fact that this statement was indeed made. However, the statement must likewise be considered in terms of the setting within which it was made. The occasion was a public work session of the Board on July 31, 1973, attended at that time by only three Board members and numerous members of the public. It has been the Board's practice to hold the greater number of its work sessions open to the public and at various times, as in this instance, they have been well attended.

The hearing examiner observes that the purpose of such work sessions is to set forth the numerous conflicting opinions of members of the Board in the interests of formulating considered judgments which may thereafter be translated at regular meetings into official acts of the Board.

The hearing examiner leaves to the Commissioner the determination whether such statements as set forth above by individual officers or members of the Board during discussions at work sessions, most of which were open to the public (Tr. III-75, 101, 134, 152), may be considered as evidence of bad faith on the part of the Board per se. In this regard the Commissioner has previously spoken in *S.J. Marcewicz et al. v. Board of Education of the Pascack Valley Regional High School District, Bergen County*, 1972 S.L.D. 619, 625.

The hearing examiner finds no evidence of official news releases or statements issued by the Board that are proof of a desire to deceive or mislead the public. While it is true that the statements released prior to the unsuccessful

referendum of October 3, 1972, are at variance with certain of the Board's statements thereafter, it appears that the Board was adjusting to what has now become a *bona fide* enrollment decrease of considerable proportions. The Board was faced with a defeated referendum which required adjustments in the Board's plans. In the interim the Board has gravitated to its present position that it will close two of the elementary schools and that no additional buildings or additions are necessary. The Board's position was supported by the Superintendent in his testimony as follows:

\*\*\*\* Q. Based upon the present enrollment and the fact that the enrollment has been declining steadily for five years, and the capacity of the six elementary schools, the two junior high schools, and the senior high school, in your opinion, are any additional facilities going to be necessary unless there is a drastic change in the enrollment pattern?

"A. I can't foresee any. \*\*\*" (Tr. IV-72)

From a careful examination of the testimony and the exhibits herein, the hearing examiner finds that in its official acts and releases the Board did not show bad faith or act in a capricious or arbitrary manner with intention to overcrowd and thus do harm to the education process. It is shown that the Board held most of its work sessions open to the public and set forth its positions in newsletters and other releases. It is evident that the Board was faced with both well-polarized support (Tr. IV-77) and opposition regarding the proposed closing of the two schools. (Tr. II-127)

In arriving at a course of action the Board was faced with the concerns presented in the following testimony by one of its teachers:

\*\*\*\* Q. I know it's nice to have a large room in a school that's half empty, but as a taxpayer do you think it's a good idea to maintain?

"A. No, I don't. \*\*\*

"A. If the school were being maintained strictly for my convenience I would say no. \*\*\*\*" (Tr. II-202)

The hearing examiner finds that the Board twice voted to close the two schools in the interest of economy and better housing for its elementary pupils and with no intent to deceive or pressure the public into voting for any subsequent referendum for additional housing within the near future.

In recognition of these findings and those considerations herein reserved for the determination of the Commissioner, the hearing examiner leaves to the Commissioner the determination whether, with respect to Charge No. 1, the Board acted capriciously or in bad faith by voting to close its Cleveland and Sherman Elementary Schools.

#### CHARGE NO. 2

The Board's proposed assignment of sixth-grade pupils, dividing them as a

class between junior high schools and elementary schools, is discriminatory against such pupils and will have an adverse effect upon them.

Petitioners charge that the shift of eleven sixth-grade classes to the junior high schools will subject those pupils to certain disadvantages; namely, irreparable harm to the education program for the sixth grade (Petition of Appeal, at p. 2); inordinate numbers of transfer requests from sixth-grade teachers (Tr. IV-125); association with more aggressive, older pupils enrolled in grades seven through nine (Tr. II-85, 153); hazards of negotiating the Blake Avenue Footbridge and other footbridges of the sometimes-flooded Rahway River and the tunnel beneath the railroad tracks near the Hillside Avenue Junior High School. (P-43; Tr. III-16, 193)

The Board, however, asserts that the housing of eleven of its sixteen sixth-grade classes in the two junior high schools will result in no change of educational program for those pupils. (Tr. IV-13) The Supervisor of Elementary Education testified that a sixth-grade housing committee consisting of parents, teachers, board members, P.T.A. presidents, and administrators (R-4) in a number of meetings of subcommittees, and the committee of the whole, had studied the effects of such transfer which resulted in a positive endorsement of the proposed housing plan. (Tr. IV-12) He further testified that the Administrative Council had reached a similar unanimous conclusion.

The Superintendent testified with regard to the proposed housing of sixth graders:

“\*\*\* There have been six rooms and a kind of office-prep storage room combination in each of the junior high schools that have been reserved for housing the elementary classes in one building, and five in the other building. With access to the library at certain times during the day, and the auditorium at certain times, and the gymnasium and outdoors. But the basic self-contained structure will be similar to that which the youngsters had before the transfer, and those rooms have been reserved.

“Q. Will their program be supervised by the junior high school principal  
\*\*\*

“A. Supervised by elementary school principal.

“Q. At the present time, how many principals do we have for the eight elementary buildings?

“A. We have four. \*\*\*

“Q. And, what is the intention in September?

“A. That we'll have six elementary principals for six elementary buildings, plus the five classes in one of the junior highs, and the six classes in the other. \*\*\*” (Tr. IV-23-24)

With regard to the proposed program of study for sixth-grade pupils at the junior high schools the assistant superintendent testified:

“\*\*\* [W]e’re going to have sixth grade classrooms in a self-contained situation as the teachers are working today in Cranford. \*\*\* [T]here will be no changes in the educational program as we know it \*\*\* be it taught at the elementary school \*\*\* or in a self-contained classroom in the junior high school \*\*\*.” (Tr. III-210-211)

The assistant superintendent further corroborated the involvement of volunteer lay and professional persons in study committees regarding the proposed sixth-grade housing program (Tr. III-209) and the administrative and supervisory plans for the transfer. (Tr. III-178)

The hearing examiner concludes from the testimony and documentary evidence that there will be no adverse effect upon the educational opportunities or program available to those sixth-grade pupils the Board intends to transfer to the junior high schools. The specialized facilities are at least equal to those available in the elementary buildings. There is no convincing evidence that the program of sixth-grade studies will be altered.

While the requests for assignment transfers by eight of the present sixteen sixth-grade teachers is high (Tr. II-48), the testimony by certain of those teachers is indicative of their desire to remain in elementary buildings to which they have become accustomed, and in programs of which they are familiar with all details, and in at least one case to avoid being locked into a single grade level of teaching. (Tr. III-178, 179, 181, 183) Any apprehension on the part of teachers regarding program changes appears groundless in the light of convincing testimony to the contrary.

The hearing examiner finds that the junior high schools contain adequate space for the grade levels and classes which the Board proposes to house therein. A straight-line projection of numbers shows that Orange Avenue Junior High with about 808 pupils and Hillside Avenue Junior with about 846 pupils would have enrollments in September 1974, considerably less than their functional capacities of 915 pupils each. (Tr. II-46) Additionally, the testimony of the president of the Cranford Education Association was that the plan presented no threat of crowding *per se* at the junior high schools. (Tr. II-131, 144)

The hearing examiner recognizes that the problems of adjustment for the sixth-grade pupils may conceivably increase with a spread of four grades in a single building, from grades six to nine. However, such problems are no greater than those of second graders in the presence of sixth graders, albeit with a difference of maturation level and concentration of numbers. The conflicting testimony herein does not lead to a conclusion that this is an unworkable grouping in Cranford or fraught with problems that cannot be resolved.

The problem posed by pupil use of the Hillside Avenue tunnel appears to be adequately discounted by the municipal provision of a uniformed guard on

duty five hours daily. (R-37) Similarly, the provisions made by both school and municipal officials for the safety of pupils negotiating the footbridges in times of floodwaters appear to be adequate. In any event, pupils enrolled in grades seven through nine have been and will be required to negotiate these crossings. The Board's proposal would merely require that sixth-grade pupils would use these footbridges a year earlier.

With regard to the charge that the Board's plan would be divisive of the sixth-grade class, the hearing examiner finds that the class would be housed in four buildings whereas it is now housed in six buildings. This result does not support a conclusion that divisiveness would result from the Board's plan.

In accordance with the expressed findings, the hearing examiner recommends that the Commissioner find that Charge No. 2 is not supported by the evidence herein.

### *CHARGE NO. 3*

The Board has not supported its abandonment program with accurate, verified estimates for the rehabilitation of the Cleveland and Sherman Schools and has thereby failed to show good faith. Additionally, it has pursued a policy of planned obsolescence for these schools.

In support of the above charge, petitioners set forth the estimates of Mr. Vincent Vicci wherein he stated that the Sherman and Cleveland Schools could be renovated for less than \$125,000 (Tr. II-78) as compared to the Board architect's estimate of \$928,430 for renovation for a five-year period, or \$1,565,130 for renovation for a twenty-five year period. (R-19)

Testimony established that Mr. Vicci is a builder with twenty years of experience who resides in Cranford. He testified that he has never been pre-qualified to bid on school building construction, but stated that in his professional opinion the Sherman and Cleveland Schools are structurally sound and that with moderate expenditures they could continue to serve as functional schools. (Tr. II-64-79)

The Board contends that Mr. Vicci was not familiar with the requirements of the State Board of Education for school building construction and renovation, and that the Board properly relied upon the estimate of its architect who is informed and experienced in regard to school building construction in the State of New Jersey and in Cranford (Tr. IV-140-141)

The hearing examiner, after a careful review of the testimony and documentary evidence, concludes that the Board did properly rely upon its architect who sought in his estimates to at least partially comply with the regulations set forth in the State Board of Education's publication *Guide for Schoolhouse Planning and Construction* wherein it is recommended that the older portions of school buildings shall be made to conform to the *Guide* as far as practicable. (Tr. III-90)

Additionally, the hearing examiner observes that, in Mr. Vicci's opinion, much of the work included in the Board architect's estimates was unnecessary to make the two schools safe and functional. (Tr. II-112) Such major items, included, *inter alia*, in the architect's estimates but not in those of Mr. Vicci, were complete new wiring with electrical panels, circuit breakers and fixtures in both schools, replacement of boilers, all wooden windows, and roofs, initial installation of mechanical ventilation in all classrooms, which provision is currently non-existent (Tr. II-98), and installation of new lavatory facilities on certain floors. (Tr. II-115-116) This discrepancy accounts for the wide variation in the two estimates, *ante*.

Petitioners also charge that the Board misrepresented to the public its estimates for conversion of the heating system in the Cleveland School from coal to oil as being \$85,000 (Tr. I-95), when in fact the work was completed at a cost of only \$20,000.

The Board maintains its published figures were based on a total replacement of boilers as well as purchase of oil burners and controls and that these were the basis of the figures released prior to the unsuccessful referendum of October 1972. The Board maintains that it was thereafter required to effect the conversion within the limits of its annual budget provisions and merely installed the oil burners and certain controls, withal complying with the requirements of the Environmental Protection Agency.

The hearing examiner finds no evidence in this instance of any attempt by the Board to deceive the public. The Board relied upon an estimate by its consulting engineers for a complete heating system replacement. (P-6) Thereafter, following the defeated referendum, the Board's decision to perform a partial replacement was made within its discretionary power. *N.J.S.A.* 18A:11-1

The hearing examiner further finds that the Board, in its decision to abandon the two schools, considered the report submitted on January 2, 1972, by a subcommittee of its volunteer twenty-six member lay Long Range Building Committee. (Tr. III-111; Tr. II-92) This report recommended that the Sherman School be considered "\*\*\*\* obsolete, inadequate and not suitable for future retention.\*\*\*\*" (R-18) This subcommittee estimated the renovation cost for the Sherman School at \$750,000. (Tr. III-62)

The Board also considered a report formulated by the Cranford Education Association at an elementary housing workshop during April 1972, which stated, *inter alia*:

"Sherman and Cleveland Schools have been allowed to deteriorate to a deplorable condition. Since it does not seem feasible to modernize these buildings, they should be closed at the end of this school year. \*\*\*\*" (Tr. II-136)

Petitioners further allege that the Board pursued a policy of planned

obsolescence for the Cleveland and Sherman Schools (Tr. I-73), which charge the Board denies.

The hearing examiner observes that within the Board's contracted services account from July 1, 1971 through December 31, 1973, there were expenditures totaling \$24,159.89 for the Cleveland School and \$4,120.12 for the Sherman School, an average expenditure per school of \$14,139.50. During the same period a lesser average of \$5,043.41 in contracted services was expended on each of the six other elementary schools. (P-5) No reliable figures were placed in evidence regarding day to day maintenance expenditures.

While it is apparent that certain facilities at the Board's older Cleveland and Sherman Schools have been allowed to deteriorate over a period of many years (R-3, 4, 6, 7), the above findings do not lead the hearing examiner to conclude that the Board has within the past three years pursued a policy of planned obsolescence or gross neglect, resulting in hazardous conditions. Nor does the hearing examiner find that the Board sought to mislead the public with its official published statements regarding the costs of renovation of the Cleveland and Sherman Schools.

The hearing examiner finds that the Board complied with the recommendations made by the County Superintendent of Schools in his safety and health inspections. Also, the Environmental Protection Agency's requirement of conversion from coal to oil furnaces at the Cleveland School was completed. Additionally, fire doors have been installed within the past two years at the Cleveland School at considerable cost to the Board.

In consideration of the above findings, and absent a finding of obvious intention on the part of the Board to deceive the public, the hearing examiner recommends that the Commissioner dismiss Charge No. 3.

#### *CHARGE NO. 4*

The Board has failed to develop a long-range program of education, which should precede a decision to abandon two of its neighborhood elementary schools.

Petitioners allege that the Board's decision to close two elementary schools is untimely in that there exists no well-formulated, long-range educational plan. This allegation is typified by the testimony of one present member of the Board as follows:

“\*\*\* I would say from the educational standpoint the plan should be completely settled \*\*\* before we go into moving the students around, and I also think we should give ourselves three to five years' time to see whether our student population will really decrease, particularly in these neighborhoods of Cleveland and Sherman, because these are the lower cost homes into which young parents with young children can buy into the town, and it is my opinion that \*\*\* our student population is not necessarily going to decrease. \*\*\*” (Tr. II-157)



“\*\*\* I feel that this particular stop-gap measure, because of the fact that we do have the spaces available and that they could be made serviceable for the next few years with the minority amount of monies, that this is a premature move at this point. \*\*\*” (Tr. II-154)

Petitioners further cite the Superintendent’s report to the Board as recorded in the minutes of the Board’s open work session of October 2, 1973, as evidence of the absence of a long-range plan:

“\*\*\* These have been offered only as a temporary solution and also remember this is elementary housing — not elementary education. We should be able to get an input within two years, present it to the Board and decide then what the future of the students will be. \*\*\*” (P-16, at p. 5)

Additionally, petitioners argue that the Board’s decision to close two elementary schools is most untimely in the light of the yet unknown ramifications of *Robinson v. Cahill*, 118 N.J. Super. 223, (Law Div. 1972), 119 N.J. Super. 40 (1973), and the uncompleted current studies to determine what is meant by a “thorough and efficient” system of education. (Tr. IV-122)

The Board does not deny that a long-range plan of education for Cranford does not now exist. However, the Superintendent testified that he could not envision the use of the Cleveland and Sherman Schools, considering their age and lack of facilities as part of any long-range plan. (Tr. III-30)

Nor does the Board deny that current studies concerning the constitutional phrase, “thorough and efficient” may well result in certain changes. (Tr. IV-55) The Board, however, denies that these considerations preclude the closing of the two schools at this point in time.

The hearing examiner finds that no long-range plan or program of educational housing or curricular development does now exist in Cranford, but that the Board, late in 1973, embarked upon a well-defined program to establish such goals, and that those studies will and do involve:

“\*\*\* members of the Community, Staff, Administration and Board and concerned citizens, students as well. It could not be implemented or defined for at least a two year period \*\*\*. It was, therefore, given to [the Superintendent] to provide an interim position to solve the housing problem, while the long range goals are being addressed \*\*\*.” (P-17, at p. 2; Tr. IV-68; Tr. I-173)

The hearing examiner leaves to the Commissioner the determination whether the finding that a long-range plan of education does not exist, or the presence of current uncertainties with respect to State financing of education, or the implications of yet uncompleted studies regarding “thorough and efficient” education, taken separately or in conjunction with other findings herein, shall preclude the Board from closing its Cleveland and Sherman Schools.

*CHARGE NO. 5*

The Board failed to properly work its capital expenditure proposals to include the need for capital outlay, the resulting commitment of the Board to the voters' response, and the details of the education plan which prompted the proposals.

The referendum held June 23, 1970, which was approved by the voters of the district contained the following proposal:

"The Board of Education of the Township of Cranford, in the County of Union, is authorized to undertake the following capital project for lawful school purposes: -

"The construction of an addition to the High School situate in the school district on West End Place, the purchase of school furniture and other equipment necessary for such addition and the making of the alterations to the existing building necessary for its use with such addition; and the further reconstruction, rehabilitation and improvement of said school by the construction of new interior walls and by the installation of electrical, plumbing, heating and ventilating systems, including all necessary and incidental work in connection with such reconstruction, rehabilitation and improvement; and to issue bonds of the school district for said purposes in the principal amount of \$6,263,000.00, thus using \$4,454,574.23 of the \$6,706,047.55 borrowing margin of the said Township of Cranford previously available for other improvements.\*\*\*" (P-8)

The referendum held October 3, 1972, which was defeated by the voters contained the following public proposal:

"The Board of Education of the Township of Cranford, in the County of Union, is authorized to undertake the following capital project for lawful school purposes: (a) The construction of (I) an addition to the Bloomingdale Avenue School located in the school district on Bloomingdale Avenue, and (II) an addition to the Walnut Avenue School located in the school district on Walnut Avenue, the purchase of school furniture and other equipment necessary for such additions and the making of the alterations to the existing buildings necessary for their use with such additions, and the expenditure therefore (sic) of not exceeding \$1,059,500.00; and (b) to issue bonds of the school district for said purposes in the principal amount of \$1,059,500.00, thus using \$1,059,500.00 of the \$5,612,708.14 borrowing margin of the said Township of Cranford previously available for other improvements." (P-9)

The hearing examiner observes that no argument on points of law respective to this charge was presented at the hearing. Counsel mutually agreed to present such argument in the form of briefs subsequent to the hearing. It appears that no useful purpose may be served by a recital of these arguments in this report. Accordingly, the hearing examiner refers to the Commissioner the question of whether the wording of the referenda questions, *ante*, may have

bearing upon or be fully dispositive of the controversy which has arisen from the Board's resolution to close two of its elementary schools.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has carefully examined the entire record of the instant matter including the exceptions filed by counsel pursuant to *N.J.A.C. 6:24-1.16*. He makes the following determinations concerning each of the five charges *seriatim*.

With respect to Charge No. 1, the Commissioner determines that the Board is not bound by the results of the voting in the 1970 and 1972 referenda to maintain any designated educational housing pattern for a specific period of time. The Board announced in connection with the 1970 referendum that an affirmative vote would result in a K-6-3-3 housing pattern. This was effected in 1973. However, changing conditions, including a pronounced decline in elementary pupil enrollment, and a defeated referendum in 1972, have required the Board to reassess its prior decision. Such reassessment is legally proper (*N.J.S.A. 18A:11-1*) and does not require approval of the voters in a special referendum as suggested by petitioners in their exceptions.

The Commissioner further determines that a provocative statement or statements made by one or more Board members at a work session open to the public may not be considered as evidence of bad faith on the part of the Board. The very fact that the Board has opened its work sessions to the public is evidence of good faith. The expression of conflicting views by Board members is essential for the synthesis of opinion which ultimately is translated into official acts of the Board. A careful review of the record convinces the Commissioner that the Board was not attempting to grossly overcrowd the elementary schools in order to force the public to vote in favor of forthcoming school building referenda. The Commissioner accepts the additional findings of the hearing examiner with respect to Charge No. 1, and determines that the Board did not act in an arbitrary or capricious manner or issue news releases that were indicative of bad faith. Charge No. 1 is hereby dismissed.

The Commissioner accepts and holds for his own the findings of the hearing examiner with respect to Charge No. 2. These findings are that the Board's proposed housing plan for sixth graders would neither be divisive of the class nor have an adverse effect upon the educational opportunities available to those pupils. Additionally, the Commissioner finds that the plan would not expose the pupils to unreasonable travel hazards. Charge No. 2 is therefore dismissed.

The Commissioner finds no evidence with respect to Charge No. 3, of an attempt on the part of the Board to deceive the public by publishing misleading or unsubstantiated estimates of rehabilitation costs for the two schoolhouses. The Board relied upon its architect's estimates and published these estimates in understandable form. They were substantiated by the estimates of the Board's

twenty-six member volunteer Long Range Building Committee. Charge No. 3 is accordingly dismissed.

The hearing examiner has found with respect to Charge No. 4, that a long-range educational program, although in the process of formulation, does not now exist in Cranford. While it is unfortunate that such a plan is not available to the Board, the Commissioner observes that the Board is nevertheless required to make many judgments and effect action on matters including curricular offerings, staffing and educational housing patterns as herein controverted. The Board must take affirmative action as these problems arise, even though there are uncertainties at this time concerning future methods of financing public education as the result of *Robinson v. Cahill, supra*, and the outcome of the current studies to define a "thorough and efficient" education. Neither the Legislature nor the courts have seen fit to place a moratorium on those powers and duties conferred upon local boards.

*N.J.S.A.* 18A:10-1 states that:

"The schools of each school district shall be conducted, by and under the supervision of a board of education, which shall be a corporate body.\*\*\*."

Additionally, *N.J.S.A.* 18A:11-1 confers upon a local school board the general *mandatory powers and duties* to:

"\*\*\* c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district\*\*\*; and

"d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

The Legislature has specifically granted these broad discretionary powers to local boards of education. Absent a clear showing of bad faith or arbitrary, capricious, or improper action on the part of the Board, the Commissioner will not substitute his judgment in this instance for that which is clearly required of the Board by the above-cited statutes. Charge No. 4 is therefore dismissed.

Petitioners argue, with respect to Charge No. 5, that the wording of the referenda held June 23, 1970, and October 3, 1972, were defective in that the proposals did not specify within their purpose clauses the changes in the educational program which would result if the referenda were approved by the voters of the district. (Petitioners' Supplemental Brief, at p. 3)

The Board contends that nothing in *N.J.S.A.* 18A:22-39 or *N.J.S.A.* 18A:24-12b requires that the resolution set forth either the need or the educational result of the proposal but that what is required is merely a statement with respect to the nature of the capital project and the amount to be raised for that purpose. (Respondent's Brief in Reply to Petitioners' Supplemental Brief, unp)

The Commissioner agrees with the Board's position concerning the required wording of the resolutions. It is a well-accepted principle of law that statutes shall be given their ordinary meaning. *Belfer v. Borrella*, 6 N.J. Super. 557 (Law Div. 19). Nor will the Commissioner in this instance seek to enlarge upon those requirements which the Legislature in its wisdom has seen fit to provide in the statutes. It is also clear from the record that the Board made known its intentions regarding each referendum through news releases. It is a requirement that a public hearing be held on each referendum in order that members of the public may seek the answers to such questions as may arise. The public hearings were held as required for each of the referenda.

The Commissioner finds no evidence of improper, illegal, or misleading language in the controverted resolutions, nor does he find otherwise defective by omission the resolutions which appeared on the June 23, 1970 and the October 3, 1973 referenda ballots. In accord with this determination the Commissioner dismisses Charge No. 5.

Having dismissed the five charges, the Commissioner makes the following observations:

The record herein is replete with evidence that the Board is aware of the problems which might arise as the result of its decision to close the two public schools. It has openly exposed itself to the forum of public opinion described by Justice Weintraub in *Board of Education of the Borough of Union Beach v. New Jersey Education Association et al.*, 53 N.J. 29 (1964), at page 40:

“\*\*\* Individuals, severally or in association, of course have the right to denounce a public body, its officers, and its programs, in the most searing terms, and even with a wide margin of error. \*\*\* It is the right of the individual and it serves equally the collective interest of society, thus to bring government before the bar of public opinion, thereby to alter its course.\*\*\*”

A board of education's discretionary authority is not without limit. It may not act in an arbitrary, unreasonable, capricious, or otherwise improper manner. In the instant matter, the Commissioner finds no convincing evidence that the Board has acted improperly in resolving to close the two schools.

In *Boult and Harris v. Board of Education of the City 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), the Commissioner said:

“\*\*\* it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.\*\*\*” (at p. 13)

Therefore, in accordance with this often-enunciated principle of law and absent a finding of improper action by the Board in the instant matter, the Commissioner dismisses the Petition and declares that the Board, within the bounds of its own discretion, is free to implement its resolution to close the Sherman and Cleveland Elementary Schools.

COMMISSIONER OF EDUCATION

August 30, 1974

Pending before State Board of Education

**Board of Education of the Township of Washington in the  
County of Gloucester,**

*Petitioner,*

*vs.*

**The Township Committee of the Township of Washington in the  
County of Gloucester,**

*Respondents.*

**CONSENT ORDER**

This matter having been brought before the Commissioner on the joint application of the Board of Education of the Township of Washington by William D. Hogan, Esquire, Solicitor, and the Township Committee of the Township of Washington by John T. McNeill, Esquire, Solicitor; and

IT APPEARING that the parties have reached agreement concerning the amount to be raised for the school year 1974-75 from local taxation for current expense purposes and for capital outlay purposes; and the parties having consented hereto;

IT IS HEREBY DETERMINED that the sum of \$30,000.00 must be added to the amount previously certified by the Washington Township Committee to be raised for the current expenses of the Washington Township School District for the school year 1974-75 in order to provide sufficient funds to maintain a thorough and efficient school system. It is further determined that no additional amount must be added to the amount previously certified for necessary capital outlay expenditures;

IT IS ORDERED on this 6th day of September, 1974 that the total to be raised from local taxation for the school year 1974-75 for current expense shall be \$4,077,867.00; that the total amount from local taxation for capital outlay shall be \$36,480.00, for a local tax levy for current expense and capital outlay for the 1974-75 school year of \$4,114,347.00

COMMISSIONER OF EDUCATION



**Elizabeth Boeshore,**

*Petitioner,*

*v.*

**Board of Education of the Township of North Bergen, Hudson County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Victor P. Mullica, Esq. (Richard J. Plaza, Esq., of Counsel)

For the Respondent, Joseph V. Cullum, Esq.

Petitioner alleges that she has acquired a tenure status in her position as Assistant to the Superintendent of Schools, and that the Board of Education of the School District of the Township of North Bergen, hereinafter "Board," improperly and illegally terminated her employment by adopting certain resolutions dated June 13 and June 18, 1973 in violation of her statutory and constitutional rights.

The Board denies that petitioner has acquired a tenure status as an Assistant to the Superintendent or that its termination of her employment was violative of her statutory or constitutional rights. The Board asserts that petitioner is estopped by laches and that the Petition of Appeal should be dismissed.

Hearings in this matter were held on October 30, November 5, November 19, and November 29, 1973 in the office of the Hudson County Superintendent of Schools, Jersey City, and on January 21, 1974 in the office of the Union County Superintendent of Schools, Westfield, before a hearing examiner appointed by the Commissioner of Education. Thereafter, counsel filed memoranda of law supporting their respective positions. The report of the hearing examiner follows:

Petitioner was initially employed by the Board on December 29, 1959, as Director of Guidance (J-1), began serving in that position on January 18, 1960, and continued in that position until July 12, 1962, approximately two and one-half years. Petitioner was issued a permanent guidance counselor's certificate on April 12, 1960. On July 12, 1962, petitioner was appointed as a vice-principal in the school system. (J-2) She served as vice-principal of the North Bergen High School (J-4) until her appointment on December 13, 1962, as Assistant to the Superintendent of Schools. (J-6) Petitioner served as Assistant to the Superintendent of Schools until August 9, 1972, a period of approximately ten years and eight months, when she was reassigned to act as principal of the McKinley School (J-7) without a reduction in salary. (P-7) The record shows that petitioner approached the Board President shortly after her



transfer to act as a principal, and requested that he "reconsider" the determination of the Board assigning her to McKinley School. (Tr. II-82-83) There was official reconsideration by the Board and petitioner served, according to Board resolution (J-7), "\*\*\*\*to act in the capacity of Principal of McKinley School\*\*\*\*" until June 30, 1973. (Exhibit B)

After the transfer there was an arbitration hearing between the Board and the North Bergen Federation of Teachers, hereinafter "Federation," on February 28, 1973, wherein the Federation charged that the Board had violated its collective negotiation agreement concerning its promotion policy and specifically the assignment of administrators. (P-7) When the Board failed to respond to the arbitrator's award (P-7), which petitioner accepted as favorable to her, she filed a Petition of Appeal with the Commissioner on May 18, 1973, more than nine months after her transfer (August 9, 1972), alleging that her transfer was a demotion, and that it was effected without her consent. The Board filed a timely Answer to the Petition of Appeal on June 7, 1973, and thereafter passed the following resolutions:

"RESOLVED by the North Bergen Board of Education that the position of Assistant to the Superintendent of Schools of North Bergen is hereby abolished, effective immediately.

"June 13, 1973"

(Exhibit A)

and,

"RESOLVED by the North Bergen Board of Education, that the services of Elizabeth A. Boeshore, as an employee in the North Bergen Public Schools, be and they are hereby terminated as of June 30, 1973.

"Dated: June 18, 1973"

(Exhibit B)

Petitioner then filed an amended Petition of Appeal on June 27, 1973, contesting her termination. No termination notice was given to petitioner.

The Board's defense of laches is based on its assertion that petitioner did not protest her August 9, 1972 transfer to act as principal of McKinley School until her Petition of Appeal was filed with the Commissioner more than nine months later.

In the hearing examiner's judgment, questions such as the ones raised herein, *e.g.*, tenure, assignment of staff, illegal and improper termination by a board, are controversies under the school laws and within the jurisdiction of the Commissioner pursuant to *N.J.S.A. 18A:6-10 et seq. Dunellen Board of Education and Commissioner of Education of New Jersey v. Dunellen Education Association and Public Employment Relations Commission*, 62 *N.J.* 188 (1973) The arbitrator recognized the limits of his own jurisdiction, in making his award (P-7) which stated, *inter alia*, that the Board had violated its promotion policy; however, he also stated: "\*\*\*\*It is not within my assignment to set aside the

August 9, 1972, Resolution of the Board of Education or to order reinstatement of individuals not in this Unit nor covered by this Agreement.\*\*\*” (P-7, at p. 7) Therefore, in terms of the timeliness of the initial appeal, respondent’s defense of laches would appear to have merit if the essential conditions of laches are met. Laches can be defined in part as follows:

“\*\*\* undue, unexcused, unreasonable delay in assertion of right\*\*\*.”

and,

“\*\*\* neglect which has operated to prejudice of defendant\*\*\*.”

(*Black’s Law Dictionary* 1016, rev. 4th ed. 1968)

In *Elowitch v. Bayonne Board of Education*, 1967 S.L.D. 78, affirmed State Board of Education 1967 S.L.D. 86, the State Board made the following statement in regard to laches:

“\*\*\* Implicit in the doctrine of laches is the inaction of a party with respect to a known right for an unreasonable period of time coupled with detriment to the opposing party. *Pomeroy, Equity Jurisprudence*, v. II, Sec. 419, p. 171-2; 27 *Am. Jur. 2nd*, Sec. 162, p. 701; *Atlantic City v. Civil Service Commission*, 3 N.J. Super. 57 (App. Div., 1949); *Park Ridge v. Salimone*, 36 N.J. Super. 485 (App. Div., 1955), aff’d 21 N.J. 28 (Sup. Ct., 1956)\*\*\*.” (at p. 88-89)

Respondent argues that petitioner had a “reasonable time” to take the proper steps to protect her interests. However, there is no showing that the delay in filing the initial Petition of Appeal with the Commissioner has worked to the “detriment” of the Board or the public interest.

The hearing examiner does not find “inexcusable delay” as asserted by respondent and recommends that respondent’s defense of laches be dismissed as without merit in the matter herein controverted. The record shows that the Amended Petition of Appeal was filed on June 27, 1973, shortly after the termination resolutions adopted by the Board on June 13 (Exhibit A) and June 18, 1973 (Exhibit B).

The salient issues to be determined are these:

1. Has petitioner acquired a tenure status?
2. If not, was her termination by the Board improper or illegal?

The Board asserts that petitioner lacks a tenure status for the following three reasons:

1. Petitioner did not serve in any category for the required time necessary to achieve a tenured status.

2. Tenure is not possible in the category "Assistant to the Superintendent."
3. Petitioner's position as Assistant to the Superintendent is more closely defined as clerical and secretarial in nature and is not an acknowledged administrative position.

Teaching staff members acquire a tenure status when they satisfy the precise conditions set forth in *N.J.S.A.* 18A:28-5, which reads in pertinent part as follows:

"The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses \*\*\* and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause \*\*\* after employment in such district or by such board for:

"(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

"(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

"(c) the equivalent of more than three academic years within a period of any four consecutive academic years\*\*\*."

*N.J.S.A.* 18A:28-6 provides that tenure may be acquired upon transfer or promotion after:

"\*\*\* (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

"(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

"(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years\*\*\*."

The record shows that petitioner did not serve in any position described in the statutes, *ante*, for the requisite period of time to obtain tenure in a specific

position. Nor does the State Board of Examiners issue a certificate for the position of Assistant to the Superintendent of Schools.

The record shows also that petitioner served in the school district of the Township of North Bergen for more than thirteen years, five months in a professional capacity as a "teaching staff member." (J-1, 2, 3, 4, 5, 6, 7, 9) The Board's assertion that her function was more clerical than administrative is not supported by the documents in evidence nor the testimony of the witnesses.

Emil Rolzhausen, a principal in the school district for 36 years, testified that petitioner was an Assistant to the Superintendent; that she attended administrative staff meetings; conducted administrative meetings; supervised nontenured teachers; evaluated nontenured teachers; and met with principals at the end of each school year to summarize these evaluations and make recommendations for transfers and tenure contracts. He testified also that all teacher problems going to the Superintendent of Schools went through petitioner; further, that she revised the kindergarten curriculum and recommended books and booklists for purchasing, and that she performed many of these duties for nine or ten years. (Tr. I-16-34)

Catherine Plenkovich testified that she is an administrative secretary and was assigned to work for petitioner. She testified that petitioner did no clerical work and, in her opinion, petitioner's duties were administrative. She testified further that petitioner assigned her duties, and that petitioner never did typewriting. (Tr. I-9-14)

The president of the Federation, a history teacher in the high school, testified that petitioner was an "Assistant Superintendent" and that she was unaware of any distinction between the title and "Assistant to the Superintendent." (Tr. II-10)

The duties of the "Assistant to the Superintendent of Schools" are enumerated as administrative duties in the Board's "Administrative Manual" as follows:

- "1. The Assistant to the Superintendent of Schools shall perform his duties under the direct supervision of the Superintendent of Schools.
- "2. The Assistant of the Superintendent of Schools shall have the responsibility for the certification of all certificated personnel in the school system.
- "3. He shall be responsible for keeping up-to-date and in proper form all personnel records of teaching and supervisory personnel.
- "4. He shall be responsible for the preparation of all reports for the County Superintendent of Schools and the State Department of Education.

“5. He shall be responsible for supervisory visits to the schools as assigned by the Superintendent of Schools.” (P-10, at p. 10)

Petitioner offered testimony to support her contention that she was indeed a school administrator and not a clerical employee. (Tr. II-27-36) She offered, as evidentiary, teacher evaluations she had made which were not admitted in evidence by the hearing examiner. The Board offered a Motion to Dismiss based on petitioner’s admission that she did not have Board permission to remove those records from the Board offices.

The hearing examiner finds no violation of the confidentiality of the teacher evaluation records. They were not admitted in evidence, although the Board asserts that her possession of these records shows “reprehensive conduct” which should bar any entitlement or claim that she be reinstated in her position. (Tr. II-3) Petitioner argues that she was attempting to show corroboration that her duties were not clerical.

The hearing examiner recommends that the Motion to Dismiss be denied as without merit in regard to the essential issues to be determined herein.

The hearing examiner finds that the duties and functions as enumerated in the testimony of the witnesses, *ante*, and the documents in evidence clearly established that petitioner was employed as an administrator and not as a clerical or secretarial employee. The Board offered no competent testimony or evidence to the contrary and the testimony of the witnesses is unrefuted. In fact, the Board concedes that she performed administrative duties. (Tr. I-42-43)

Additionally, her duties were clearly administrative according to the testimony of the Superintendent of Schools (Tr. III-54) and the Board resolutions appointing her to administrative positions of vice-principal, Assistant to the Superintendent, and principal. (J-2, 5, 6, 7) Her name is listed on the Board Resolution approving salaries for “Teaching and Administrative Employees.” (J-3; J-5)

The record is devoid of any proof whatever that would support the Board’s assertion that petitioner was a clerical employee. The hearing examiner finds in that assertion an attempt by the Board to rid itself of a tenured employee by devious means and are not in accord with the tenure statutes for reasons that are not stated nor apparent.

Requested and received from the State Board of Examiners is the following evidence of petitioner’s professional certification as a teaching staff member:

#### CERTIFICATES ISSUED

1. Elementary	(limited)	1933
	(permanent)	1936

2.	High School (limited) (English and Social Studies) (permanent)	1940 1944
3.	Psychologist and Guidance Endorsement (Equivalent to counselor's certificate currently issued)	1945
4.	Director of Guidance (limited) (permanent)	1956 1960
5.	High School Principal (limited) Secondary Principal (standard)	1964 1965
6.	General Supervisor of Instruction (standard)	1965
7.	School Administrator (standard)	1967

It is not refuted that petitioner holds these appropriate certificates issued by the State Board of Examiners, nor that she has served the requisite time in the school district pursuant to statute. She has tenure in the school district. Therefore, the answer to issue one as posed, *ante*, has been answered in the affirmative. The hearing examiner recommends, therefore, that the Commissioner set aside as *ultra vires* the Board's resolution. (Exhibit B) (It is noted also that she was given no notice of her termination.) The answer to issue two is, in part, that petitioner was not terminated pursuant to the Tenure Employees Hearing Law, *N.J.S.A. 18A:6-10 et seq.*

The remaining issues to be addressed, therefore, are these:

1. Are the Board resolutions terminating petitioner's employment proper and within its discretionary and statutory authority? (Exhibits A and B)
2. If so, has petitioner received her full protection and entitlement pursuant to the statutes enabling a Board to abolish a position? (*N.J.S.A. 18A:28-9 et seq.*)
3. If the Board's termination of petitioner is improper, to what position in its employ is she entitled?

Boards of education have the legal right to abolish positions when their action is taken in good faith. *N.J.S.A. 18A:28-9* provides:

"Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."



In *Deborah Shaner v. Board of Education of Gloucester City*, 1938 S.L.D. 542, affirmed State Board of Education 1938 S.L.D. 543 (1933), the Commissioner commented as follows:

“\*\*\* It is entirely within the discretion of a board of education whether a high school principal should have any administrative assistants. The efficiency of the high school without an assistant principal is not an issue in this case. Less efficiency at reduced cost is permissible in situations of this kind. It may be necessary to reduce the cost of school government in many districts and boards of education should be permitted to reorganize their school systems to secure more economical administration; but *good faith should be evident in all such instances.*\*\*\*” (*Emphasis supplied.*)  
(at p. 543)

The Commissioner stated in *Shaner, supra*, that, while boards have statutory discretion to abolish positions, those discretionary powers are not absolute; they are required to be exercised in “good faith” (e.g., for reasons of economy). See also *Charles R. Lauten v. Board of Education of Jersey City, Hudson County*, 1963 S.L.D. 119.

Petitioner was employed as a principal during the 1972-73 school year when the position of Assistant to the Superintendent was abolished. (J-7) The President of the Board testified that the position was abolished because the Board wanted to reorganize the administrative structure. This reorganization was being considered in 1972 (Tr. IV-96) and is still under consideration; however, no change in the administrative structure has been made. (Tr. IV-75, 96-97, 102) Petitioner’s termination was in “the best interest of the school system.” (Tr. I-54) (Tr. IV-96-97) When asked why petitioner could not have remained as principal of the McKinley School, the Board President replied: “\*\*\*Well, you know, looking retrospectively, *I have a feeling that she did not want to remain as principal of the McKinley School.*\*\*\*” (Tr. IV-102-103) (*Emphasis added.*)

The hearing examiner notes that there is nothing in the record that suggests that petitioner was ever asked whether or not she would like to remain as principal of the McKinley School, the position she filled for the 1972-73 school year, before her termination. (J-7)

The Board President testified that after petitioner’s transfer to the McKinley School, in August 1972, the high school principal “\*\*\*was assigned to perform administrative duties in the superintendent’s office.” (Tr. IV-74-75) His testimony is confusing in distinguishing the duties performed by the new assignee from those previously performed by petitioner. (Tr. IV-75-84) He testified that the new “Assistant” was to perform duties assigned by the Superintendent and the Board, and that his function would be to evaluate nontenured teachers. (Tr. IV-76-77)

The record shows that petitioner performed these duties also. The difference in their duties, according to the Board President, appears to be that the new Assistant would devote the majority of his time “\*\*\*working with



nontenured teachers\*\*\*,” whose number had increased (Tr. IV-79); whereas petitioner did not place her “\*\*\*emphasis on observation, conferences, [and] suggestions with non-tenured teachers.\*\*\*” (Tr. IV-80) Although the Board President has made this comparison, he testified that he had not evaluated petitioner in her position of Assistant to the Superintendent or as acting principal of McKinley School. (Tr. IV-82-83, 89) The hearing examiner concludes, therefore, that his analysis of petitioner’s work was not grounded properly on educational or economic considerations.

In the hearing examiner’s judgment, the element of good faith, which is held by the Commissioner to be essential in matters such as these, is absent when the sequence of events as reported herein is weighed against the testimony of the witnesses and the documents submitted in evidence. (See *Arthur L. Page v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County*, Decision on Motion December 27, 1973, affirmed State Board of Education, 1974 S.L.D. 1416 (May 1, 1974).)

The facts educed reveal the history and sequence of events in this matter and are summarized as follows:

1. Petitioner was employed by the Board for nearly fourteen years in a professional capacity.
2. She served nearly ten years as an Assistant to the Superintendent of Schools and performed administrative duties.
3. She was transferred by Board resolution dated August 9, 1972 to act as principal of McKinley School. (J-7)
4. She appealed this transfer to the Commissioner of Education on May 18, 1973.
5. Thereafter, the Board passed two resolutions (Exhibits A and B) abolishing the position of “Assistant to the Superintendent of Schools,” and terminating petitioner’s employment in the school district.
6. The high school principal was thereafter appointed to the Superintendent’s office to perform “administrative duties.” (Nothing in the record shows any significant difference between the duties performed by petitioner and those performed by the high school principal; nor does the record show any change in the title of the position or in the restructuring of the Superintendent’s office.)

The hearing examiner finds that petitioner enjoys tenure in respondent’s school district in an administrative capacity. She has served the Board in an administrative capacity for more than ten years. To hold now, as the Board does, that she lacks any tenure whatever, would violate the very purpose of the tenure statutes. The Commissioner commented in *Quinlan v. Board of Education of the Town of North Bergen*, 1959-60 S.L.D. 113 that:

“\*\*\* The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. He must be equally vigilant against the employment of devices to confer tenure upon those who are not entitled to its protection. The duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure. *Nomenclatures may not be the deciding factor.* \*\*\*” (*Emphasis added.*) (at p. 114)

In reaching the conclusion that petitioner has tenure, the effect of the Board resolution (Exhibit A) abolishing her position must now be examined. Even if it is held that petitioner’s termination did not show the absence of good faith by the Board, she is entitled to the statutory protection afforded by *N.J.S.A.* 18A:28-10, 11, and 12. Specifically, *N.J.S.A.* 18A:28-10 reads as follows:

“Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board.”

And, *N.J.S.A.* 18A:28-11 reads in part as follows:

“In the case of any such reduction the board of education shall determine the seniority of the persons affected\*\*\*and shall notify each such person as to his seniority status.\*\*\* ”

Also, *N.J.S.A.* 18A:28-12 reads as follows:

“If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940 shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service.”

It appears that titles, such as assistant to the superintendent, or assistant to the principal, are used by boards when an employee is selected to hold a particular position and he/she lacks all the specific requirements for certification in the titled categories; *e.g.*, assistant superintendent or assistant principal. Although the statutes do not prevent boards from using titles for which no certificate is required, in the judgment of the hearing examiner, such a title may not be used to deny tenure for persons otherwise eligible for tenure status.

The record shows that petitioner was not certificated as a school

administrator when first appointed as Assistant to the Superintendent; however, she earned the certificate, which was required prior to appointment, on June 5, 1967. (J-9) Had her title been changed to Assistant Superintendent, she would have enjoyed tenure as such; however, the Board did not change her title.

The hearing examiner recommends that petitioner be reinstated as a tenured employee in an administrative capacity.

If the Commissioner adopts this conclusion of the hearing examiner, he must determine in which position or positions petitioner is entitled to reinstatement.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and observes the recommendation contained therein that petitioner be reinstated as a tenured employee in an administrative capacity within the District. The objections and exceptions filed by the Board have also been reviewed. The Commissioner observes the Board's argument that petitioner should be barred by the doctrine of laches from appealing her transfer by the Board to the position of school principal in August 1972. The Commissioner finds no merit in the Board's argument for the doctrine of laches in the circumstances of this case, for the reasons set forth by the hearing examiner.

The Commissioner takes particular notice of the Board's argument which states:

“\*\*\* Ten years in one position may well make one too comfortable therein and surely for the good of the system the Board could reshuffle personnel without the consent or approval of those affected.\*\*\*”  
(Respondent's Objections and Exceptions to Hearing Examiner's Report, at p. 4)

Such an argument is a broad and encompassing one indeed. It embraces not only the undisputed statutory authority of a local board of education to transfer teaching staff members in a lateral manner (*i.e.* principalship to principalship), but it also postulates the view that such authority may be exercised so that teaching staff members may be transferred from a higher to a lesser position. The Commissioner cannot agree.

The statutes and prior decisions of the Commissioner stand as clear authority for the proposition that the status of tenure has both general and specific implications. *N.J.S.A. 18A:28-6 Michael J. Keane v. Board of Education of the Flemington-Raritan Regional School District*, 1970 *S.L.D.* 162 The statute, *N.J.S.A. 18A:28-6*, provides that:

“Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or *promoted* with his consent to

another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new *position* until after:

“(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

“(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

“(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

“provided that the *period* of employment in such new position *shall be included in determining the tenure and seniority rights in the former position* held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.” (*Emphasis supplied.*)

Thus, the specific intention is that teaching staff members may achieve a tenure status not only within the district, but also in a particular position as well. Once achieved, tenure in a specific position may not lightly be set aside, and if the position is abolished certain residual rights remain. The teaching staff member “shall be returned to his former position.”

The Commissioner had occasion in *Keane, supra*, to discuss such a tenure status and he said:

“\*\*\* Petitioner having thus acquired tenure of employment in the school district, there remains the question whether he has such protection in a particular category of position. Such protection in a *specific work category* comes into being only after tenure in the district has accrued and is accomplished by the employment in a *particular job for one of the statutory probationary periods defined in the law. N.J.S.A. 18A:28-6* Protection in a position is dependent on the achievement of tenure status in the district and is in addition thereto.” (at p. 164)

In the application of these statutory and case law principles to the instant matter, it is clear that petitioner served for a period of approximately ten years as a school administrator with the encompassing duties required of an assistant superintendent of schools. Although the Board did not so designate the position and characterizes all of petitioner’s service therein as clerical rather than

administrative, the facts in the record before the Commissioner fail to support the Board's position. The Commissioner cannot condone this designation of a *bona fide* administrative position by an inappropriate title, which would result in relegating petitioner's service to an amorphous limbo. Petitioner did serve as assistant superintendent of schools in the Board's employ for the requisite period required by law to acquire a tenure status, and she possessed the appropriate certification to perform the duties of that position. Therefore, the Board's action transferring petitioner to the position of acting principal of the McKinley School effective August 9, 1972, was *ultra vires* and must be set aside. The Commissioner so holds.

This holding is grounded on the fact that petitioner did perform the duties of an assistant superintendent of schools, and in the section of the State Board of Education's Rules (*N.J.A.C.* 6) with respect to the assignment of titles for administrative positions. These rules provide as follows:

*N.J.A.C.* 6:11-10.5

"(a) School districts are urged to assign to administrative or supervisory personnel titles that are recognized in these regulations. If the use of unrecognized titles is necessary, a job description should be formulated and submitted to the county superintendent of schools in advance of the appointment, on the basis of which a determination will be made of the appropriate certificate for the position."

There is no record herein that the Board received approval for an unrecognized title.

*N.J.A.C.* 6:11-10.4 Authorization

"(a) School Administrator: This endorsement is required for the position of superintendent of schools. The holder of this endorsement may also serve as assistant superintendent of schools, principal, or supervisor."

The Commissioner also finds that petitioner's position as assistant superintendent which the Board designated as assistant to the superintendent, was never abolished by the Board and continues as a viable one to the present day. Therefore, the Commissioner directs the Board to restore petitioner to her position, retroactively to the day of her purported transfer, August 9, 1972, and to afford her all the emoluments which are her due.

Finally, the Commissioner is cognizant of the fact that in the instant matter the Board not only denied petitioner her tenured entitlement to the position of assistant superintendent of schools but, additionally, when such position by another designation was purportedly abolished, the Board completely ignored petitioner's tenured entitlement to be assigned to former positions she had held. These were the positions of vice-principal and director of

guidance, and petitioner's claim with respect to such positions, in the event of a legal abolishment of her primary position, is clear and unambiguous in accordance with the rules concerning seniority. These rules read, in pertinent part, as follows:

*N.J.A.C. 6:3-1.10 Standards for determining seniority*

“(a) The word ‘employment’ for purposes of these standards shall also be held to include ‘office’ and ‘position.’

“(b) Seniority, pursuant to N.J.S.A. 18A:28-9 *et seq.*, shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence.

“(c) Employment in the district prior to the adoption of these standards shall be counted in determining seniority.

“(d) The holder of a provisional certificate shall be entitled to seniority rights but not over the holder of a standard certificate. \*\*\*

“(e) Not more than one year of employment may be counted toward seniority in any one academic or calendar year. \*\*\*

“(f) *Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with duties performed and not by title.* Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to *the duties performed*.

“(g) *Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment.*

“(h) 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.

“(i) 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.

“(j) 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.

“(k) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:

\*\*\*

“4. Assistant Superintendent (Each assistant superintendency shall be a separate category);

\*\*\*

“14. High School Vice-Principal or Assistant Principal;

\*\*\*

“30. Additional categories of specific certificates issued by the State Board of Examiners are listed in the State Board rules dealing with Teacher Certification.” (Emphasis supplied.)

If the Board had in fact abolished petitioner’s position as assistant superintendent, she would have been entitled, under the above-stated provisions of *N.J.A.C.* 6:3-1.10, to placement in one of her previous positions of either vice-principal in the high school or director of guidance. However, the Commissioner has found and determined that petitioner’s position was not abolished by the Board in this matter.

Finally, the Commissioner takes notice of the Board’s Motion to Dismiss. He finds that the issues raised in such Motion are peripheral to the questions discussed, *ante*, and, accordingly, the Motion is denied.

COMMISSIONER OF EDUCATION

September 12, 1974  
Pending before State Board of Education



**In the Matter of the Tenure Hearing of Thomas Williams,  
School District of the Pascack Valley Regional High School District,  
Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION TO SUPPRESS**

For the Complainant Board of Education, Parisi, Evers & Greenfield  
(Irving C. Evers, Esq., of Counsel)

For the Respondent, Saul R. Alexander, Esq.

The Board of Education of the Pascack Valley Regional High School District, hereinafter "Board," has certified a series of nine charges against respondent, a tenured teaching staff member employed by the Board, pursuant to the statutory prescription contained in the "Tenure Employees Hearing Law," *N.J.S.A.* 18A:6. The Board avers that such charges, if proven true in fact, constitute evidence of unbecoming conduct by respondent and are of sufficient gravity to warrant disciplinary action by the Commissioner. In support of its charges, the Board proposes to offer, or states that it may offer, certain telephone wiretap recordings made by the parents of a former pupil enrolled in the Pascack Valley Regional High School and the personal diary of the pupil. Respondent moves at this juncture for a decision by the Commissioner that such evidence is improper and if offered, should not be accepted at the hearing with respect to the merits of the charges.

An oral argument on the Motion was held on November 5, 1973 at the office of the Bergen County Superintendent of Schools, Wood-Ridge. Subsequently, each counsel has filed a Memorandum of Law. The record of the oral argument and the Memoranda are presented directly to the Commissioner for decision at this juncture.

It is noted by the Commissioner that the Motion herein is concerned with certain specific and limited questions pertinent to the admissibility of evidence in a hearing before the Commissioner. These questions have been posed by respondent in his Memorandum of Law and his arguments pertinent thereto are grounded on moral principles and provisions of federal and state law with respect to the wiretapping of telephone conversations. The Board sets forth its views in the framework of respondent's questions and maintains that, both on principle and in the context of law, the evidence controverted herein is admissible at a hearing before the Commissioner of Education.

Succinctly stated, the basic facts around which the questions are framed are as follows:

1. Respondent is a tenured teacher in the employ of the Board and is about forty years of age.
2. At some time during the year 1971, respondent (who was then married

but later divorced) developed a social relationship with a pupil in one of his classes and in August 1973, he and his former pupil were married.

3. At the time of marriage the former pupil was eighteen years of age.
4. During the months prior to the marriage the parents of the pupil tapped their own home telephone, and that of their daughter, and made tape recordings of conversations between respondent and their daughter without the knowledge of either party.
5. At some time during the period prior to the marriage, the parents took, without the permission of their daughter, her personal diary and have maintained possession of it to the present day.

This recital contains the essential elements of fact from which a series of questions have been posed by respondent. The oral argument on the Motion and the respective Memoranda were centered around such questions, and they may be framed succinctly as follows:

1. May evidence obtained by parents who tapped their own telephone and monitored phone calls by respondent to their daughter, without the knowledge of the conversants, be properly admissible in a hearing before the Commissioner of Education?
2. May a diary taken by parents from their daughter without the daughter's knowledge and consent be admitted into evidence (if offered) before the Commissioner of Education?
3. If such evidence is not properly admissible, are the charges herein otherwise viable?

The Commissioner has reviewed such questions and the various moral and legal arguments pertinent thereto and has determined that:

1. The tape recordings and the diary may not be accepted, if offered, in evidence at the hearing.
2. While charges founded on such evidence alone may not be pressed, the Petition remains otherwise viable - specifically with respect to those charges that respondent left his post of duty as a teacher without permission on certain occasions. A hearing in this latter regard will be set down at an early date.

The Commissioner has said on a number of occasions that he expects a high order of conduct from those employed in the public schools. However, the Commissioner holds that a vigorous insistence on this ideal for the benefit of society as a whole, and school pupils in particular, cannot be properly founded on theft, either of the written word or of oral conversation by surreptitious means. Theft is rendered no less palatable by the fact of its commission by

parents against a child, particularly where, as herein, the evidence purportedly obtained, if accepted, might prove as deleterious to the interests of the child—now an emancipated married adult—as to the named respondent. If theft is condoned by indirection (the admission of evidence) how can it be otherwise abhorred? In such circumstances, the Commissioner determines that the human rights of the former child and pupil are paramount and may not be set aside.

Finally, the Commissioner takes note that, by agreement at the conference of counsel which preceded the hearing on Motion, *ante*, the right of appeal with respect to this ruling is maintained intact to the point of a final decision on the merits of the charges by the Board against respondent.

COMMISSIONER OF EDUCATION

February 6, 1974

**In the Matter of the Tenure Hearing of Thomas Williams, School District of  
Pascack Valley Regional High School District, Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Complainant Board of Education, Parisi, Evers and Greenfield  
(Irving C. Evers, Esq., of Counsel)

For the Respondent, Saul R. Alexander, Esq.

The Board of Education of the Pascack Valley Regional High School District, hereinafter "Board," has certified a series of nine charges against respondent, a tenured teaching staff member in its employ, pursuant to the statutory prescription contained in the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.* The Board avers that such charges, if proven true in fact, constitute evidence of unbecoming conduct by respondent and are of sufficient gravity to warrant disciplinary action by the Commissioner of Education. Respondent, while admitting some of the stated charges against him, denies that his conduct has been either unbecoming or otherwise improper. He requests the Commissioner to restore him to his teaching position.

A hearing in this matter was conducted on March 27, 1974 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

This matter was delayed in reaching a hearing on the merits of the Board's charges against respondent in order that the Commissioner might consider the nature of the evidence which the Board proposed to use against him.

Specifically, in support of the majority of its charges herein, the Board stated its desire to introduce the diary of a former school pupil and certain tape recordings of telephone conversations, which had been obtained by the parents of the pupil without the pupil's consent.

In a Decision on Motion to Suppress such evidence, handed down on February 6, 1974, the Commissioner ruled that the proffered evidence was not admissible but that the Petition remained otherwise viable. Thus, the hearing of March 27, 1974, ensued and was conducted within the parameters of the Commissioner's decision. That decision in its entirety is made a part of this report by reference. The following specific finding and rationale is set forth again in order that the instant report may be viewed in a proper context.

“\*\*\* The Commissioner has said on a number of occasions that he expects a high order of conduct from those employed in the public schools. However, the Commissioner holds that a vigorous insistence on this ideal for the benefit of society as a whole, and school pupils in particular, cannot be properly founded on theft, either of the written word or of oral conversation by surreptitious means. Theft is rendered no less palatable by the fact of its commission by parents against a child, particularly where, as herein, the evidence purportedly obtained, if accepted might prove as deleterious to the interests of the child—now an emancipated married adult—as to the named respondent. If theft is condoned by indirection (the admission of evidence) how can it be otherwise abhorred? In such circumstances, the Commissioner determines that the human rights of the former child and pupil are paramount and may not be set aside.\*\*\*”

(at pp. 4-5)

Thus, at the hearing of March 27, 1974, the Board was restricted by the Commissioner's decision to a proffer of evidence other than that obtained from wiretapping and a pupil's diary, and such restriction had the practical effect of limiting the proofs to two of the nine charges which the Board had certified. Nevertheless, the hearing examiner feels constrained to consider all of the charges *seriatim* since some of the charges are admitted to be true in fact, in whole or in part, and since Charges Seven and Nine were the subject of proofs at the hearing.

It should also be stated at this juncture that at the hearing the Board did propose to question respondent with respect to allegations contained in Charges One, Two, Three, Four, Five, Six, and Eight but it was prevented from doing so by a ruling of the hearing examiner. This ruling was that no defense was required of respondent except with respect to those charges which had been supported by the testimony of other witnesses at the hearing.

Charges Seven and Nine were so supported.

#### Charge One

“That sometimes during the summer of 1972, the said Thomas Williams did escort a female pupil under the age of 18 to Bear Mountain and did there participate with said pupil in the consumption of an alcoholic beverage.”

Respondent admits the first part of this charge but denies that he participated in the consumption of an alcoholic beverage.

There were no proofs offered with respect to the charge at the hearing except as noted, *ante* (the testimony of respondent as a witness for the Board).

#### Charge Two

“That on or about the 9th day of June, 1972, the said Thomas Williams did leave his teaching assignment and duties and did proceed to New York with a female pupil under the age of 18, he well knowing that said pupil had cut classes which she was required to attend.”

There were no proofs offered with respect to the charge at the hearing except as noted, *ante*. Respondent states in his Answer that he is unable to reply to the charge since no date is “specified” but he denies any dereliction of duty.

#### Charge Three

“That on or about the 14th day of June, 1972, the said Thomas Williams knowing that a female pupil under the age of 18 had cut certain classes, did leave his teaching assignments and duties to join said pupil for lunch away from school.”

Respondent admits he joined the pupil for lunch on or about the date alleged but denies the rest of the charge. There were no proofs offered in support of this charge at the hearing except as noted, *ante*.

#### Charge Four

“That at various times during the year 1972 and specifically on or about March 17, May 2, 4, 11, 23, 29, June 20, 22, August 22, 23, 24, October 3, 6, 11, 13, 17, 18, 19, 20, 21, 27, 28, 29 the said Thomas Williams did entertain at his living quarters a female pupil under the age of 18 years.”

This charge is denied as alleged and respondent further states he has no knowledge with respect to the dates specified. There were no proofs offered in support of this charge at the hearing except as noted, *ante*.

#### Charge Five

“That the said Thomas Williams did on or about the 7th day of July, 1972, address to a female pupil under the age of 18, a communication containing foul, lewd, lascivious and obscene language.”

The allegations of this charge are denied by respondent and were not the subject of proofs at the hearing except as noted, *ante*. However, respondent also avers that if such communication does exist it was received with the consent and without the objection of the addressee, not on school property, and therefore, a privileged communication outside the concern or jurisdiction of the Board.

#### Charge Six

“That on or about the 7th day of April, 1973, the said Thomas Williams

did engage in a lewd, lascivious and indecent telephone conversation with a female pupil under the age of 18 years.”

Respondent denies this allegation, and the allegation contained therein was not the subject of proofs at the hearing except as noted, *ante*. However, respondent also avers that if such alleged conversation took place it was with the consent of the female pupil, not on school property, and therefore, a privileged communication outside the jurisdiction of the Board.

#### Charge Seven

“That the said Thomas Williams, having been requested to cease and desist from carrying on a relationship with a female pupil under the age of 18 years, and having promised and agreed to cease his relationship did nevertheless openly and clandestinely continue said relationship.”

Respondent admits the first portion of this charge which alleges that a request had been made to him to terminate the relationship with the female pupil, but denies the remainder of the charge. The testimony pertinent to the charge which was elicited at the hearing, *ante*, by the Superintendent of Schools, by the President of the Board, and by the high school principal, attests, in the judgment of the hearing examiner, to the truth of the total charge, and thus negates respondent’s denial in written form of the second part of the charge.

The President of the Board stated that she had spoken to respondent in March 1973, “as a friend” with respect to his actions, and that she had told him she thought he was acting “unwisely.” She then stated respondent indicated to her that:

“\*\*\* he would cease seeing the young lady, at least until after the end of the school year.\*\*\*” (Tr. 9)

This same promise was also given in substance to the Superintendent of Schools (Tr. 24) on or about March 31, 1973 (Tr. 23) and to the high school principal on March 1, 1973. (Tr. 100)

The principal’s testimony was buttressed by a written summary of a meeting he held with respondent on that latter date wherein it is stated:

“\*\*\* Mr. Williams informed the Principal that he would not see this young lady except on a purely professional basis at any time in the future.\*\*\*” (P-5)

Despite such statements and promises, however, it is clear that respondent continued to see the pupil, then seventeen years of age, during the balance of the school year, and counsel for respondent stated at the hearing that there was “no denial of that situation.” (Tr. 100)

This admittance effectively negates the written Answer reported, *ante*, and further establishes the truth of the total charge. The hearing examiner so finds.

### Charge Eight

“That the said Thomas Williams improperly and without parental consent did purchase and give to a female pupil under the age of eighteen years certain items of intimate apparel.”

Respondent admits that he gave certain items of intimate apparel to a female pupil under the age of eighteen but denies any impropriety in such gift. There were no offers of proof with respect to this charge except as noted, *ante*.

### Charge Nine

“That the said Thomas Williams having been counselled and advised to cease and desist from continuing a personal relationship with a female pupil under the age of 18, did nevertheless continue said relationship thereby causing a rupturing of and a break-up in a family relationship.”

The first part of this charge is a reiteration of Charge Seven discussed, *ante*, and in addition attributes to respondent the “rupturing” and “break-up” of a family relationship. To the extent that it reiterates Charge Seven, the hearing examiner finds it to be true in fact for the reasons already set forth in the recital, *ante*.

The remainder of the charge was the subject of an offer of testimony at the hearing, *ante*, but was found to be unnecessary and superfluous by the hearing examiner in the context of a Motion by respondent for a dismissal of this portion of the charge. (Tr. 137) Accordingly, testimony concerning it was not elicited.

The truth of the latter portion of the charge, however, cannot be in factual dispute since the allegations against respondent considered herein were forwarded to the Board by the parents of the seventeen-year-old pupil and the rift in the family relationship is apparent.

This view is not seriously questioned by respondent and, in fact, is ultimately admitted (Tr. 135), but he contends that there is no cause for complaint since, in his words:

“\*\*\* No teacher ought to be a guarantor that whatever he does with respect to anything, will not cause disruption in the family.\*\*\*” (Tr. 131)

In the Board’s view, “\*\*\* it’s not the function or duty of a teacher to cause a break-up in a family relationship\*\*\*” (Tr. 123) and when such a break occurs, as herein, because of a teacher’s deliberate action, it is properly brought as a charge to the Commissioner.

In summation, the hearing examiner finds Charge Nine to be true in fact.

This concludes a discussion of the charges *seriatim*.



In summation of the total findings herein, the hearing examiner finds it is true in fact that:

1. During the summer of 1972, respondent escorted a female pupil under the age of 18 to Bear Mountain. (Charge One)
2. On or about June 14, 1972, respondent joined said pupil for lunch away from school. (Charge Three)
3. Respondent promised school officials that he would cease and desist from carrying on a relationship with a female pupil under the age of eighteen years but did nevertheless continue such relationship contrary to the promise. (Charge Seven)
4. Respondent gave certain items of intimate apparel to a female pupil under the age of eighteen. (Charge Eight)
5. Respondent's actions did cause a rift in the family relationship of a female pupil under the age of eighteen.

The limited findings, *ante*, with respect to the charges are presented at this juncture to the Commissioner. However, it should also be noted, in assessing these findings, that respondent's prior record as an employee of the Board has been otherwise unmarred and, in fact, his school principal attested to respondent's excellence as a teacher of foreign languages. (Tr. 101)

Thus, the determination required of the Commissioner of Education at this juncture is whether or not the limited proofs herein constitute evidence of unbecoming conduct by respondent and if they do, whether or not a penalty should be assessed pursuant to the statutory prescription in this regard. (*N.J.S.A.* 18A:6-16)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record of the instant matter, the report of the hearing examiner, and the exceptions pertaining thereto which have been filed by counsel pursuant to *N.J.A.C.* 6:24-1.16.

Respondent takes exception to the reliance by the hearing examiner on respondent's own admission, without the corroborative testimony of other witnesses, as conclusive proof that Charges One, Three, and Eight were true in fact. The Commissioner finds no reason to conclude that respondent's admissions were other than honest, factual representations of that which occurred. These admissions were neither self-serving nor unclear, and are in all respects sufficient, standing alone, to justify the findings of the hearing examiner.

The Commissioner accepts and holds for his own the findings of fact and

conclusions of the hearing examiner. He has carefully weighed respondent's purported right to engage in an amorous relationship with a female pupil against respondent's duty to comport himself in accord with the professional standards of a teacher and the standards reasonably expected of him by the Board.

Respondent admittedly accompanied to lunch, away from the school premises, a female pupil who had illegally absented herself from her classes. This act of respondent as a teacher is directly contrary to the spirit of the New Jersey Constitution's mandate that requires a thorough and efficient program of education. By his actions, respondent encouraged and assisted the female pupil to illegally absent herself from the school. Additionally, respondent, after being counseled by school officials, promised on three separate occasions to the principal, Superintendent, and Board President to desist from seeing the aforementioned female pupil at least until she graduated at the end of the school year, a period of less than three months. However, he failed to act in accord with that which he had solemnly agreed to do and persisted in continuing activities with the female pupil which resulted in a serious rift between the pupil and her parents.

In the judgment of the Commissioner, these actions by respondent constituted an undesirable and improper intermixture of professional responsibilities and personal desires. Respondent's conduct proved disruptive of the desired cooperative and beneficial relationship among the Board, the school administrators, teachers, the parents, and the pupil. Accordingly, the Commissioner determines that respondent's actions constituted conduct unbecoming a teacher within the intendment of *N.J.S.A. 18A:6-10*.

The Commissioner has frequently spoken of the import of personal example that is incumbent upon all New Jersey public school teachers and is constrained to repeat his previous statement *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302* wherein he said:

“\*\*\* [T]eachers are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.\*\*\*”  
(at p. 321)

Similarly, it was said *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97* that:

“\*\*\* Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and

attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully \*\*\* violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. \*\*\*” (at pp. 98-99)

The Commissioner views respondent's unbecoming conduct in the instant matter within the context of an otherwise unblemished record of eighteen years of exemplary service to the Board. The Commissioner determines that dismissal would be unduly harsh and is not warranted in this instance. Accordingly, it is ordered that respondent be reinstated to his teaching position forthwith, at the same annual salary he was paid during the time of his suspension, without benefit of any adjustment or increment which might have otherwise pertained. The Board shall deduct from his 1974-75 salary earnings as a further penalty a sum equal to one-tenth of his annual salary for the 1974-75 school year.

COMMISSIONER OF EDUCATION

September 13, 1974

**James P. Beggans, Jr. and Carol F. Beggans, individually and  
as parents and natural guardians of Timothy John Beggans and  
James P. Beggans, III,**

*Petitioners,*

*v.*

**Board of Education of the Town of West Orange, Essex County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION ON MOTION**

For the Petitioners, James P. Beggans, Jr., Esq., *Pro Se*

For the Respondent, Samuel A. Christiano, Esq.

This Appeal is brought by the parents of Timothy and James Beggans, contesting the action of the Board of Education of the Town of West Orange, hereinafter “Board,” which denied their children transportation to a private elementary school.

Oral argument of counsel for immediate interim relief and free transportation to be provided by the Board, was heard on September 12, 1973 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The transcript of the oral

argument is contained in the record before the Commissioner. The positions of the parties are as follows:

Petitioners' Appeal is based on two contentions: the first is that the distance from their home to the private school, coupled with the hazardous roads and the hardship of climbing a long, steep incline, in the aggregate, is sufficient reason for the Board to provide transportation for their children. The second is that the Board has violated petitioners' constitutional rights to equal protection under the law, in that the Board buses some private school children and not others, at public expense, because of hazardous road conditions.

Petitioners concede, for the purposes of this Appeal, that the school is not "remote," pursuant to *N.J.A.C. 6:21-1.3*, and it is slightly closer than two miles from their home. (Tr. 30) However, petitioners offered topographic maps prepared by the U.S. Department of the Army, Corps of Engineers (P-1, P-2), which show that their children must climb a hill more than 180 feet high to reach school, over a distance of approximately one-half mile, after first walking approximately a mile and one-half from their home. They argue, also, that the route their children must walk to reach the school is hazardous in that it lacks adequate walkways, has a blind curve in the road, unprotected crossings, and is, in part, a high accident area. (Tr. 8-10)

Petitioners' second argument is that the Board has made arbitrary rules which provide busing for some private school pupils and deny busing to other pupils similarly situated. (Tr. 19)

They aver that this private school busing is done at taxpayers' expense; therefore, petitioners are being denied the protection and benefit for their children to which they are entitled under the constitutional doctrines providing equal protection under the law. (Tr. 11)

The Board admits that petitioners' children must walk up a steep hill to their school; however, they deny that petitioners' children must walk along a hazardous route, and aver that there are other routes available to petitioners, which have adequate walkways, provisions for safety, and are less than the "remote" distance as described in *N.J.A.C. 6:21-1.3*.

The Board argues, also, that for many years the Commissioner of Education has repeatedly denied transportation appeals for pupils who live less than remote from the schoolhouse, for reasons of hazard or safety.

The Board denies, also that their rule for transporting pupils who are not remote is arbitrary; nor, does it deprive petitioners of their constitutional right to equal protection under the law.

The Board avers that its policy for busing private school pupils residing less than remote from the schoolhouse is applied to those pupils residing on five hazardous streets where there are no sidewalks, and that the rule is applicable to both public and private school pupils. The Board avers further that petitioners

do not live on any one of those five streets, and that it does bus eligible pupils to the private school in question.

The Board also buses pupils up to twenty miles to the school of their choice, pursuant to *N.J.S.A. 18A:39-1*, which provides in part that:

“\*\*\* When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil\*\*\*.”

There is no question about the Board’s statutory authority to bus pupils less than remote; rather, the issue in contention is the Board’s responsibility, if any, to transport petitioners’ children as demanded in their Petition of Appeal.

The Commissioner concludes that the essential issues controverted herein, are not different from those of many previous transportation disputes.

The Commissioner has reviewed and considered the argument of counsel and notes that petitioners concede, for the purpose of this oral argument, that their children do not reside remote from the schoolhouse. Therefore, the only issue to be determined is whether or not petitioners are entitled to transportation for their children for the reasons they set forth, *ante*.

This Appeal is one more in a long series of transportation appeals for reasons other than residing remote from the schoolhouse as described, *ante*.

Although the Commissioner would not condone an arbitrary rule which provided transportation for some pupils and not others similarly situated, petitioners’ charge of being denied a constitutional protection is insufficient to make such a determination.

The Board has the discretionary authority to select less-than-remote transportation routes. The allegation that these route selections are arbitrary or discriminatory requires more proof than has been offered by petitioners. Moreover, the Board contends that it buses many eligible private school pupils who meet the provisions of the relevant statutes and their own rules.

The Commissioner commented on a similar issue in *Trossman v. Board of Education of the Borough of Highland Park*, 1969 *S.L.D.* 61, as follows:

“\*\*\* ‘The words ‘remote from the schoolhouse’ should mean 2½ miles or more for high school pupils and 2 miles or more for elementary pupils, except for pupils suffering from physical or organic defects. State aid for shorter distances for the sole reasons of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility.’\*\*\*” (at p. 64)

This statement is applicable to the issue controverted herein.

In *Read et al. v. Board of Education of the Township of Roxbury*, 1938 S.L.D. 763 (1927), the Commissioner said:

“\*\*\* Boards of education are not authorized by law to provide for the safety of children in reaching school. While a board should be concerned as to the safety of children and should report to the State Police or local officers reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation.\*\*\*” (at p. 765)

This position has been reaffirmed by the Commissioner in many subsequent decisions. See *Trossman, supra*; *Locker et al. v. Board of Education of the Township of Monroe*, 1969 S.L.D. 178; *Rosenman v. Board of Education of the Township of Howell*, 1969 S.L.D. 124; *Frieman et al. v. Board of Education of the Borough of Haworth*, 1970 S.L.D. 113; *Tolliver et al. v. Board of Education of the Borough of Metuchen*, 1970 S.L.D. 415; *Bocco v. Board of Education of the City of Camden*, 1971 S.L.D. 71; *Concerned Parents of Howell Township School Children v. Board of Education of the Township of Howell*, 1972 S.L.D. 600.

In the matter controverted herein, the Commissioner finds no evidence that the Board’s rule pertaining to transportation of pupils in its school district, is arbitrary, or unreasonable; nor does the Commissioner find that the Board’s transportation policy denies petitioners their constitutional guarantees of equal protection under the law.

Petitioners do not attack the Board’s assertion that it buses private school pupils to the same school their children attend, provided such pupils meet the Board’s eligibility requirements.

Under these circumstances, the Commissioner finds no evidence to support petitioners’ argument that they should be granted transportation for the reasons of distance, hazard, and physical hardship. Nor does the Commissioner find that petitioners have been treated unfairly, inequitably, or denied any of their constitutional rights. See *West Morris Regional Board of Education et al. v. Sills et al.*, 58 N.J. 464.

The Commissioner holds that the Board acted within its discretionary authority pursuant to N.J.S.A. 18A:33-1, 39-1 and N.J.A.C. 6:21-1.3.

This principle was enunciated in *Boult and Harris v. Passaic* 1939-49 S.L.D. 7, affirmed State Board of Education 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E. & A. 1948) as follows:

“\*\*\* it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless

they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. \*\*\*” (at p. 13)

In *Schrenk et al. v. Board of Education of the Village of Ridgewood, Bergen County*, 1960-61 S.L.D. 185, 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. *Guill, et al. v. Mayor and Council of City of Hoboken*, 21 N.J. 574 (1956); *Pierro v. Baxandale*, 20 N.J. 17 (1955); *De Monaco v. Renton*, 18 N.J. 352 (1955); *Borough of Lincoln Park v. Cullari*, 15 N.J. Super., 210 (App. Div. 1951). \*\*\*” (at p. 188)

Finding no evidence or proof, therefore, that the Board has acted in bad faith or outside of its discretionary authority, the Commissioner determines that petitioners’ demand for immediate relief and transportation for their children has not been supported in light of the argument and evidence offered.

Petitioners’ Motion for immediate interim relief and transportation for their children is, therefore, denied.

COMMISSIONER OF EDUCATION

December 14, 1973



James P. Beggans, Jr. and Carol F. Beggans, individually and  
as parents and natural guardians of Timothy John Beggans and  
James P. Beggans III,

*Petitioners,*

*v.*

Board of Education of the Town of West Orange, Essex County,

*Respondent.*

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioners, James P. Beggans, Jr., Esq., *Pro Se*

For the Respondent, Samuel A. Christiano, Esq.

Petitioners, the parents of Timothy and James Beggans III, contest the action of the Board of Education of the Town of West Orange, hereinafter "Board," which denied their children transportation to a private elementary school.

A hearing in this matter was held on March 15, 1974 in the office of the Essex County Superintendent of Schools, East Orange, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

The Commissioner rendered a Decision on Motion, dated December 14, 1973, and a conference was held in which two additional issues were raised for determination after a factual hearing. The first issues were restated by petitioners and accepted by the hearing examiner without objection by the Board. These are as follows:

“\*\*\* Is the route walked by the Beggans’ children so physically exhausting that they cannot successfully participate in their scholastic exercises; and is this sufficient reason for busing them to school?\*\*\*” (Conference Agreement, January 28, 1974)

“\*\*\* ‘Is the Board’s determination that five named streets in West Orange are hazardous and require the busing of school children even when not reimbursed by the State Board [of Education] arbitrary with respect to petitioners’ children and the route suggested by the Board for them to walk to school? \*\*\*’ (Petitioners’ letter, January 31, 1974)

Petitioners’ contentions and stipulations as stated at the hearing are summarized as follows:

1. The two children in question are five and eight years old.
2. The Board has denied them transportation based on its policies, rules,

and regulations, as applied to petitioners' place of residence which is less than "remote" from the school. It is the Board's determination that petitioners' children are not required to walk along five designated hazardous streets, and that these two children do not have special problems considered hazardous by the Board.

3. Petitioners allege that the Board's denial of transportation is arbitrary, capricious, and unreasonable in that the overall route that their children must walk is practically impossible.

4. Petitioners' contention that the route is practically impossible is based on: a) insufficient sidewalks and schoolguards; b) extreme distance for children of this age; c) the fact that the children must climb a very steep hill (approximately 200 feet high from petitioners' home to the school). (P-1)

5. The overall effect of these conditions is to deny petitioners' children "convenience of access" as required by statute. (*N.J.S.A.* 18A:33-1)

6. Petitioners aver that the safety of pupils is not a municipal responsibility.

7. Petitioners argue that the State Board of Education rule, *N.J.A.C.* 6:21-1.3, is unconstitutionally discriminatory in that it sets a rigid, unrealistic, two-mile limit for transporting pupils.

8. Petitioners contend that the Board does not allow exceptions for individual considerations which are mandated by statute; e.g., the Board provides transportation or \$200 to parents who send children out of town to schools which are not more than twenty miles distant. (*N.J.S.A.* 18A:39-1)

9. Petitioners assert that the Board does bus pupils for reasons of safety and "convenience of access," who do not reside along the five named hazardous streets thereby discriminating against petitioners' children. (Tr. II-2-6)

Petitioner testified as follows:

\*\*\*\* My feeling is that I have a right to send my children to St. Joseph's School. I pay school taxes. If my children have to get there by some form of transportation—I feel I'm making a judgment that they have to use some form of transportation and that the burden is falling entirely upon me, even though others in the community are receiving some form of public funds. I want to make it very clear in my testimony here that it is the over-all route that I'm talking about. If it were just the area with no sidewalks on Lowell Avenue, I could take the kids out and give them hard instructions on how to stop and wait if they saw a car coming in any direction and that they should get up to somebody's lawn or what have

you. If it was just a question of climbing up Bradford, I would say, 'O.K., let's go out on Saturdays and get exercise and get used to climbing the hill.' If you take the three factors together, the area with no sidewalks and the distance itself and then the hill on top of it, then I feel I'm going beyond the point where I could, in good conscience, stand on the front porch and send off two small children at a quarter after seven in the morning. I couldn't do that. For me, that is a practical impossibility. If they don't have bus transportation, we will just continue with the carpool. There is no question about that. I want my children to get to school safely and in good physical condition. They could use a little more exercise, but not under these conditions.\*\*\*" (Tr. II-33-34)

Petitioners educed the testimony of an expert witness, Dr. Robert Weierman, who testified that he walked one of the proposed routes to the school with Petitioner Beggans and his younger son on a clear day when the average temperature was about 55°F. (P-4) He testified also that the boy's pulse rate was "not normal" at the end of the walk, when it was measured at 160 beats per minute. (Tr. II-42-44) He testified further that the boy's pulse was normal before the walk (Tr. II-44), and that if it were a colder day or if there were other adverse weather conditions, a greater degree of fatigue would be experienced which, in his opinion, would prevent the child from concentrating in school for the first hour or so. (Tr. II-46) He testified finally as "a layman," that he did not think the route was appropriate for children of this age because of the combination of the factors of distance, hazard, and the steep hill. (Tr. II-49)

Petitioner's wife testified that she could not let her children walk because of the distance, the steep hill, and the hazard. (Tr. II-64-65) She testified also that there was a bus routed in their vicinity and that it could be re-routed to pass their home at no added expense and with little change in time for the driver. (Tr. II-65)

Petitioners summarize by stating that the testimony supports their contention that it is practically impossible for their two children to walk to school. They state, also, that the Board discriminates against their children by transporting some pupils outside the scope of State aid purposes (Tr. II-55) while denying transportation for their children. They conclude that the burden of transporting these two children rests with them, and since they are taxpayers, that burden should rest with the community.

The Board denies that it discriminates against petitioners or that its rules are arbitrary, capricious, or unreasonable. The Board asserts that it has not suggested a particular walking route to petitioners, and that there are several possible walking routes which are not considered as hazardous by the Board. The Board avers, also, that its actions are in full compliance with the statutes and the rules of the Administrative Code. (Tr. II-8-9)

The Board proffered testimony from its own expert witness, the school medical inspector, Dr. William B. Kantor, who testified that there was no medical reason why petitioners' normal children, ages five and eight, could not

walk from their home to their school. He testified that the distance and steepness of the hill should not affect the ability of the children to perform their classroom duties. (Tr. II-13-14) Dr. Kantor testified further that children run around for “\*\*\*forty minutes or an hour playing ball and this doesn’t affect their functional capacity one bit.\*\*\*” (Tr. II-18) Under cross-examination, the following exchange occurred:

“\*\*\* Q. Doctor, is it your opinion or is it not your opinion that growing children expend more energy than adults in indulging in the same exercise?

“A. You will have to forgive me. I don’t have any personal way of giving you an answer to that other than that I checked with some of my pediatric colleagues and I asked them this question, knowing that I was coming here today and to a T, everyone of them said no.

“Q. The rate of the metabolism is not higher than smaller children?

“A. The rate of the metabolism is normally higher in children because they are going through a growth phase. But, when I posed the question to them as to what effect it might have on the child’s health or well-being, to one hundred percent, they said it would have no bearing whatsoever.\*\*\*” (Tr. II-19-20)

The Board Secretary testified that the Board’s resolution regarding transportation of pupils and its recognition of the five “hazardous streets,” was adopted at a public meeting of the Board held July 14, 1958 (P-6), and that the rules now in effect have not been changed since that adoption. (Tr. II-53)

He testified, also, regarding two exceptions to the Board’s policy for transportation of pupils which are as follows:

“\*\*\* Q. As part of the rules and regulations, I note, the phrase, ‘transportation for pupils with special problems considered hazardous by the Board of Education.’ Do you have any knowledge of documents which would indicate the interpretation of that phrase?

“A. I think the intent of the Board, at that time, the policy was adopted to allow consideration of any particular situation which might not fall within the per view (sic) of the other provisions of the policy.

“Q. Do you know whether any such special cases have been treated by the Board and handled by the Board?

“A. There is only one situation I’m aware of. That is the transportation of youngsters residing in what we call the Fairmount School District who go to Edison Junior High School because of the construction of Route 280. The youngsters living west and south on Route 280, who would have to cross the construction area, were provided transportation.

“Q. Is that still in effect?

“A. Yes.

“Q. Other than that, there have been no other special cases that you know of departing from the strict application of those rules?

“A. One other that concerns some kindergarten youngsters attending Mt. Pleasant School in the morning session who live in the Westminster-Buckingham area. I think there is (sic) six or seven kindergarteners who are allowed to ride the bus back to their homes because a bus is provided to return home another group of kindergarten children attending Mt. Pleasant School who qualify for transportation. In as much as it comes at 11:00 or 11:15 in the morning, the bus is not filled and does pass the particular area so that permission has been granted to allow those six or seven children to be transported on that vehicle.” (Tr. II-54-56)

The Board admits that it transports some pupils to private schools and that it reimburses other private school pupils for transportation expenses at \$200 each pursuant to the provisions of *N.J.S.A. 18A:39-1*.

The Board concludes by reasserting its position that the Beggans’ children do not require transportation. The Board relies on the long line of Commissioner’s decisions which state that provisions regarding hazards and safety of pupils on the way to and from school are a municipal function and that terrain is not a factor in determining remoteness.

The hearing examiner summarizes his findings, conclusions, and recommendations as follows:

1. The Board policy on pupil transportation is based on remoteness which is defined in *N.J.A.C. 6:21-1.3*.
2. The Board policy is applied equally to all pupils in the district. Regarding petitioners’ charge of discrimination, the Commissioner addressed the question of applying a policy equitably in *Marciewicz v. Board of Education of the Pascack Valley Regional High School District*, 1972 *S.L.D.* 619 as follows:

“\*\*\* The charge of petitioners that the Board’s redistricting plan is inequitable, lacking in rationale, and discriminatory is also without merit in the Commissioner’s judgment. While it is true that some inequity may exist at the present time, the question may also be posed — Is there ever an enrollment assignment plan that is perfectly balanced, a plan where no iota of inequity exists? While it is clear that the answer to such a question is a negative one, it is equally clear that every situation which involves the assignment of pupils to one school or another requires careful and constant scrutiny to avoid the possibility of an imbalance which is clearly detrimental to the interests of all. \*\*\*” (at p. 626)

3. There is no proof that the Board has acted in an arbitrary,

unreasonable, or capricious manner, nor has it been shown that the Board is discriminating against petitioners' children.

4. The expert testimony adduced does not prove that the required walking distance is physically damaging or exhausting for petitioners' children; nor does it prove that the effort would adversely affect ordinary pupils' abilities to do their school work.

5. The combination of the conditions of distance, hazard, and the steep hill about which petitioners complain does not deny petitioners "convenience of access." (Decision on Motion, *ante*)

6. Safety of pupils going to and from school is a function of the municipality. (Decision on Motion, *ante*)

7. There is no showing that the transportation statute (*N.J.S.A. 18A:39-1*) is being applied to petitioners' children in a manner which denies them constitutional rights.

The hearing examiner concludes that the Board has acted properly pursuant to its discretionary authority conferred by statute, *N.J.S.A. 18A:11-1*, in making rules for the transportation of pupils. He recommends, therefore, that this Petition of Appeal be dismissed in consideration of the findings, enumerated above, and the many prior decisions of the Commissioner and the courts cited herein.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter. Petitioners' detailed and extensive exceptions to the report have also been reviewed and considered. Petitioners contend that "\*\*\* where the Board of Education does in fact bus school children for reasons of safety and not distance from the schoolhouse, then the said Board, having assumed such responsibility, must make such services available to all children similarly situated and cannot adopt arbitrary rules which afford protection for some and deny it to others.\*\*\*" (Petitioners' Exceptions and Reply to Hearing Examiner's Report, p. 1) This argument by petitioners suggests a criterion for the transportation of school children which would be a broad and encompassing one. That is, if any pupils of a school district are afforded transportation for reasons of safety, such transportation must be furnished to all pupils whenever a safety factor is involved.

The Commissioner has not in the past held such a view of the law with respect to pupil transportation, and he does not hold it now. Petitioners' contention, if carried to its ultimate conclusion, would deprive local boards of education of much of their discretion with respect to the evaluation of local conditions, and substitute for it a blanket rule which, the Commissioner holds, is unwarranted and unnecessary. There are gradations of safety hazard. The test of efficacy is the manner in which children within specific classifications are treated *vis-a-vis* one another.

As the Commissioner said in *William A. Pepe v. Board of Education of the Township of Livingston, Essex County*, 1969 S.L.D. 47:

“\*\*\* Boards of education must provide for the transportation of pupils who live remote from school. *N.J.S.A.* 18A:39-1 In their discretion they may provide such services to children who are not remote. *N.J.S.A.* 18A:39-1.1 Such transportation may not be furnished on a discriminatory basis. *Klastorin v. Scotch Plains Board of Education*, 1956-57 S.L.D. 85; *Dorski v. East Paterson Board of Education*, 1964 S.L.D. 36, affirmed State Board of Education, 39

“The Board of Education, in this case, has an established policy regulating pupil transportation. Its policy provides such services to pupils who are not remote under certain special circumstances, including lack of sidewalks on main roads and unusually hazardous conditions. Such a policy has been sustained as reasonable and a proper exercise of a board of education’s discretionary authority. *Iden v. West Orange Board of Education*, 1959-60 S.L.D. 96 The Commissioner finds that respondent’s rules governing transportation represent a proper exercise of its discretion.

“The Board has seen fit to provide school bus service to certain children in petitioner’s area. This service is furnished under the special circumstance provisions of its policy, *i.e.*, the absence of sidewalks on the east side of the street and the unusual hazards resulting from road construction work in the area. The transportation provided is temporary only, and will be withdrawn when the special circumstances no longer exist. *In order to establish unlawful discrimination there must be a showing that one group in entirely the same circumstances as another is given favored treatment.* There is no such showing herein. Petitioner’s daughter is the only child attending Collins School who lives on the west side of East Cedar Street. In going to and from school there are sidewalks available to her and she is not required to cross East Cedar Street. Children on the East side, however, do not presently have sidewalks and must cross East Cedar Street to get to Collins School. Such differentiation in conditions furnishes sufficient grounds for separate classifications under which respondent may distinguish services.

“\*\*\* 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.’ *Schrenk v. Ridgewood Board of Education*, 1960-61 S.L.D. 185, 188

“See also *Livingston v. Bernards Township Board of Education*, 1965 S.L.D. 29; *Peters et al. v. Washington Township Board of Education*, New Jersey Commissioner of Education, March 8, 1968.

“Respondent Board has inspected conditions in petitioner’s general area



and as a result of its observations has determined to provide bus service to children who encounter certain hazards in walking to and from school. Those hazards do not exist for petitioner's child. She is, therefore, in a reasonably distinct classification and for that reason has not been discriminated against in being denied a service provided to others who are situated differently.\*\*\*" (*Emphasis supplied.*) (1969 *S.L.D.*, at pp. 49-50)

Thus, a local board of education may evaluate conditions involving the safety of school pupils in their journey to and from school. It must make reasonable classifications with respect thereto. All children within such classifications must then be treated in an equitable manner.

However, when a local board of education has so acted there is no authority conferred on the Commissioner to interpose his discretion for that of the Board in the absence of evidence of discrimination or of evidence that the Board's policy is arbitrary, capricious or unreasonable. There is no such evidence herein. Accordingly, the Commissioner will not intervene. *Boult and Harris v. Passaic Board of Education*, 136 *N.J.L.* 521 (*E. & A.* 1948)

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

September 13, 1974

Leave to Appeal denied by Superior Court of New Jersey, October 16, 1974

Pending before State Board of Education

“J.L.,” on behalf of “D.L.,” an infant,

*Petitioner,*

*v.*

Board of Education of the Town of West Orange, Essex County,

*Respondent.*

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioner, Mellinger & Rudenstein, (Seymour Rudenstein, Esq., of Counsel)

For the Respondent, Samuel A. Christiano, Esq.

Petitioner seeks an Order from the Commissioner of Education directing the Board of Education of the Town of West Orange to temporarily excuse “D.L.,” a tenth grade pupil, from physical education as long as she pursues a private ice skating program.

The Board in its Answer to the Petition of Appeal agrees that D.L. should be excused from physical education training but asserts that it is prevented from excusing her by reason of *N.J.A.C. 6:29-6.2* which details only the following exceptions to full compliance with *N.J.S.A. 18A:35-7*:

“(a) The foundation program in physical education for the public schools of this State shall be the program as provided in this Chapter. Boards of Education may at their discretion, accept the successful completion of basic training in the military or naval service of the United States or United States Merchant Marine, in full satisfaction of the physical training requirements of *N.J.S.A. 18A:35-7*.

“(b) A board of education may give approval for members of an interscholastic athletic team of a school to be excused from physical activity in their physical education class on the days that a regular interscholastic game is scheduled. \*\*\*”

The testimony adduced at a hearing before a hearing examiner at the office of the Morris County Superintendent of Schools, Morris Plains, on June 24, 1974, discloses the following factual situation:

D.L. has for six years pursued a program of ice skating training, established by the U.S. Figure Skating Association. She aspires to become an applicant for and participant on the United States World and Olympics Ice Skating Team in the year 1976. Her regimen for fifty weeks each year consists of a minimum of thirty-five hours a week of rigorous physical training in ice skating and ballet classes which are supervised by professional personnel. (Tr. 6) During days when school is in session D.L. skates from 4:30 a.m. to 8:50 a.m. (Tr. 7)

D.L. was excused from her physical education class from September 1973 through December 1973 and assigned to a study hall during that period. Thereafter, she was required to participate fully in physical education. Petitioner alleges that the calisthenics, rope climbing and other strenuous exertions, in addition to her ice skating regimen, resulted in a prolonged illness which her personal physician attributed to exhaustion. (Tr. 11)

Petitioner states that D.L., in addition to her competition as an amateur ice skater, also has as her goal the vocation of a professional instructor of ice skating. (Tr. 14)

The Commissioner has carefully examined the record in the instant matter. He recognizes that D.L. has of her own volition and with the approval of her parents entered upon a rigorous training program in ice skating which together with the requirements of her physical education course have, at times, overtaxed her physical endurance during her adolescent years. While it is evident that the school is in no way responsible for her involvement in the strenuous ice skating regimen, it should not fail to recognize the physical demands of that program. Nor should the school fail to recognize the values that are derived from the discipline of training, the associations made possible through national and international competition, and the vocational opportunities which may result for D.L. as a result of such endeavors.

Educators have long emphasized that the school should adapt its offerings to meet the needs of the whole child. This valid principle dictates that, in the instant matter, no greater physical burden be placed upon D.L. than her body can bear.

*N.J.S.A. 18A:35-7* states that:

“Every pupil, excepting kindergarten pupils, attending the public schools, insofar as he is physically fit and capable of doing so, as determined by the medical inspector, shall take such [health, safety and physical education] courses, which shall be a part of the curriculum prescribed for the several grades\*\*\*and the standing of the pupil in connection therewith shall form a part of the requirements for promotion or graduation.”

The Board in its Answer states that it is in agreement that D.L. should be excused from physical education training. The Legislature in its wisdom has ordered that all pupils who are physically fit and capable shall be enrolled in physical education courses. Only those who have completed similar programs while in military service may at the discretion of boards of education be excepted. *N.J.A.C. 6:29-6.2(a)* This requirement by the Legislature and the rules of the State Board of Education allow for no other exception. D.L. may not, therefore, be excused from enrollment in health, safety and physical education classes which shall aggregate at least two and one-half hours in each school week. *N.J.S.A. 18A:35-8*.

However, the Legislation has also provided in *N.J.S.A. 18A:35-5* that:

“Each board of education shall conduct as a part of the instruction in the public schools courses in health, safety, and physical education, *which courses shall be adapted to the ages and capabilities of the pupils.* \*\*\* To promote the aims of these courses any additional requirements or rules as to medical inspection of school children may be imposed.” (*Emphasis supplied.*)

It is the position of the State Department of Education that requirements in physical education shall be such as will benefit the individual participants. Those with extreme handicaps and weaknesses are not required to climb ropes, or perform calisthenics, or engage in forms of play which require vigorous bodily contact. Thus, it is shown that historically the physical education programs of the public schools in this State have not been without flexibility. Local boards of education have properly modified the requirements for certain individual pupils in recognition of both their specific capabilities and limitations.

The Board is not only free to adapt the requirements of its physical education program to the capabilities of the pupils; it is required by statute to do so. The Board recognizes that the total physical exertion required of D.L. is excessive. (Tr. 58) The physical education director expressed willingness to make some accommodation for D.L. and make some adjustment for the physical exercises required of her in physical education. (Tr. 44; Tr. 68)

In the Commissioner’s judgment, this is precisely what should be done in this case. The Board may limit for D.L. its requirements of physical exertion in physical education in recognition of her thirty-five hours per week of strenuous training in ice skating and ballet. At the same time she will be afforded the benefits of instruction in the numerous areas of individual and group sports, dance, leisure time activities and other worthwhile adjuncts of the Board’s varied program. D.L. has shown herself a willing participant, sometimes, perhaps, to the detriment of her health. (Tr. 31) This being so, there is no reason to assume that she will not do those things which may reasonably be expected of her. There are numerous parts of the program, such as archery, wherein she may safely engage to the fullest. By so participating she may receive instruction in all areas, which will benefit her by providing varied interests and skills for both leisure time and spectator activities.

The Commissioner directs the Board to have its medical examiner evaluate D.L. so that the physical education director will be provided with such information as will be required to modify her individual physical education program. Such a modified program shall contain only limited physical exertion that will allow her to continue her worthy pursuits in ice skating. Such modification shall pertain only as long as she continues her program of instruction in ice skating. To this limited extent, the Petition of Appeal is granted.

COMMISSIONER OF EDUCATION

September 16, 1974

**“M.A.M.,” as Parent and Natural Guardian of “M.M.,”**

*Petitioner,*

*v.*

**Board of Education of the Black Horse Pike Regional School District,  
Camden County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Greenberg, Shmerelson & Greenberg (Lawrence M. Vecchio, Esq., of Counsel)

For the Respondent, Hyland, Davis & Reberkenny (John S. Fields, Esq., of Counsel)

Petitioner, on behalf of his infant son, hereinafter “M.M.,” contests the action of the Board of Education of the Black Horse Pike Regional School District, hereinafter “Board,” which determined that M.M. is no longer domiciled within its school district and, therefore, may not attend its Highland Regional High School.

This matter is submitted for Summary Judgment by the Commissioner on the Briefs of counsel. Petitioner also filed a supporting affidavit.

The following facts are not in dispute:

On or about September 30, 1973, M.M., his father, and his brother moved from the Black Horse Pike Regional School District to West Collingswood, New Jersey, which is in the Haddon Township School District. M.M. was enrolled in the eleventh grade in the Highland Regional High School. On or about February 22, 1974, the Board determined that M.M. was no longer domiciled in its school district; therefore, he could not attend its Highland Regional High School. M.M. was allowed to continue in attendance at Highland Regional High School pending disposition of this matter by the Commissioner.

Petitioner submitted an affidavit dated March 8, 1974, which sets forth the following information:

“1. Affiant is the parent and natural guardian of [M.M.] .

“2. Affiant and his wife, [A.M.] , are record owners of [a property], Bellmawr, New Jersey. [Bellmawr is in the Black Horse Pike Regional School District.]

“3. Affiant pays mortgage payments, real estate taxes, water and sewerage charges and utilities on the aforementioned residence.

"4. On or about September 29, 1973, affiant's wife in a state of drunkenness, ejected affiant and his two sons from the aforementioned address..

"5. On or about September 30, 1973, affiant and his two sons went to reside temporarily at [address] West Collingswood, New Jersey; said home is owned by affiant's sister.

"6. On or about January 14, 1974, affiant's wife ejected affiant's daughter from the residence [address], Bellmawr, New Jersey.

"7. Affiant pays room and board to affiant's sister for himself and his three children at [address] West Collingswood, New Jersey.

"8. Affiant will be financially unable to obtain an apartment or other residence for himself and his three children within the Black Horse Pike Regional School District until affiant's divorce action is concluded."

[signed — M.A.M.]

Petitioner states further that he stayed in a motel with his two sons on September 29, 1973, and on September 30, 1973, he took them to his sister's home to reside there temporarily. Prior to the aforementioned dates, he states that M.M.'s mother became inebriated on numerous occasions, and berated M.M. for no reason at all. Therefore, he adds, M.M. finds it impossible to live under such conditions. Further, M.M.'s mother's actions have caused M.M. great strain and anxiety, and to the best of petitioner's knowledge, she still continues to drink alcoholic beverages to the point of inebriation. Petitioner asserts also that M.M. has returned home on numerous occasions since September 30, 1973; but, due to his mother's actions, is unable to stay there nor does he desire to live under such conditions. M.M. avers that, if it were not for his mother's actions and his parent's marital dispute, he would be residing at home within the Black Horse Pike Regional School District. Petitioner asserts finally that his residency is temporary until his divorce action is concluded. (Petition of Appeal, affidavit)

Wherefore, petitioner prays that: (1) M.M. be permitted to remain a pupil at Highland Regional High School; (2) the Board be enjoined and restrained from releasing or discharging M.M. from Highland Regional High School; and (3) M.M. be declared a domiciliary pursuant to *N.J.S.A. 18A:38-1(a)*.

The Board neither admits nor denies the information set forth in the affidavit and the Petition of Appeal. Rather, it sets forth a separate defense of its action regarding petitioner.

The Board states that M.M. is presently a resident and domiciliary of Haddon Township, New Jersey, which maintains a secondary educational program in which M.M. should be enrolled. The Board argues that M.M. is not a domiciliary of the Black Horse Pike Regional School District, as that term is legally interpreted under the provisions of *N.J.S.A. 18A:38-1(a)*. According to

the Board, it cannot legally provide educational services to M.M. without providing the same services to all similarly situated pupils for to do so would deny equal protection to all such pupils. The Board also states that, regardless of the cause of petitioner's change of residence, the actual residence and domicile of the pupil is controlling with respect to his right to receive a free public education. Finally, the Board argues that petitioner is not entitled to such education for M.M. solely as a result of his status as a taxpayer or owner of property within the Board's school district.

The applicable statute, *N.J.S.A.* 18A:38-1, reads in pertinent part as follows:

"Public schools shall be free to the following persons over five 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 any person who has had or shall have his all-year-around dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section \*\*\*."

The Commissioner determines that there is no question of M.M.'s right to attend the public schools in the Haddon Township School District where he presently resides, pursuant to *N.J.S.A.* 18A:38-1. However, the salient issue is whether or not M.M. should be permitted to continue in attendance in the Black Horse Pike Regional School District because of the particular circumstances described herein.

It is necessary at this juncture to comment on the definition of "domicile," as it applies to the education statutes.

*Black's Law Dictionary* 572 (rev. 4th ed. 1968) is quoted, in part, as follows:

"DOMICILE. That place where a man has his *true, fixed, and permanent home* and principal establishment, *and to which whenever he is absent he has the intention of returning.* Kurilla v. Roth, 132, N.J.L. 213, 38 A.2d 862, 864 \*\*\**Not for a mere special or temporary purpose*, but with the present intention of making a permanent home, for an unlimited or indefinite period.\*\*\* 18 N.J. Misc. 540 \*\*\*."

And,

"The established, fixed, permanent, or ordinary dwelling place or place of residence of a person, *as distinguished from his temporary and transient through actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode;* or his home, as distinguished from a



place to which business or pleasure may temporarily call him. \*\*\*”  
(*Emphasis supplied.*)

Also, “residence” is defined, in part, as follows:

“RESIDENCE. A factual place of abode. Living in a particular locality.  
\*\*\* It requires only bodily presence as an inhabitant of a place. \*\*\*

“As ‘domicile’ and ‘residence’ are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place *and also an intention to make it one’s domicile.* \*\*\*” (*Emphasis supplied.*)  
(*Ibid.*, at p. 1473)

The courts have traditionally held that the domicile of a child is that of the father. However, this general conclusion is not without exception or modification. In *Walton v. Board of Education of the City of Brigantine*, 1950-51 *S.L.D.* 39, the Commissioner determined that petitioner’s children were domiciled with their mother because of an arrangement made at the parents’ divorce settlement. The Commissioner commented in *Walton*, as follows:

“\*\*\* Ordinarily, children residing in a district without a high school must travel to a designated high school in the bus furnished by the board of education of the sending district. It happens in this case that both parents desire the children to attend Atlantic City High School and transportation facilities are not available. In most cases, however, it would not be possible for children of a divorced mother to travel to the school district where the father resides. *In deciding this case, the Commissioner must avoid establishment of a precedent whereby the children of divorced parents might encounter difficulty in securing an education.*

“If the petitioner should prevail in this case, a school district in which children of divorced parents are residing with their mother could save money by refusing to pay their tuition to high school on the theory that they are not domiciled in the district. It is the opinion of the Commissioner that such was not the intention of the Legislature.

“The Commissioner finds and determines that the children of the petitioner are domiciled with the mother within the intendment of R.S. 18:14-1, as amended, and that the Board of Education of the Borough of Linwood is responsible for their education in the high school designated to receive the pupils of the district. \*\*\*” (*Emphasis supplied.*) (at p. 41)

The courts have determined that every person has a domicile somewhere under all circumstances and conditions, and that a person may have several residences or places of abode, but can only have one domicile at a time.

The Commissioner quoted *State v. Benny*, 20 N.J. 238 (1955) as he determined its relevancy to *Board of Education of the Township of Little Egg Harbor v. Boards of Education of Galloway et al*, 1973 S.L.D. 324; affirmed State Board of Education, 1974 S.L.D. 1410 as follows:

“\*\*\* It is everywhere conceded that a person can have only one true domicile, which is synonymous with the common understanding of the word ‘home,’ *Stout v. Leonard*, 37 N.J.L. 492 (E. & A. 1874); *Cromwell v. Neeld*, 15 N.J. Super. 296 (App. Div. 1951).

“Residence, on the other hand, though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a ‘home’ according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile.”\*\*\*”

N.J.S.A. 18A:1-1 is particularly significant in the instant matter. It provides in part that:

“\*\*\* ‘Residence’ means domicile, unless a temporary residence is indicated \*\*\*.” (Emphasis supplied.)

In *Mansfield Township Board of Education v. State Board of Education*, 101 N.J.L. 474 (Sup. Ct. 1925) the Court stated that:

“\*\*\* The permanent residence of the father is that of the child, until the latter is emancipated and chooses a place of residence of its own.\*\*\*” (Emphasis supplied.) (at p. 478)

Petitioner in this matter does not consider his residence at his sister’s home as his permanent residence.

The issue of domicile was reviewed by the New Jersey Supreme Court in *Worden et al. v. Mercer County Board of Elections*, 61 N.J. 325 (1972). In that case, students were seeking voting rights in their college and university communities where they claimed they were domiciled. The Court stated, in part, the following:

“\*\*\* if a student asserts that his plans as to future residence are uncertain but that he considers the college town his home for the present and has no intention of returning to his parents’ home, he will ‘be allowed by the courts in most states to vote in his college town.’ 31 *Ohio St. L.J.* at 714; *Annot.*, 98 *A.L.R. 2d* 488, 497-498 (1964), *Annot.*, *supra*, 44 *A.L.R. 3d* at 826-29. Although this action is taken without abandonment of the domicil requirement it may have pertinence to the growing recognition that *domicil is not a unitary concept and that its application may vary in different contexts*. See Reese, ‘Does Domicil Bear a Single Meaning?’, 55

*Colum. L. Rev.* 589 (1955); Weintraub, 'An Inquiry into the Utility of 'Domicile' as a Concept in Conflicts Analysis,' 63 *Mich. L. Rev.* 961, 983-86 (1965); *Restatement (Second) Conflict of Laws* § 11, comment o at 47-50 (1971); cf. *Gladwin v. Power*, 21 *A.D.* 2d 665, 249 *N.Y.S.* 2d 980, 982 (1st Dept. 1964); *In re Jones' Estate*, 192 *Iowa* 78, 182 *N.W.* 227, 229 (1921).

"In his discussion of domicile, Professor Weintraub has noted that, while articulating the same technical definition of domicile, courts may vary its meaning 'by shifting the emphasis to one or another element of the definition or by drawing different reasonable inferences from essentially the same fact pattern.' 63 *Mich. L. Rev.* at 984. Earlier, Professor Reese had expressed the thought that *since courts are desirous of attaining the right result in the individual case it would be 'suprising if they did not take advantage of the flexibility in application of the rules of domicile to achieve this end.'* 55 *Colum. L. Rev.* at 596-97.\*\*\*" (Emphasis ours.)

(at p. 343-344)

As stated by Chief Justice Weintraub, in his concurring opinion in *Worden, supra*:

\*\*\*\* The concept of domicile is not constant. *It is designed to assure fairness to the individual or to the State or both in a given setting.* Its ingredients therefore will vary, depending upon what is just and useful in a given context.\*\*\*\*" (Emphasis supplied.)

(at p. 349)

In the instant matter, therefore, the Commissioner determines that the fair and equitable resolution of this problem is that M.M. may continue in attendance at the Highland Regional High School. This determination is based on petitioner's verified statement, *ante*, that he and his children are temporarily residing with his sister and that they intend to return to their home in Bellmawr.

If a divorce does not in fact occur, the settlement then imposed by the court would have to be considered to determine the proper school district for petitioner's children to attend.

For the reasons expressed herein the Board of Education of the Black Horse Pike Regional School District is directed to permit M.M.'s continued enrollment at the Highland Regional High School. The Commissioner commends the Board for permitting M.M.'s attendance in its high school pending the determination of the instant matter.

COMMISSIONER OF EDUCATION

September 16, 1974

William J. Wheatley, Matthew Cipriano, Ronald Elsis, Jeffrey Haynes,  
Douglas Reynolds, Karen Shansey, Francis O'Keefe,  
Chester Mazur and Mary Zeisloft,

*Petitioners,*

*v.*

Board of Education of the City of Burlington, Burlington County,

*Respondent.*

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioners, Ernest A. Ferri, Esq.

For the Petitioner Elsis, Kent and Grayer (James Rosenberg, Esq., of Counsel)

For the Respondent, John E. Queenan, Jr.

Petitioners, nine pupils enrolled in the twelfth grade of Burlington City High School, allege that the Board of Education of the City of Burlington, hereinafter "Board," has improperly denied them their diplomas of graduation by the application of an arbitrary and unreasonable attendance policy adopted by the Board, and by the interpretation of said policy by the Board's administrators and teaching staff members.

The Board denies that the challenged attendance policy is arbitrary and unreasonable, and asserts that such policy was properly interpreted and applied to petitioners by the Board's administrators and other teaching staff members charged with that responsibility.

Petitioners pray for relief in the form of an Order of the Commissioner of Education directing the Board to award a diploma of graduation to each petitioner on the basis of full credit for each course of study successfully completed by each petitioner.

A hearing in this matter was conducted on June 12, 1974, and June 19, 1974, by a hearing officer appointed by the Commissioner, at the State Department of Education, Trenton.

The report of the hearing officer is as follows:

For the 1972-73 academic year, the Board adopted and implemented a policy regarding pupil attendance which was applicable to all pupils enrolled in the ninth, tenth, eleventh and twelfth grades. This policy was published in a handbook which was distributed to all pupils at the beginning of the 1972-73 academic year, and is reproduced in its entirety as follows: (R-3)

\*\*\*\* f. *Student attendance.* A student who is absent from school six (6)

or more sessions during a marking period *may* be required to have a doctor's excuse, or have the parents return with the student upon his or her sixth absence. A school session consists of a morning session or an afternoon session.

"Any student who is absent from a subject 30 days or more *may* not be given credit for that subject. Thirty days is approximately 17% of the school year. It also represents two-thirds of a marking period in the high school.

"Each student's case will be reviewed by the Attendance Credit Council. The Council will consist of the Principal, Vice-Principal, Disciplinarian, Nurse, Guidance Counselor, and the subject teacher involved. Each case will be reviewed individually and the decision made based on the facts.

"Warning letters are sent to the parents by the Vice-Principal when the absence of a student reaches a total of 15, 20, or 25 days. Also, student conferences will be held at least two times during the year.

"Where seniors are involved, if the final average in any given subject is C or better, the student may be given credit at the discretion of the Attendance Credit Council. However, where the final average in a given subject of the senior student is D, the student may be required to attend summer school for review to make up the credits withheld because of poor attendance involving absenteeism of thirty or more days. Recommendation for summer school would be at the discretion of the Attendance Credit Council.\*\*\*"

This attendance policy was revised for the 1973-74 academic year. The only portion changed in the policy was the fourth paragraph, which removed the provisions that warning letters would be sent to parents by the vice-principal after a pupil's absence reached fifteen, twenty or twenty-five days, and that pupil conferences would be held at least two times during the year. In place of the fourth paragraph, the Board included the following: (R-2)

"\*\*\* Warning letters will be sent to the parents by the Vice-Principal when in his judgment it is necessary. Also, student conferences will be held when deemed necessary.\*\*\*"

The warning letter referred to in the policy (R-2) is a form letter, which is addressed to parents of a pupil and is signed by the vice-principal. The body of this warning letter (R-4) is quoted as follows:

"We wish to inform you that your son/daughter has not attended many class periods because of absence from school, appointments, or other activities.

We think it important to remind you that the Board of Education of Burlington City passed a ruling last year which states, 'Any student missing

thirty (30) or more sessions may not receive credit for the course (or courses) affected.'

"If you would like more information in regard to your son/daughter in this matter, please telephone Burlington City High School\*\*\*."

The Board's interpretation of its attendance policy is that a pupil may miss up to thirty class sessions in each subject matter course in which he or she is enrolled and still receive credit for that subject, providing that the pupil attains a passing grade in that subject matter course. These class absences include all excused absences such as for illness, observances of religious holidays, college visitations, and even absence from class by virtue of keeping an appointment in the guidance counselor's office or being in some other part of the high school on legitimate school business during the missed class session. Illegal absences, for instance for "cutting" class without permission, are also included in totaling the thirty class absences permitted by the policy. Testimony of school administrators disclosed that pupils are assigned after-school detention for illegally cutting class periods, but pupils are not suspended from school attendance for such a violation of school rules. If a pupil suffers from an extended illness, he or she is provided home instruction by teaching staff members, and the pupil's attendance is counted as being present in the attendance register kept for this purpose. Requests for home instruction, also called bedside instruction, must be made in writing by the pupil's family physician, and the nature of the illness or disability must be disclosed by the physician. None of the nine petitioners in this matter either requested or received home instruction during the 1973-74 academic year.

The testimony of the vice-principal who mailed the warning letters established that the attendance policy was announced over the high school public address system at the beginning, in the middle, and near the end of the academic year as a means of warning pupils that they must not exceed the thirty-day limitation on class absences. (Tr. I-29) This vice-principal also testified that he sent at least two and, in some instances, three warning letters to each of the petitioners regarding their class attendance. (Tr. I-30, 32) According to the vice-principal, he held a conference with all twelfth grade pupils during April 1974, in order to caution them not to exceed the thirty-day limitation of class absences permitted by the Board's policy, and most of the twelfth grade pupils were in attendance at this conference. (Tr. I-31) He also presented the names of pupils who were in danger of exceeding the thirty-day limitation to the two guidance counselors for the twelfth grade pupils, and these two guidance counselors called these pupils in for individual conferences regarding this matter. (Tr. I-31) Each pupil's report card also listed each subject being studied, the grade for each of the four grading periods, and the number of classes missed during each grading period immediately following the grade for each subject. The vice-principal testified that this procedure enabled the parents of each pupil to review the pupil's class attendance in each subject for each grading period, as compared to the pupil's actual daily attendance at school, which was shown by the total of days present and absent recorded on the report card. (Tr. I-31-32)

This vice-principal testified that the attendance credit council, consisting

of the principal, the two vice-principals, the school nurse, and the two twelfth grade guidance counselors, met and conferred regarding the circumstances of each of petitioners' attendance records, and then made determinations as to whether or not each petitioner would receive credit for the courses taken during the 1973-74 academic year. (Tr. I-33, 44-45) The subject teachers were not present at these meetings of the attendance credit council, but they did submit reports for the council's consideration. (Tr. 48) The vice-principal testified that, when the council conferred, it did not have a written itemization as to how many specific classes were missed by a pupil in a subject course for various reasons such as illness, religious observances, college visitations, illegal cutting of class and the like. (Tr. I-35-36, 54) According to this witness, the council did have the benefit of the knowledge possessed by the school nurse, the guidance counselors, the vice-principals, plus his own knowledge of each individual petitioner's circumstances, when it conferred to make a final determination regarding the awarding of credits toward graduation requirements. (Tr. I-35)

At the beginning of the first day of hearing in this matter, the Board stated its position that classroom participation in an area of study is essential for a thorough education. Therefore, says the Board, a pupil may receive a passing grade for a given subject course, but not receive credit for that subject because excessive absence has prevented him or her from securing the essential benefit of the educative process missed through lack of participation. The Board would prefer that pupils in such circumstances repeat the subject during the succeeding academic year rather than make up the credit by means of summer school attendance, because sufficient hours of classroom attendance are not provided on the same basis during summer school as could be obtained during the regular school year. The Board states that this philosophy is the established basis for its attendance policy. (Tr. I-7-8)

During the hearing, a substantial amount of testimony and documentary evidence was adduced in regard to the class absences of each of the petitioners. The factual findings pertaining to each is hereafter summarized.

*William Wheatley*

This pupil has earned seventy-eight credits toward the total of eighty-four required for graduation. He needed to acquire six credits during the 1973-74 academic year, which included passing the required courses in English IV and Health and Physical Education. The following sets forth this pupil's schedule, final grade, number of possible credits, credits earned and classes missed: (Exhibit R-17)

Subject	Poss.	Final	Classes Missed		Earned
	Cr.	Av.	Actual	Rep.	Cr.
English IV	5	D	41	36	0
Health	1/2	C	—	—	1/2
Phys. Educ.	1/2	A	—	—	1/2
Humanities	5	F	68	60	0
Mech. Draw II	2-1/2	B	—	—	2-1/2
Total	13-1/2				3-1/2



This pupil was given credit for earning three and one-half credits during the 1973-74 academic year. The controversy arises with this petitioner over the fact that the attendance credit council did not award him five credits for English IV, although his final average grade was a "D."

An analysis of this pupil's records discloses that he was absent from school a total of thirty-three and one-half days of a possible one hundred and eighty school days. This total was derived from the official school attendance register. (Exhibit R-16) Petitioner Wheatley's written excuses for absences and the subject teacher's daily attendance cards were also examined and compared with the attendance register. This pupil missed English IV a total of forty-one times. Thirteen of these absences may be considered as excused because a written explanation was provided either by the pupil's parent or by a physician. Twenty-five absences from English IV were the result of either tardiness to school or unexcused absences. Three of the missed classes were instances where the pupil was in school but cut the class. The classroom teacher's attendance card failed to record some of the pupil's absences when the attendance register recorded him as absent for an entire day. This explains why the teacher reported only thirty-six instead of forty-one missed classes in English.

Petitioner Wheatley missed 22.8 percent of his English IV classes during the 1973-74 academic year, almost one-fourth of the total year. Of his forty-one missed classes, thirteen were excused and twenty-eight were not excused. Almost thirty-two percent of his class absences were actually unexcused, illegal absences from English IV.

Petitioner Wheatley missed his Humanities class a total of sixty-eight times, and only fourteen of these missed classes were for *bona fide* excused reasons. He cut this class twenty-seven times on days when he was present in school. He received a failing grade in this Humanities class.

This pupil testified that he did not know whether his parents received the warning letters sent by the vice-principal on February 7, 1974, and April 5, 1974.

He lost his report card after both the first and third marking periods. Therefore, his parents did not see his accumulated absences recorded for each subject. An examination of the report cards of all the petitioners discloses that the replacement report cards prepared by teachers do not record the absences for each subject after each marking period. As a result, the loss of a report card by a pupil automatically precludes the possibility that parents will see the accumulation of absences on replacement report cards.

#### *Matthew Cipriano*

Petitioner Cipriano had earned sixty and one-half credits prior to the 1973-74 academic year and needed twenty-three and one-half credits to be eligible for a high school diploma of graduation. The following is a summary of his experience during the 1973-74 academic year:

Subject	Poss.	Final	Classes Missed		Earned
	Cr.	Av.	Actual	Rep.	Cr.
English III	5	D	72	43	0
English IV	5	D	50	42	0
Health	1/2	D	—	—	1/2
Phys. Ed.	1/2	B	—	—	1/2
Humanities	5	D	70	42	0
Basic Math.	5	D	50	45	0
Intro. Films	2-1/2	D	—	—	2-1/2
Tech. Films	2-1/2	C	—	—	2-1/2
Total	26				6

This pupil was present a total of one hundred and thirty six days and absent a total of forty-four days, of a possible one hundred and eighty days. (Exhibit R-16) As may be seen from the above summary, he missed his English III class seventy-two times, English IV fifty times, Humanities seventy times, and Basic Mathematics fifty times. In English III his missed classes constituted forty percent of the academic year. Forty-three of his seventy-two absences may be considered as excused, because written excuses were filed with the school nurse. However, from September through January this pupil wrote his own excuses, since he was eighteen years of age during the entire academic year. Beginning in February, following conferences between school administrators and his parents, the mother of this pupil began to write excuses for certain of his absences. On occasion, this pupil also wrote several absence notes, even when his mother had assumed this responsibility.

Petitioner Cipriano testified that he had played varsity basketball during the 1973-74 academic year, but he quit the team after the tournament which was held over the Christmas and New Year vacation period. Many of this pupil's classroom absences were on days when he either arrived late for school or left early. In most of these instances he pleaded illness as the reason for missing the classes.

In English IV, thirty-five of the fifty missed classes may be considered excused by virtue of the fact that written excuses were presented. Of these thirty-five, the pupil wrote his own notes for twenty-six absences between September and January, until his mother began to write the absence notes in February.

In Humanities, the pupil presented written excuses for forty-four of his seventy missed classes, but thirty-four of these notes were written by him between September and January. The total of seventy missed classes in Humanities constitutes thirty-nine percent of the total academic year.

Petitioner Cipriano presented written excuses for thirty-three of his fifty missed classes in Basic Mathematics. Of the thirty-three, he wrote twenty-four between September and January. His absences from Basic Mathematics represented almost twenty-eight percent of the academic year.

Petitioner Cipriano testified that his parents did receive the warning letters sent by the vice-principal on December 3, 1973, and February 7, 1974, but he was not certain whether they received the third letter dated April 5, 1974.

The large discrepancy between the number of classes actually missed by this pupil as compared to the number reported by the classroom teacher was discovered by comparing the attendance cards marked by the teachers to the official attendance register. In many instances this pupil was recorded as absent all day in the attendance register, but one or more teachers failed to mark him absent on his daily card. This situation occurred most frequently in English III where few of Petitioner Cipriano's all-day absences were reported on the card maintained by the teacher. As a result, there is a difference of twenty-nine absences from English III which were not reported by the teacher.

He lost his report card for the second marking period, and the replacement card did not record his total absences from each subject during the first marking period. As a result, his parents could not see from the report card his accumulated absences for the first half of the school year. This pupil signed his own report card for the third marking period.

*Ronald Elsis*

Petitioner Elsis was present one hundred and forty-four days and absent thirty-six days of a possible one hundred and eighty days. He had acquired eighty-three credits prior to the 1973-74 academic year and therefore needed only one credit to earn a diploma of graduation. His final records are summarized as follows:

Subject	Poss	Final	Classes Missed		Earned
	Cr.	Av.	Actual	Rep.	Cr.
English IV	5	C	50	35	0
Health	1/2	D	—	—	1/2
Phys. Ed.	1/2	B	—	—	1/2
Typing I	2-1/2	C	58	53	0
Adv. Math	5	F	60	49	0
Humanities	5	*	—	—	—
Anthropology	5	*	—	—	—
Total	23-1/2				1

\*Withdrawn January 1, 1974

Although this pupil earned one credit by receiving passing grades in Health and Physical Education, he did not receive credit for English IV, which is a required subject that must be completed in order to qualify for graduation.

In English IV, this pupil actually missed the class fifty times, although only thirty-five absences were reported by the classroom teacher. Many absences were recorded in the official attendance register but were not marked on the classroom teacher's card. Of the fifty missed English IV classes, only twenty-one

were excused by a written note from a parent. Petitioner Elsis missed twenty-eight percent of the English IV classes.

In Advanced Mathematics this pupil actually missed sixty classes instead of forty-nine reported by the subject teacher. Only sixteen of the sixty missed classes may be considered as excused. He cut this class twenty times and additionally had twenty-four unexcused absences from the class. These sixty absences represent one-third of the academic year.

Petitioner Elsis missed Typing I fifty-eight times, and not fifty-three as reported by the classroom teacher. He cut this class nineteen times, was illegally absent from school and the class twenty-four times, and had only fifteen excused absences. These fifty-eight missed classes in typing represent thirty-two percent of the academic year.

This pupil lost his report card after the second marking period, therefore his total absences from various classes was not recorded on the replacement report card which his father signed after the third marking period. The academic year is divided into four marking periods.

Petitioner Elsis testified that he was called in to a conference with the vice-principal and later with the guidance counselor after he had missed twenty to twenty-five classes. He admits that he was warned at that point regarding excessive absences, but he was never suspended for illegally missing classes.

It is difficult to understand how this pupil could have received a grade of "C" in English IV while missing fifty classes which represented twenty-eight percent of the academic year.

The Board's records disclose that letters were sent on the dates of December 3, 1974, February 7, 1974 and April 5, 1974 by the vice-principal warning Petitioner Elsis' parents regarding his absences. This pupil testified that his parents did not receive these letters, and his mother testified that she received only the April 5, 1974 letter but not the previous two. This pupil's mother testified that she wrote excuses for his absences. While testifying, she was handed four written notes and asked whether she had written them. She testified that she had. An examination of these notes discloses that they were written in four distinctly different handwritings. All of the notes submitted by this pupil can be grouped into four distinct categories. Four different handwritings were used, and the mother's handwriting matches her signature on the report card.

It must be concluded that possibly three other persons wrote numerous notes for the pupil and in each instance signed his mother's name. It is not determined whether or not one of the handwritings matches the pupil's, since no examples of his handwriting appear in the record.

*Jeffrey Haynes*

Petitioner Haynes was present one hundred and fifty-three and one-half

days and absent twenty-six and one-half days of a possible one hundred and eighty days. Prior to the 1973-74 academic year, he had acquired sixty and one-half credits and needed twenty-three and one-half credits in order to receive a diploma of graduation. A summary of his status is set forth as follows:

Subject	Poss. Cr.	Final Av.	Classes Missed Actual	Rep.	Earned Cr.
English IV	5	C	—	—	5
Health	1/2	B	—	—	1/2
Phys. Ed.	1/2	B	—	—	1/2
Basic Math.	5	B	—	—	5
Gen. Bus. Tr.	5	D	50	35	0
Bus. Law	2-1/2	D	—	—	2-1/2
Consum. Ed.	2-1/2	D	—	—	2-1/2
Typing I	2-1/2	*	—	—	—
Humanities	5	C	—	—	5
Total	28-1/2				21

\*Withdrawn February 6, 1974

The controversy concerning this pupil arises from the fact that the attendance credit council did not grant him five credits for the completion of a course in General Business Training, even though his final grade was a "C," because his classroom teacher reported that this pupil had missed the class thirty-five times.

A careful review of the school records discloses that Petitioner Haynes actually missed his General Business Training class a total of fifty times, or approximately twenty-eight percent of the time the class was held. Eighteen days of his absence were for suspension from school for excessive tardiness and disciplinary reasons. Of the total number of fifty missed classes, only fourteen may be considered excused for appropriate reasons. Twenty-three absences are unexcused, and additionally, on thirteen days this pupil merely cut the class while he was present in school. Three of the excused absences were for days the pupil made college visitations.

Petitioner Haynes testified that his parents did not receive warning letters regarding his absences which were sent by the vice-principal on February 7, 1974 and April 5, 1974.

#### *Douglas Reynolds*

During the course of the hearings, this pupil withdrew as a petitioner, therefore, no determination need be made of his status.

#### *Karen Shansev*

This pupil needed to earn thirteen and one-half credits during the 1973-74 academic year in order to attain the total of eighty-four credits required for a diploma of graduation. She was present a total of one hundred and forty-seven

days and absent thirty-three days during the 1973-74 academic year. Her status is listed as follows:

Subject	Poss.	Final	Classes Missed		Earned
	Cr.	Av.	Actual	Rep.	Cr.
English IV	5	D	38	37	0
Health	1/2	B	—	—	1/2
Phys. Ed	1/2	C	—	—	1/2
Anthropology	5	C	—	—	5
Family Living	5	B	—	—	5
Total	16				11

As may be seen from the above summary, this pupil did not earn sufficient credits to graduate, because she did not receive five credits for English IV, even though the classroom teacher gave her a final grade of "D."

Petitioner Shansey actually missed her English IV class thirty-eight times. Of these, nine may be considered excused absences, twenty-six were not excused, and in three instances the pupil cut the class. Two of her unexcused absences are for two days in June, following the day she was informed she would not graduate. According to her testimony, she saw no point in attending if she could not graduate.

This pupil's absences from her English IV class totaled twenty-one percent of the academic year.

*Francis O'Keefe*

This pupil was present one hundred and fifty-five days and absent twenty-five days during the 1973-74 academic year. He had earned sixty-seven credits and needed to successfully pass seventeen credits in order to qualify for a diploma of graduation. His circumstances are summarized as follows:

Subject	Poss.	Final	Classes Missed		Earned
	Cr.	Av.	Actual	Rep.	Cr.
English IV	5	C	35	35	0
Health	1/2	D	—	—	1/2
Phys. Ed.	1/2	B	—	—	1/2
Amer. His. II	5	B	—	—	5
Pow'r/Auto II	7-1/2	C	—	—	7-1/2
Bus. Law	2-1/2	F	—	—	0
Consum. Ed.	2-1/2	F	—	—	0
High. Safety	1/2	B	—	—	1/2
Total	24				14

An examination of Petitioner O'Keefe's absences from English IV discloses that he had two excusable absences, thirty-one unexcusable absences and two cuts, for a total of thirty-five instances of missed English classes. These

thirty-five missed classes occurred over the ten months of the academic year. He had six missed classes in December, five each in January, February and April, four in May, three in September, two each in October, November and March, and one in June. All of the written excuse notes submitted to the school by Petitioner O'Keefe, with one exception, do not match the handwritten signature of his mother on the report card. The conclusion is that his mother wrote only one excuse note, dated December 11, 1973, and one or more other individuals signed his mother's name on twenty-two written excuses. One of his absences was excused by a telephone call from his mother to the school nurse. The remaining missed classes were simply unexcused absences, and no written excused notes were submitted by Petitioner O'Keefe. This pupil's absences from his English IV class represented approximately twenty percent of the academic year.

*Chester Mazur*

Petitioner Mazur's attendance for the 1973-74 academic year totaled one hundred and forty-seven days present and thirty-three days absent. At the end of his eleventh grade year he had acquired seventy and one-half credits toward the total of eighty-four academic credits required to be eligible for a high school diploma of graduation. He needed to earn thirteen and one-half credits during the 1973-74 academic year. His record is summarized as follows:

Subject	Poss.	Final	Classes Missed		Earned
	Cr.	Av.	Actual	Rep.	Cr.
English IV	5	D	39	34	0
Health	1/2	C	—	—	1/2
Phys. Ed.	1/2	B	—	—	1/2
Basic Math.	5	B	—	—	5
Bus. Law	2-1/2	F	—	—	0
Wood Shop II	2-1/2	B	—	—	2-1/2
Total	16				9-1/2

This pupil actually missed his English IV class a total of thirty-nine times, although his classroom teacher reported his absences as only thirty-four. Of the total thirty-nine missed classes, ten were excused, twenty were unexcused, and in nine instances he was in school but cut the class. His absences from the Business Law class approximate seventy, but these need not be reviewed in view of the fact that he received uniformly failing grades in the Business Law course. Petitioner Mazur's absences from his English IV class totaled twenty-two percent of the academic year. He lost his report card prior to the last marking period and therefore his absences for the early part of the year are not recorded on the duplicate report card. (Exhibit R-29)

*Mary J. Zeisloft*

Petitioner Zeisloft was present one hundred and forty-two and one-half days and absent thirty-seven and one-half days of a possible one hundred and eighty days in the academic year. She had earned seventy-seven and one-half



academic credits at the end of her eleventh-grade year and needed to acquire six and one-half during the 1973-74 year in order to receive a diploma of graduation. However, she also had to satisfactorily complete the required English IV course. She did receive satisfactory grade reports in several subjects during the 1973-74 academic year, but she did not receive five credits for English IV, even though her final grade was a "B," because she was reported to have missed her English IV class on forty days. The summary of her grades and credits is as follows:

Subject	Poss.	Final	Classes Missed		Earned
	Cr.	Av.	Actual	Rep.	Cr.
English IV	5	B	42	40	0
Health	1/2	B	—	—	1/2
Phys. Ed.	1/2	A	—	—	1/2
Humanities	5	A	—	—	5
Anthropology	5	B	—	—	5
Adv. Comp.	<u>2-1/2</u>	A	—	—	<u>2-1/2</u>
Total	18-1/2				13-1/2

As may be seen from the above summary, this pupil's grade reports show a high level of academic achievement. Her absences from the English IV class actually totaled forty-two, and of these twenty were excused, twenty were not excused and in two instances the pupil cut the class while she was present in school. Beginning on March 20, 1974, this pupil submitted her own written excuse notes, because she had become eighteen years of age on March 18, 1974. The fact that this pupil attained a final grade of "B" in English IV indicates that she was able to make up any school assignments which she missed because of her class absences.

The hearing examiner refers to the Commissioner the issue of whether the Board's policy constitutes a proper exercise of discretion and the further determination of whether each of the petitioners was improperly deprived of his/her diploma of graduation by the Board's application of the policy in each individual instance.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter and observes that the parties have each waived receipt of the report and the filing of exceptions thereto in accordance with *N.J.A.C. 6:24-1.16*.

As was previously stated, petitioners attack the attendance policy enacted by the Board on the grounds that said policy is arbitrary and unreasonable. The Commissioner has stated in previous decisions that, when called upon, he must examine the actions of local boards of education and determine whether such actions were taken in good faith and not irresponsibly, and to further examine

the application of any and all regulations, rules, and policies deriving therefrom. See *McCabe v. Board of Education of the Township of Brick, Ocean County*, 1974 S.L.D. 299, aff'd State Board of Education, 1974 S.L.D. 315.

The Board adopted the policy regarding pupil attendance pursuant to the authority of *N.J.S.A. 18A:11-1*. This statute, which iterates the primary enabling authority conferred by the Legislature upon local boards of education, provides *inter alia*, as follows:

“The Board shall —

\*\*\*

“c. *Make, amend and repeal rules*, not inconsistent \*\*\* with the rules of the state board, for its own government and the transaction of its business and *for the government and management of the public schools* \*\*\* of the district \*\*\* and

“d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.” *(Emphasis ours.)*

The Board's policy on pupil attendance must be examined in view of other statutory provisions regarding public school attendance.

New Jersey parents are required to send their children to school. *N.J.S.A. 18A:38-25* reads in part:

“Every parent \*\*\* having custody and control of a child between the age of six and sixteen years shall cause such child regularly to attend the public schools of the district\*\*\*.”

The statutes also define the days when children are required to regularly attend school. *N.J.S.A. 18A:38-26* states in pertinent part:

“Such regular attendance shall be during all the days and hours that the public schools are in session in the district\*\*\*.”

If a child between the ages of six and sixteen is repeatedly absent from school, and his parent is unable to compel him to attend school, he “\*\*\* shall be deemed to be a juvenile delinquent and shall be proceeded against as such\*\*\*” in accordance with *N.J.S.A. 18A:38-27*. In case of violation of the compulsory attendance requirement, the statutes require that formal written notice be served upon the parent to cause the child to attend school, *N.J.S.A. 18A:38-29*; and that a parent who fails to comply with the provisions of the law “\*\*\* shall be deemed to be a disorderly person and shall be subject to a fine\*\*\*.” *N.J.S.A. 18A:38-31*

The courts of this State and the United States Supreme Court have upheld the principle that compulsory education in New Jersey is a matter of public concern and legislative regulation, and that it should be enforced so long as statutory requirements are reasonable, subject to constitutional limitations. See *Everson v. Board of Education of Ewing Township*, 133 N.J.L. 350 (E. & A. 1945), affirmed 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), rehearing denied 330 U.S. 855, 67 S. Ct. 962, 91 L. Ed. 1297.

It is clear that the State policy for compulsory attendance at school is of long standing and is in the public interest.

In the instant matter, the Commissioner agrees with the Board's position that pupil participation in all regularly-scheduled classroom learning activities in each area of study is essential in order for each pupil to receive the maximum benefits of a thorough educational program.

Frequent absences of pupils from regular classroom learning experiences disrupt the continuity of the instructional process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra after-school instruction. Consequently, many pupils who miss school frequently experience great difficulty in achieving the maximum benefits of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic programs. The school cannot teach pupils who are not present. The entire process of education requires a regular continuity of instruction, classroom participation, learning experiences, and study in order to reach the goal of maximum educational benefits for each individual child. The regular contact of the pupils with one another in the classroom and their participation in well-planned instructional activity under the tutelage of a competent teacher are vital to this purpose. This is the well-established principle of education which underlies and gives purpose to the requirement of compulsory schooling in this and every other state in the nation.

In the judgment of the Commissioner, the Board's policy of permitting pupil absences for whatever reason, up to thirty instances, in each subject matter class, impedes and impairs the State policy for compulsory schooling. The length of the academic year for pupils in the public schools of this State averages approximately 182 days. Given such a limited number of school days for pupils, any local policy which condones, excuses, or encourages any absences by pupils, constitutes a derogation of the long-standing State policy for compulsory and maximum attendance at school. Therefore, in the instant matter, the Commissioner finds and determines that the portion of the Board's attendance policy which permits pupils to be absent from each class or subject matter course up to thirty times in an academic year is *ultra vires*, and is accordingly set aside.

The Commissioner is well aware that the Board's purpose in adopting the controverted policy was to shift the responsibility for classroom attendance to the pupils and their parents. The Commissioner is also aware that this Board and every other local board of education experience difficulty in enforcing

compulsory attendance requirements, and that school administrators expend a great deal of time and effort in this task. Notwithstanding these kinds of reasons, the public schools have the consistent obligation to require that their pupils be present in school in order that they may be taught. This policy is for the benefit of the pupils, their parents, and the community at large.

The Commissioner is constrained to issue a caveat to all local boards of education in this State to review their policies and rules regarding pupil attendance in order that such policies conform to the State policy and also provide the most effective methods of insuring maximum school attendance. In particular, public school policies should require that pupils complete assignments missed because of their absences.

The Commissioner will next consider the circumstances of each petitioner in the matter.

Petitioner Wheatley missed his English IV class a total of forty-one times of a possible 180. This represents a total of almost one-fourth of the academic year. Only thirteen of his absences were excused and twenty-eight were not excused. Under these circumstances it is not reasonable to conclude that he acquired a mastery of the subject taught. This petitioner should either attend the summer school session in English IV, which he may have done by this point in time, or he should repeat the subject. The Commissioner cannot conclude that Petitioner Wheatley should receive credit for English IV for the 1973-74 academic year. The amount of schooling he has missed, combined with his level of achievement reported throughout the academic year, leads to this logical conclusion.

Petitioner Cipriano missed English III seventy-two times, English IV fifty times, Humanities seventy times, and Basic Mathematics fifty times. His achievement during the course of the 1973-74 academic year has not been indicative of a mastery of his studies. This pupil should either complete a summer school session in the subjects needed for graduation or he should repeat them.

Petitioner Elsis missed his English IV class a total of fifty times during the 1973-74 academic year. It is difficult to understand how this pupil could have been granted a final grade of "C" for this course when he missed almost thirty percent of the classroom instruction. The pupil should, under these circumstances, either repeat the course or attend a summer school review session.

Petitioner Haynes was absent from his class in General Business Training a total of fifty times, but was granted a grade of "D" by his teacher. The Commissioner cannot conclude that a sufficient mastery of such a course of study could have been attained by this pupil under these circumstances to warrant granting him credit for the course. Petitioner Haynes may have enrolled in a summer school program to acquire the credits needed for a diploma of graduation. If this is not so, he should repeat the course to earn the required credits.

Petitioner Shansey missed her class in English IV a total of thirty-eight times, of which only nine were excused absences. The fact that she was granted a final grade of "D" is difficult to comprehend. Credit should not be granted for this course, in view of the excessive number of unexcused absences of Petitioner Shansey, and the Commissioner so holds. She also may either repeat the course or else complete an approved summer school program in English IV.

Petitioner O'Keefe missed his English IV class a total of thirty-five times, and only two absences were excusable. His situation is similar to that of Petitioner Shansey, and the Commissioner makes the same determination that he should not receive credit for English IV for the 1973-74 academic year.

Petitioner Mazur missed English IV a total of thirty-nine times, of which only ten were excusable. He also was awarded a final grade of "D." The Commissioner directs that this pupil either make up this deficiency in a summer school program or repeat the course, since no credit may be granted as the result of such excessive unexcused absences.

Petitioner Zeisloft's circumstances are unique of all the petitioners in this case. She missed English IV a total of forty-two times and, of these, twenty-two were not excused. Her final grade in English IV was a "B." Her overall academic record discloses that she earned three final grades of "A," and three final grades of "B." Obviously, this pupil performed significantly above average in her schoolwork during the entire academic year. In view of the fact that her English IV grade was a "B," the conclusion must be reached that she was able to perform on a superior level, and to make up school assignments which she had missed, even though she had forty-two absences from that class. Under these particular circumstances the Commissioner directs that the Board grant Petitioner Zeisloft five credits for English IV, and award her a diploma of graduation.

COMMISSIONER OF EDUCATION

September 23, 1974

**In the Matter of the Tenure Hearing of Edward R. Chrzan,  
School District of the Borough of Sayreville, Middlesex County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Casper P. Boehm, Esq.

For the Respondent, Wilentz, Goldman & Spitzer (Vincent P. Maltese, Esq., of Counsel)

Charges of inefficiency, insubordination, and unbecoming conduct were certified to the Commissioner of Education on March 20, 1973 by the Sayreville Board of Education, hereinafter "Board," against respondent, a janitor with a tenure status in its employ. Respondent denies the allegations herein and asserts that the Board denied him due process of law and that in making its determination to certify the instant charges, it acted illegally.

Hearings in this matter were conducted on June 6 and 12, 1973, and thereafter on July 17, September 4, 5, and 6, and October 25, 1973 at the office of the Middlesex County Superintendent of Schools by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The specification of charges against respondent as certified by the Board to the Commissioner is divided into two major parts, as follows:

\*\*\*\*

"1. The [Sayreville] Board of Education hereby certifies the following charges to the State Commissioner of Education as conduct unbecoming a school employee and for insubordination:

[Here follows a series of nine instances in support of major Charge 1.]

"2. The [Sayreville] Board of Education further certifies a charge of inefficiency and failure to perform the duties of his [respondent's] job, said failure to perform his job being tantamount to insubordination based upon his repeated willful failures to perform his duties and upon notices repeatedly given\*\*\*\*"

[Here follows a series of four instances in support of Major Charge 2.]

The following recitation will address those specific instances delineated by the Board in support of each of its two major charges.

**Charge 1**

"a. On Monday, March 12, 1973 and Tuesday, March 13, 1973 the said Edward R. Chrzan [respondent] did:

“(1) Absent himself from his employment without permission

“(2) Take an extended lunch period in violation of contract, Board policy and previous directives

“(3) Use loud and abusive language to a teacher in the employ of the Board of Education in and out of the presence of others

“(4) Unduly harass fellow employees of the Board of Education

“(5) Frequent areas of the building other than those areas that he was assigned and did otherwise make himself unavailable to perform his duties.”

The five instances reported above and which allegedly occurred on March 12 and 13, 1973, and which the Board advances as sub-charges in support of its first major charge, *ante*, emanate from an altercation which occurred between respondent and a science teacher assigned to the same high school as respondent.

The science teacher, testifying on behalf of the Board, stated that he frequently returned to school during the evening hours to videotape certain television programs for later use with pupils. (Tr. I-7-8) During the evening of March 12, 1973, two programs were being televised, between 7:30 p.m. and 9:00 p.m. which he wanted to tape. (Tr. I-10-11) Because the regular school television antenna system installed in his classroom was not providing the desired reception, he requested permission of the teacher in charge of the high school's electric shop, where a more effective television antenna system was installed, to use his antenna system that evening to insure good reception. (Tr. I-8) With that teacher's permission (Tr. I-8, 70), the science teacher returned to the high school at approximately 6:30 p.m. (Tr. I-8) Knowing that he was using a classroom other than his own, he began looking for a janitor to obtain the classroom door key. (Tr. I-9)

He testified that he was uncertain as to which janitor was assigned to the area of the electric shop, therefore he walked through “C” and “D” corridors in an effort to locate a janitor. (Tr. I-9) Finally, he did locate several janitors and they informed him that the only one who had the key to the electric shop was respondent. (Tr. I-10)

According to a schematic plan of the high school (J-1), the schoolhouse is laid out similar to a horizontal H, with one of the two vertical bars designated as “A” corridor, while the other vertical bar is divided into “C” and “D” corridors. The division occurs at the intersection of the vertical line of the H, designated as “B” corridor. The science teacher's classroom is designated B-4 (Tr. I-13), located at the point where “C” and “D” corridors are intersected by “B” corridor. The electric shop is designated as “C-9” (J-1; Tr. I-13), and is located approximately two classrooms away from the science teacher's room, but in “C” corridor. Respondent's janitorial responsibility was in the “C” and “D” sections at the high school. (Tr. II-9, 25, 23; Tr. IV-7; Tr. V-112) This assigned



responsibility is set forth in "The Two Shift Custodial Work Plan" (P-7) which was recommended by the principal to the Superintendent of Schools on January 5, 1973, and which became effective January 8, 1973. (Tr. V-112)

The science teacher testified that, after ascertaining which janitor could unlock the electric shop, he went through "C" and "D" corridors, knocking on classroom doors to find respondent. (Tr. I-10) Finally, with the time nearing 7:30 p.m., when the television programs were to start, the science teacher, not being able to get into C-9, set up the video-tape equipment in his own classroom thus requiring him to use his own, less effective, television antenna. (Tr. I-10)

The science teacher pointed out that once video-tape equipment is set up to record a television program, there is no need for anyone to monitor it because the program can be seen at any future time from the tape. (Tr. I-11) But because the reception in his room was poor (Tr. I-11), after setting up the taping equipment, he still continued to search for respondent to open the electric shop. He did this every ten to twelve minutes, but was unsuccessful in locating respondent. (Tr. I-12)

Finally, about 8:30 p.m. while he was standing at the end of "B" corridor, the science teacher testified, he noticed all the classroom lights were on and the classroom doors were open in "D" corridor, which, he stated, was not the condition during his previous attempts to locate respondent. (Tr. I-13) Proceeding to "D" corridor, the science teacher looked in all the classrooms for respondent until he reached the Foods Room, designated as D-5 on the plan. (J-1) The science teacher stated that he called out, "Hello\*\*\* Is anybody there" (Tr. I-14), after which respondent came walking out of room D-5, and the following occurred:

\*\*\*

"I [science teacher] said, [to respondent] 'I've been looking for you since 6:50 [p.m.], I've been trying to get in C-9 to video tape a program.' [However, on cross-examination, the science teacher testified he never told respondent why he wanted to get into the electric shop. (Tr. I-35) Furthermore, on cross-examination he stated that after asking respondent where he was, he [the science teacher] told him he was going to ask respondent's superior the next day where he was. (Tr. I-35) Inexplicably, respondent averred the science teacher told him he wanted to use a television antenna to video tape a program. (Tr. VI-92)] All of a sudden he [respondent] blew up. He said, 'What business is it of yours.' He shouted at me and I jumped back because I was shocked and \*\*\*he said, 'Are you a spy for the school?' \*\*\* I [the science teacher] backed out of the room, out of this " 'Foods Room' and backed all the way down the corridor.\*\*\*" (Tr. I-14)

As he backed down the corridor, the science teacher asserted he saw the chairman of the mathematics department, who had been in the building that evening for a yearbook meeting (Tr. I-60-61) in Room B-22, a science office located directly at the intersection of corridors "C", "B", and "D". (Tr. I-57)

The mathematics teacher, who had earlier in the evening been asked by the science teacher if he had a key to the electric shop (Tr. I-56), testified that he came out of room B-22 into the corridor to see what was occurring because both respondent and the science teacher “\*\*\* were loud enough to be heard all over that corridor.” (Tr. I-63) The mathematics teacher believed respondent did not know that the science teacher was, in fact, a teacher in the school, so he explained to respondent that the science teacher was indeed a faculty member at the high school. (Tr. I-58) The testimony of the mathematics department chairman corroborated the science teacher’s assertion that respondent kept saying to him, “Who are you, what are you doing here and are you spying on me?” (Tr. I-58) However, the mathematics teacher further testified that both men were walking side by side. (Tr. I-61)

The science teacher testified that the following occurred after his brief encounter with the mathematics department chairman:

“\*\*\* I’m still backing down the corridor, I’m still backing down, I was facing him, but yet backing up the long corridor, he [respondent] kept hollering about being a spy, what business you have being here at night, you’re not supposed to be here, all the way down the hallway. I turned around, walked into my [class] room and he didn’t come in, he followed me all the way down to my room hollering and yelling all the way. I went into my room, he came no further, he stopped at the doorway. I went in, I was upset\*\*\*.” (Tr. I-14-15)

Additionally, the science teacher testified that, during the episode reported, *ante*, respondent called him “a stupid jerk” and “a no-good little punk.” (Tr. I-15)

After putting away the video-tape equipment, the science teacher testified, he went to the principal’s office, located in “A” corridor (J-1), where he talked with the administrative assistant to the principal. (Tr. I-15) After the science teacher related what had just occurred, he was advised to report the incident the next morning to one of two vice-principals assigned to the high school which he subsequently did, both verbally (Tr. I-15; Tr. III-14), and in written reports to the Superintendent. (P-1; P-3)

The Superintendent testified that he believed the science teacher’s first report (P-1, dated March 13, 1973) on the incident was “evasive” (Tr. III-159); therefore, he requested an additional report (P-3, dated March 21, 1973), which was submitted.

After being advised by the administrative assistant to report to one of two vice-principals the next morning, the science teacher had to go back through “B” corridor to get to “C” corridor, and then outside the building in order to reach his car. (P-3) He testified that when he left the administrative offices and got into “A” corridor, respondent was standing there with other janitors. The science teacher testified that while he was walking through “B” corridor, respondent began following him calling him “no good punk” and “no good little punk.” (Tr. I-16) To reach his car, he had to pass the janitors’ room in “C”

corridor where several janitors were seated. While he was passing that room, the science teacher testified, respondent still referred to him as a "no good punk." (Tr. I-16-17) After the science teacher reached his car, parked just outside the janitors' room, and was opening the car door, respondent continued to refer to him as "some sort of punk," whereupon the science teacher said, "\*\*\* Can you for the record spell it [punk]. \*\*\*" (Tr. I-17) In response to that question, it is averred, respondent stated, "\*\*\* Why don't you go back to Pennsylvania where you came from, why don't you stay home with your family and kids instead of being here at night.\*\*\*" (Tr. I-17) When the science teacher was seated in his car, he testified, respondent then said, "\*\*\* Don't try to come back at night again.\*\*\*" The science teacher then drove away. The following morning he filed a report (P-1) of the incident with the vice-principal temporarily in charge of janitors at the high school (Tr. I-17; Tr. IV-5), who, in turn, made a copy for the head janitor. (Tr. I-17)

At the conclusion of his regular teaching day on March 13, 1973, the science teacher began to walk to the electric shop teacher's classroom for a general discussion with that teacher, as was his normal practice. (Tr. I-18) The time was approximately 3:00 p.m. (Tr. I-18) According to the plan of the high school (J-1), in order to traverse from the science teacher's classroom, B-4, to the electric shop classroom, C-9, it is necessary to walk in reasonably close proximity to the janitors' room located in the "C" corridor. The science teacher testified that as he was walking from his classroom to the electric shop respondent emerged as he walked past the janitors' room. At this point the following dialogue occurred, according to the science teacher:

Respondent: "Well, did you turn a memo in?"

Science Teacher: "You have no business talking to me, you see your boss and you see my boss, they have copies of the memo, you talk to them."

Respondent: "Remember, don't you touch me, don't you touch me."  
(Tr. I-18-19)

The science teacher testified that, as he backed down "C" corridor towards the electric shop during the above dialogue, respondent once again called him a "no good little punk" and "jerk." At this juncture, the science teacher testified, he was in the electric shop, where the electric shop teacher and an industrial arts teacher were standing in the back of the room working on a lathe. (Tr. I-19, 72, 92) The science teacher testified that he then said to respondent:

"\*\*\* I don't have to listen to another word. I understand about not touching you, I wouldn't touch you, I don't want to hear another word from you."  
(Tr. I-19)

With that, the science teacher left the electric shop classroom to report this incident to the head janitor (Tr. I-19-20) who was in the boiler room located in "C" corridor. Respondent followed the science teacher to the boiler room.

When the science teacher attempted to open the boiler room door, upon which there is a "no admittance" sign, respondent allegedly ordered him not to enter the boiler room because he was not an "authorized person." (Tr. I-20, 46-47) The head janitor testified that as the science teacher was attempting to get into the boiler room, respondent at the same time was attempting to keep the door closed while saying to the science teacher, "\*\*\*\* Can't you read, you jerk, unauthorized persons stay out.\*\*\*\*" (Tr. I-108) Respondent was then instructed by the head janitor to go back to his work. The science teacher then submitted a written report of this latest incident to the vice-principal. (P-2)

While respondent's version of the incidents which occurred on March 12 and 13, 1973, is substantially the same as the testimony of the science teacher, *ante*, there are variations which must be noted.

Firstly, respondent averred that the science teacher, during the first encounter over the television antenna and electric shop key, told him he was going to report respondent to the vice-principal because he could not be located. (Tr. VI-92) Respondent asserted that on March 12, 1973, he took no more than approximately thirty-five to forty-five minutes for lunch (Tr. VI-127), and that he was working in "D" corridor that evening between 6 and 7 p.m. (Tr. VII-86, 102) Furthermore, he denies ever absenting himself from his duties, except on one occasion which shall be discussed in Charge 1c. (Tr. VI-130-131) It is clear that the unwritten policy of the Board provides a lunch period of thirty minutes for janitors. (For a full exposition of this policy, see Charge 1b.) During the subsequent discussion between the two men as they proceeded through "D" corridor, *ante*, respondent asserted he became provoked only after the science teacher struck him on his shoulder. (Tr. VI-94; Tr. VII-14) It was only after being struck, respondent asserted, that he called the science teacher a "punk." (Tr. VI-94; Tr. VII-14) This is the version he reported to the high school principal. (R-3)

The hearing examiner is not convinced by respondent's testimony that he was struck by the science teacher before he referred to the teacher as a "punk." Rather, it is credible to believe that the science teacher may have extended his arm outward towards respondent as the argument continued through the corridor in an effort to keep a distance from respondent.

On cross-examination, respondent testified regarding the reason he had asked the science teacher who he was and what he wanted. Although respondent was aware prior to that evening of the science teacher's identity (Tr. VII-6-7), he questioned the science teacher because of the manner in which the science teacher insisted upon the use of the television antenna in the electric shop. (Tr. VII-13) Respondent testified that he did not like the science teacher's attitude, but if the science teacher had asked him in a nice way for the use of the antenna, respondent would have unlocked the electric shop for him. (Tr. VII-13-14)

Respondent's testimony includes an assertion that he walked through "D" corridor with the science teacher because he, respondent, wanted to use the telephone in the science office (B-22) to report the whole incident to the

Superintendent. (Tr. VII-10,12) The hearing examiner finds little credibility in this testimony. Rather, the hearing examiner believes that respondent walked through "D" corridor and "B" corridor in order to continue the conversation with the science teacher (Tr. VII-13-14, 17) which degenerated into an argument. (Tr. VIII-118)

In regard to the second incident on March 12, 1973, *ante*, respondent testified that when the science teacher went back to his own classroom, prior to his putting away the video-tape equipment and his reporting the first incident to the administrative assistant, he, respondent, turned around and went back to his work in "D" corridor. (Tr. VII-95)

On the afternoon of March 13, 1973, respondent testified, he referred to the science teacher as a "punk" and told him to keep his hands off him because the science teacher had reported him to the vice-principal. (Tr. VII-17, 119)

Finally, respondent testified that he never used loud or abusive language to any teacher in the Board's employ, except the science teacher, as described herein. (Tr. VI-128)

The hearing examiner points out that the specific events in Sub-charge a (1 through 5) are set forth to support charges of conduct unbecoming a school employee and insubordination as recited in the first major charge.

In regard to Sub-charges a(1) and a(2), in which respondent allegedly absented himself on March 12 and 13, 1973 from his employment without permission and did take an extended lunch period in violation of Board policy and previous directives, the hearing examiner finds that respondent did, on March 12, 1973, absent himself from his employment by taking a lunch period of from thirty-five to forty-five minutes in violation of the standing, though unwritten, policy of a thirty-minute lunch period for janitors. There is no showing that respondent did, in fact, repeat this behavior on March 13, 1973. Whether respondent's action herein is conduct unbecoming a school employee and insubordination is referred to the Commissioner for his determination.

As to Sub-charge a(3), that respondent used loud and abusive language to a teacher, the hearing examiner finds that the overwhelming weight of credible evidence supports this charge of conduct unbecoming a school employee. There was no need for respondent to initiate verbal attacks upon the science teacher on March 12 and 13, 1973, while the teacher was attempting to use school facilities for class preparation. The function of janitorial staff members of public schools is to assist, through the completion of their unique responsibilities, the total educational process.

While it is the finding of the hearing examiner that the behavior on respondent's part in regard to Sub-charge a(3), *ante*, is conduct unbecoming a school employee, no such finding is made in regard to insubordination. *Black's Law Dictionary* 942 (rev. 4th ed. 1968) defines insubordination as:

"State of being insubordinate; disobedience to constituted authority.\*\*\*

Refusal to obey some order which a superior officer is entitled to give and have obeyed.\*\*\*"

There has been no showing by the Board that the position of teacher, organizationally, has been vested with authority to issue orders to its janitors. Accordingly, the hearing examiner recommends that Sub-charge a(3), alleging insubordination, be dismissed.

In regard to Sub-charge a(4), that respondent allegedly unduly harassed fellow employees of the Board, there have been no specific proofs presented by the Board to substantiate this charge as a separate charge from a(3), *ante*. Accordingly, the hearing examiner recommends that Sub-charge a(4) be dismissed.

Finally, as to Sub-charge a(5), that respondent frequented areas of the building other than those areas to which he was assigned and did otherwise make himself unavailable to perform his duties, the hearing examiner can find no specific proofs offered by the Board in support of this charge. Accordingly, it is recommended that Sub-charge a(5) be dismissed.

In summary, the hearing examiner finds that the evidence supports Sub-charges a(1) and a(2) for March 12, 1973. He recommends dismissal of those charges as to March 13, 1973. The hearing examiner finds Sub-charge a(3) to be supported by the evidence for March 12 and March 13, 1973; however, he recommends that Sub-charge a(3), alleging insubordination, be dismissed for the reasons stated, *ante*. He recommends dismissal of Sub-charges a(4) and a(5).

#### Charge 1

"b. [Respondent] [h]as continually taken extended lunch periods contrary to warning given to him on January 4, 1972."

The Board offered no written policy regarding the amount of time janitors have available for lunch, and, in fact, the Superintendent testified that he does not believe there is a Board policy regarding lunch periods for janitors. (Tr. III-93-94) However, it is agreed among all who testified that the unwritten policy permits thirty minutes for lunch. (Tr. II-131-132; Tr. III-144; Tr. VI-5, 29) In fact, respondent himself testified he was aware that he had thirty minutes for lunch. (Tr. VI-128)

On cross-examination respondent, while asserting that other janitors extend their lunch periods, admitted that he generally takes more than thirty minutes in order to eat a hot meal. (Tr. VI-99) In fact, his admitted practice is to take approximately forty minutes for lunch. (Tr. VI-98) The Superintendent testified that he notified respondent to complete his lunch within the time prescribed or other arrangements would have to be made. (Tr. III-72) Respondent testified that he probably received such a notice from the Superintendent. (Tr. VI-100-101) The Board offered the contents of the written notice (P-25) the Superintendent sent to respondent by certified mail in regard to the thirty-minute lunch hour policy. (Tr. III-70-71) However, respondent

refused to accept the letter and returned it unopened to the school authorities. At the time of the hearing, the envelope (P-20), which contained the notice (P-25) was opened before the hearing examiner.

Finally, respondent asserted that if he were to be reinstated to his position of janitor with the Board he would continue to take more than thirty minutes for lunch. (Tr. VII-118)

The hearing examiner finds that the weight of credible evidence supports Charge 1b.

#### Charge 1

“c. [Respondent] [h]as worked on his automobile in the automotive shop on December 29, 1971 and other occasions while on duty and submitting time cards contrary to the terms of his employment.”

In regard to the first portion of this charge, the Superintendent testified that on December 29, 1971, he observed respondent changing a muffler while standing under his car, which was up on a car lift in the automotive shop. (Tr. III-26) According to the Superintendent, he said nothing to respondent, but went to locate the head janitor who, he subsequently determined, was absent because of illness. (Tr. III-27) Within a few days, the Superintendent sent the following memo (P-21) to respondent. (Tr. III-27, 58)

”On Wednesday, December 29, 1971 at 10:15 a.m., I visited the Sayreville War Memorial High School and observed your (sic) working on your car in the automobile shop. Your car was up on the hydraulic lift.

“This was a working day for all employees in the custodial department. The fact that Mr. Wojaczyk, the lead man, was absent from his job because of illness does not give you the right to neglect your custodial duties to work on your car. You submitted a time card showing you had worked from 7:00 a.m. to 3:30 p.m. I am returning your time card for a corrected time card. I am requesting that your time card show the amount of time you worked on your car. The amount of time you worked on your car will be deducted from that days pay.

“I urge you to make this correction as soon as possible so that there will not be a need to withhold a full days pay from your paycheck.”

Attached to this memo (P-21) and made part thereof is respondent’s time card (Tr. III-35, 64-65) for the last week of December 1971, which includes Wednesday, December 29, 1971, the critical date in this charge. Because respondent offered no response to the Superintendent’s request (P-3), his pay was docked either by one hour, as respondent testified (Tr. VI-119), or the full day as the Superintendent asserted would be done. In any event, respondent did have his pay reduced, but the amount of deduction is not clear. Respondent did not challenge the action of the Superintendent in regard to his pay deduction. (Tr. VI-120)



Testifying on behalf of the Board, the Superintendent contended that he, personally, did not give respondent permission to work on his automobile. (Tr. III-37) Thereafter the following direct testimony was elicited:

\*\*\*\*

“Q Is any janitorial employee permitted to work on his automobile in the automobile shop?

“A During his working hours, I would assume not.

“Q Well, even not during his working hours, would he need a specific permission to do so?

“A I would say that he probably would ask the particular shop teacher if he could do some work in it.

“Q Wouldn't use of school property which is the automobile shop, wouldn't that take an authorization either from you or from the Board of Education?

“A I would say that there have been people who have worked in those shops who have just asked the teacher who was in charge of the particular shop whether he could do some work in it, and he's been permitted to do it.

“Q Permitted by the teacher, but that would not be authorized by the Board of Education, would it?

“A Well, while it was never authorized, I don't know that there's any policy which would ever forbid it either.

\*\*\*

“Q And how long have you been [Superintendent in the Sayreville Schools] ?

“A About six years.

“Q And during that period of time, the Board of Education has not specifically authorized it [to use school facilities for personal use] is that correct?

“A Not to my knowledge.

“Q Well, do you know or don't you know?

“A I don't think that there's ever been any policy that anybody has ever authorized anyone. I've used that [automobile] shop a million times since I've been there in 1945 on a Saturday or Sunday. \*\*\*” (Tr. III-37-39)

On cross-examination, the Superintendent testified that the "million times" was a figure of speech. (Tr. III-101)

The Superintendent testified that his own car was worked on by pupils during the regular school day because "\*\*\*\* that's the policy of this board of education and the automobile shop to take cars from the outside to work on \*\*\* to give them [auto shop pupils] experience.\*\*\*\*" (Tr. III-101) The Superintendent also testified that, to his knowledge, his automobile had been worked on by auto shop pupils. (Tr. III-101-102)

According to the Superintendent, respondent's pay was deducted for December 29, 1971, because he was working on his own car and not performing his janitorial responsibilities. (Tr. III-102) However, the Superintendent also testified that janitors are entitled to a coffee break (Tr. III-105), and the Superintendent would not have objected if respondent had been working on his car during his coffee break. He admitted, however, that he did not know whether respondent was on a coffee break at the time he was working on his car. (Tr. III-106)

Furthermore, the Superintendent testified that he decided to make a deduction from respondent's pay for December 29, 1971, without too much thought because he had received no reply from respondent to his letter. (P-3; Tr. III-103-104) The Superintendent further testified that he believed he had the authority to make a deduction from respondent's pay. The Superintendent testified that he was unsure whether the Board had a policy for making such deductions from an employee's salary. (Tr. III-124)

In regard to that portion of Charge 1c, *ante*, that respondent "\*\*\*\* submit[ted] time cards contrary to the terms of his employment \*\*\*\*" respondent testified that he had been suspended from his duties in November and December 1970, for allegedly "\*\*\*\* falsifying time cards.\*\*\*\*" (Tr. VI-77) However, such suspension was reversed by an arbitrator pursuant to the terms of an agreement between the janitors and the Board (Tr. III-122), and respondent was ordered reinstated to his position with back pay. (Tr. III-123)

Respondent admitted that occasionally he may have, while in the office where the time cards are located, signed out at 11:00 p.m., when his shift ended, even though it was only 10:30 or 10:45 p.m. (Tr. VII-65-66) On one occasion he admitted signing out at 11:00 p.m. when it was only 8:00 p.m. (Tr. VII-95) There is no admission or proof that respondent left the building before 11:00 p.m. He averred that this practice, occasional though it may have been, was a matter of convenience because the location of the time cards was far removed from the place in the building where he finished his work. (Tr. VII-95)

The hearing examiner finds that the evidence adduced in regard to the portion of Charge 1c which alleges improper use of the auto shop by respondent is not sufficient to support a conclusion of unbecoming conduct or insubordination. Obviously, there is a critical need for the Superintendent and the Board to formulate policies to regulate use of the auto shop by employees. It is recommended that this part of Charge 1c be dismissed.

In regard to the time card allegation of Charge 1c, the hearing examiner finds that respondent did on several occasions make false entries on his time card. Such behavior does not rise to the level of conduct unbecoming a school employee because respondent did not leave his post of duty, nor was there a showing that respondent's intention was to defraud the Board.

Consequently, the hearing examiner recommends that Charge 1c be dismissed in its entirety.

#### **Charge 1**

"d. [Respondent] [d]id commit an act of insubordination on June 20, 1969 by reporting a school condition to the Board of Health rather than to the employer."

In regard to this charge, the Superintendent testified that on June 20, 1969, he received a memorandum from the principal of the Arleth School. The principal's memorandum, reported a telephone call from a member of the Sayreville Board of Health, who informed the principal that a man telephoned him to report that the lavatories at the Arleth School (a Sayreville elementary school to which respondent was assigned at that time) had no paper towels, toilet tissue, or soap. According to the Superintendent, the principal stated in the memorandum that he denied the truth of the allegation to the caller, and then he personally inspected the Arleth School lavatories and found each had the required items therein. (Tr. III-44, 111)

The Superintendent testified that the Board Secretary informed the principal of the Arleth School that respondent had telephoned both a member of the Board and a member of the Sayreville Board of Health and had alleged a lack of hygienic articles. (Tr. III-44) The Superintendent then sent the following letter (P-18) to respondent:

"I have been directed by the Sayreville Board of Education to inform you that your action of June 20, 1969, when you reported an alleged condition in the Arleth School to the Sayreville Board of Health, was insubordinate.

"As a result of the insubordination the Board of Education will transfer you out of the Arleth School for the school year 1969-70. However, until your assignment is decided upon, you will continue your employment during the summer months at the Arleth School.

"An investigation of your records will indicate that your relationship with your immediate supervisors has been poor. I have been instructed to inform you that if another infraction of the rules and regulations, as set forth by the Board of Education, occurs that your employment with the Sayreville Board of Education will be terminated."

Although respondent did not deny receiving this letter (P-18) he averred that he had no recollection of it. (Tr. III-47) The hearing examiner observes that

a United States Post Office Department return receipt, stapled to the Superintendent's copy of the original letter (P-18), is signed by respondent as having been received July 16, 1969. Although, as pointed out by respondent, the letter (P-18) does not carry a corresponding certification number, nor does it show that the letter (P-18) was, in fact, sent certified registered mail. (Tr. III-47) The weight of the evidence supports the conclusion that respondent did receive the letter and was aware of its contents.

On cross-examination, the Superintendent testified that other than the memorandum he received from the principal, *ante*, which was not introduced in evidence, he had no personal knowledge of the incident recited above. In regard to the letter (P-18), the Superintendent testified that he received informal authorization from the Board to send it. (Tr. III-114) Since the Board of Health incident was designated as an act of insubordination, respondent questioned why the Board did not consider the charge sufficiently significant at that time to certify such charge to the Commissioner. The Superintendent testified that respondent had been an "\*\*\*\* untouchable in the school system ever since I can remember.\*\*\*" (Tr. III-116) Explaining that statement, the Superintendent stated that, regardless of what respondent had ever done, he, the Superintendent, believed the Board did not wish to take action against him. (Tr. III-116)

There is no need for the hearing examiner to make a finding as to whether the lavatory supplies were adequate or not on June 20, 1969. The procedure used by respondent to correct what he obviously considered to be an unsanitary condition in the pupils' lavatories, could not promote a harmonious working relationship. However, there is no showing that respondent was disobedient to constituted authority or that he refused to obey some order from a superior officer in this regard. Finally, according to the Superintendent's testimony, respondent did call a member of the local Board (respondent's employer). Accordingly, the hearing examiner recommends dismissal of Charge 1d.

#### Charge 1

"e. [Respondent] [h]as taken envelopes and papers from desks in the office of the high school, not being authorized to do so on repeated occasions."

Testimony in support of this charge was heard from the Board President (Tr. II-104-105), the Superintendent (Tr. III-88, 145-147, 150, 156, 158), the high school principal (Tr. II-114, 116), the high school vice-principal to whom the head janitor reports (Tr. IV-84, 100-101), an administrative assistant (Tr. III-20), and finally, an office secretary. (Tr. III-5-6, 8) From their collective testimonies, it is clear that (1) neither the Board nor the administrators had a policy which precluded the use by respondent of paper upon which "OFFICIAL MEMORANDUM" was printed; (2) respondent's use of the paper to write various memoranda to his superiors (R-1; R-13) was not objected to by any of the recipients; (3) these pads of paper are generally made available to school personnel for school purposes.

Respondent does admit using the official memorandum paper, and he does

admit getting such paper from an office secretary's desk on occasion because it was convenient. (Tr. VI-99) He further admits he never received permission to take paper from the secretary's desk. (Tr. VII-79)

Notwithstanding respondent's admission to this charge, the hearing examiner finds that the behavior complained of does not rise to the level of conduct unbecoming a school employee or of insubordination. This finding is based on the overwhelming testimony that there was no policy against the use of official memorandum paper, and by the tacit, if not overt, approval of its use by respondent from the superiors to whom he submitted the memoranda. The hearing examiner finds respondent's explanation that he took the paper from a secretary's desk as a matter of convenience completely credible.

In summary, the hearing examiner recommends dismissal of Charge 1e.

In its second major charge, the Board alleges that respondent demonstrated "\*\*\*\* inefficiency and failure to perform the duties of his job, said failure to perform his job being tantamount to insubordination based upon his repeated willful failures to perform his duties and upon notices repeatedly given.\*\*\*"

Subsequent thereto, the Board set forth four specific instances in support of its second major charge. They are:

"a. Official memorandum re cleaning of lavatories dated December 7, 1972 requesting improvement.

"b. Official memorandum dated January 18, 1973 with regard to responsibilities, inefficiencies in work performed by employee and request to fulfill work requirements.

"c. Oral notices given to employee through Lead man Custodian, Charles Wojaczyk as to inefficiencies in work for the last six months.

"d. Memoranda from school personnel on February 1, 1973 and other dates concerning inefficient work performance of employee."

Prior to the hearing in this matter, respondent moved to dismiss the second major charge in its entirety on the grounds that sufficient notice was not given by the Board pursuant to *N.J.S.A. 18A:6-12*, which provides as follows:

"The board shall not forward any charges of inefficiency to the commissioner, unless at least 90 days prior thereto and within the current or preceding school year, the board or the superintendent of schools of the district has given to the employee, against whom such charge is made, written notice of the alleged inefficiency, specifying the nature thereof with such particulars as to furnish the employee an opportunity to correct and overcome the same."

During oral argument on the Motion subsequent to the completion of the testimony in this matter, respondent asserted that the "Official Memorandum"

(P-34) referred to in Charge 2a, *ante*, is not the required notice intended by the statute, *N.J.S.A.* 18A:6-12. The “Official Memorandum” was not given respondent by either the Superintendent or by the Board, and, furthermore, the “Official Memorandum” does not provide any particulars of the alleged inefficiencies in his work.

In regard to Charge 2b, *ante*, respondent asserts it must fall because the period of time between January 18, 1973, and March 20, 1973, the date of the Board’s certification of charges to the Commissioner, is clearly less than the statutorily prescribed time of 90 days set forth in *N.J.S.A.* 18A:6-12.

Respondent further contends that Charge 2c must fall because such charge is not grounded on “written notice” pursuant to *N.J.S.A.* 18A:6-12. Finally, respondent argues Charge 2d must fall because the statute clearly states the notice of inefficiency must issue either from the superintendent or from the board of education. (Tr. VII-128-129)

The Board argues that it did issue respondent the “Official Memorandum” referred to in Charge 2a (P-34), because through the doctrine of delegation of authority by boards of education, it adopts as its acts those acts carried out by its employees. Arguing that the intent of *N.J.S.A.* 18A:6-12 is to give notice, the Board asserts that it is not important who gives the notice so long as such notice is given. (Tr. VII-132-133)

While conceding that Charges 2b, 2c, and 2d, do not meet the statutory prescription in regard to charges of inefficiency, the Board contends that these charges were included to buttress Charge 2a. In regard to the 90-day provision of the statute, the Board argues that *N.J.S.A.* 18A:6-12 does not require the Board to inform respondent he has 90 days to correct the alleged inefficiencies. (Tr. VII-134)

Finally, the Board points out that the nature of the second major charge is both inefficiency and insubordination and respondent moves to dismiss Charge 2 in regard to inefficiency. Accordingly, if the motion to dismiss in regard to inefficiency is granted, Charge 2 as it relates to insubordination should remain, says the Board.

In regard to Charge 2a, the “Official Memorandum” (P-34) referred to therein is reproduced here in full:

“OFFICIAL MEMORANDUM

“Sayreville Public Schools

“TO Mr. Chrzan	Dec. 7, 1972	FROM Mr. H. Dill
“cc: Mr. Fleming		[vice-principal]
[Board Secretary]		

“The condition of the girls lavatory (B-16) was called to our attention earlier in the day by a day shift custodian. We have attempted to institute

remedial measures so the lavatory will not be abused. However, it serves no useful purpose to leave the lavatory in the condition it was in. It has to be used the following day. Incidentally, if lavatories were left clean and unused, it would be unnecessary to employ custodians. Clean this lavatory at your earliest convenience.”

On cross-examination, the vice-principal testified that the general condition of the girls’ lavatory was not quite as poor as was the boys’ lavatory (R-9; R-10; R-11) at the end of the school day. (Tr. IV-92)

Respondent testified that he would generally find overturned cans, apple cores, cigarette butts, and “\*\*\* just about anything you can think of\*\*\*” on the floor of the girls’ lavatory. (Tr. VI-138) He testified that he reported the condition of the girls’ lavatory, the subject of the memorandum (P-34), to the Superintendent and requested that the Superintendent visit the school in order to see for himself the condition of the girls’ lavatory. The Superintendent did not visit the school, but relayed a message to respondent to clean the lavatory. (Tr. VI-138-139; Tr. VII-72)

Respondent, on cross-examination, testified that he cleaned the toilets and sinks in the girls’ lavatory, but left the floor in an unclean state so that either the Superintendent or the second vice-principal could examine it. (Tr. VII-72-73)

The hearing examiner does not agree with the Board’s contention that the “Official Memorandum” (P-34) meets the requirement of *N.J.S.A. 18A:6-12* that written notice must be given by either the Superintendent or the Board. Accordingly, it is recommended that Charge 2a be dismissed as a charge of inefficiency.

The hearing examiner has searched the record for proof that respondent did not comply with the memorandum (P-34) to: “\*\*\* clean this lavatory [B-16] at your earliest convenience.\*\*\*” There is no proof that respondent failed to perform this task. Accordingly, it is recommended that Charge 2a be dismissed as a charge of insubordination.

The remaining Sub-charges b, c, and d in support of the second major charge in regard to inefficiency, are recommended for dismissal for the following reasons:

Charge 2b — fails to meet the statutorily prescribed time of 90 days pursuant to *N.J.S.A. 18A:6-12*;

Charge 2c — fails to meet the statutorily prescribed “written notice” pursuant to *N.J.S.A. 18A:6-12*;

Charge 2d — fails to have the alleged notice issue from either the Superintendent or the Board to respondent. The hearing examiner has reviewed the series of thirty-six notes prepared by classroom teachers and given to the vice-principal regarding the cleanliness of their rooms. (P-35)



There is no showing that any of the critical comments therein, and not all of the comments are critical of respondent's work, were ever shared with respondent.

The three Sub-charges, 2b, 2c and 2d, will not be considered as they relate to insubordination.

#### **Charge 2b**

"Official memorandum dated January 18, 1973 with regard to responsibilities, inefficiencies in work performed by employee [respondent] and request to fulfill work requirements."

The principal of the high school testified that on January 5, 1973, a memorandum (P-38) was sent to all staff members of the high school, including teachers, cafeteria, clerical, and custodial personnel to secure their assistance in maintaining a clean school facility. (Tr. II-110) On the same day the memorandum (P-38) was issued, specific janitorial responsibilities were also set forth in writing in the custodial work plan. (P-7; Tr. II-110; Tr. I-111, 114-115) In that plan (P-7), respondent's responsibilities are described as follows:

"a. Clean following classrooms C-2, C-6, C-9, C-16, C-19, C-22, C-23, C-26, D-2, D-5, D-9, D-10, D-13 and D-18.

"b. Clean lavatories B-16, B-17, B-20, B-21, D-18. (Clean, wet mop, disinfect, and re-supply necessary paper and soap items.)

"c. Clean and dry mop corridors 'C' and 'D'.

"d. Clean Language Department Office B-22."

The custodial work plan (P-7) also provides that the responsibilities of all janitors in regard to the cleaning of classrooms is as follows:

"Note: Classroom cleaning includes:

"a. Dry mop floor and picking up foreign items sticking to floor.

"b. Moving and re-arranging furniture and clean as needed.

"c. Empty receptacles

"d. Clean chalkboard (wash down). also include chalk tray

"e. Check areas for needed repairs \*\*\*.

"f. Replace lights \*\*\*.

"g. Periodically clean window areas (entrance areas).

“h. Make necessary minor repairs.

“i. Secure doors and windows.”

The head janitor testified that all janitors were given a copy of the custodial work plan (P-7) and were instructed to read it. Additionally, a copy of the plan (P-7) was placed on the janitor's bulletin board. (Tr. I-115) The head janitor also testified that respondent's responsibility in regard to all “C” corridor rooms, except two mechanical drawing rooms designated as C-23 and C-26, was limited to emptying the trash, cleaning the blackboards, and securing the rooms. (Tr. I-125) However, respondent testified that subsequent to the written work plan (P-7) being issued, he was informed by the head janitor that he was to sweep classrooms in “C” corridor. (Tr. VI-66) The hearing examiner finds that respondent's responsibilities did, in fact, include sweeping classrooms in “C” corridor.

The essential changes in respondent's responsibilities, prior to the time when all janitorial responsibilities were set forth in writing in the custodial work plan (P-7), and the respondent's responsibilities after the custodial work plan (P-7) was issued are described in a memorandum (P-8) from the vice-principal to the head janitor, dated January 4, 1973. That memorandum is reproduced here in pertinent part: (Tr. I-130)

“\*\*\* Effective January 8, 1973, the following changes in the custodial work schedule will occur.

“1. The teachers' lavatories (A-58, A-62) [originally assigned respondent] now assigned to the day shift.

“2. Rooms D-2, D-5, D-9, D-10, D-13, D-18, lavatory in D-18 and B-22 assigned to the custodian who has ‘C’ wing responsibilities. [“C” wing responsibility is assigned to respondent as set forth in the custodial work plan (P-7).] \*\*\*” (P-8)

The head janitor testified that respondent had been responsible for the classrooms in “D” corridor prior to the implementation of the custodial work plan (P-7; Tr. I-127), and respondent provided similar testimony in that regard. (Tr. VI-47; Tr. V-112)

Subsequent to the implementation of the new janitorial assignments (P-7), the head janitor testified respondent became rebellious because he [respondent] believed he should not have to clean the “D” corridor classrooms, since the man formerly assigned there only had to empty trash. The head janitor testified that he explained to respondent that the new work order (P-7) required this duty; therefore, he [respondent] had to perform it. According to the head janitor, respondent said, “\*\*\* Well, I'll see about that, I'll see the Board.\*\*\*” (Tr. I-141)

In this regard, respondent sent a memorandum (R-12) to the vice-principal on January 8, 1973, requesting a meeting to discuss his responsibilities as set

forth in the new work order. (P-7) The next day respondent sent another memorandum (R-5) to the vice-principal asserting that lavatories in "A" corridor were kept in immaculate condition by him as well as a lavatory in the "D" corridor. Furthermore, respondent contends in this memorandum (R-5) that until September 1972, he had always cleaned B-22 until he was told by a "substitute" that he, respondent, was not to clean B-22. (Tr. VI-73-74)

On January 11, 1973, and subsequent to speaking with respondent, the vice-principal sent the following memorandum (P-9) to the head janitor:

"Please inform Mr. Chrzan [respondent] to refer to Page 3 of the Two Shift Custodial Work Plan [P-7] in reference to his complete assigned duties. I have informed Mr. Chrzan that all questions regarding this [his responsibilities] are to be handled through you."

On or about January 12, 1973, the vice-principal received complaints (P-30) from teachers assigned to classrooms D-5 and D-13 in regard to the cleanliness of those rooms. The vice-principal then informed the head janitor by memo (P-10) of the complaints he had received. Furthermore, the head janitor was instructed to inform respondent "\*\*\*\* that the next time his [respondent's] job is not being done correctly a formal memo will be given to him and copies will be sent to the Superintendent of Schools.\*\*\*" (P-10)

Respondent averred in a memorandum (R-1) to the head janitor regarding the condition of classrooms D-5 and D-13 that, upon his inspection, classroom D-5 was in very good condition, while classroom D-13 was in very poor condition with paper towels, cookies, potato chips, candy and gum wrappers strewn about. In fact, respondent requested the head janitor to view the condition of classroom D-13. The hearing examiner finds the contents of this memorandum (R-1) does support respondent's main defense of his being "overworked." Classrooms should not be expected to be left in "very good condition" prior to a janitorial cleaning; rather, a classroom should be in "very good condition" after a janitor has cleaned it.

Along with respondent's memorandum to the head janitor (R-1) in regard to classrooms D-5 and D-13, respondent also sent a similar memorandum (R-13) to the vice-principal on the same day, January 12, 1973. However, in his memorandum (R-13) to the vice-principal, respondent points out that the principal requested the assistance of teachers and pupils to keep the classrooms clean by memo (P-38) on January 5, 1973. This, respondent averred, was not being done.

By separate memo (R-4) also on the same day, respondent asked to meet with the vice-principal to discuss his alleged "over abundance of work" since the implementation of the new work order. (P-7) The vice-principal replied to this request (R-4) by asking the head janitor, by way of a memorandum (P-11), to remind respondent that if he had any questions on his assigned responsibilities, they were to be presented to the head janitor. Furthermore because of continuing complaints being received regarding respondent's work, the

vice-principal asked the head janitor to review his work performance and submit a written report. Finally, the vice-principal instructed the head janitor to inform respondent not to leave notes to classroom teachers regarding the cleanliness of their classrooms.

In regard to the vice-principal's instructions to the head janitor for a report on respondent's performance, the head janitor, on January 18, 1973, reported (P-33) that on January 16, 1973, he "\*\*\*\* went over the entire area [respondent's work area] found Boards (sic) not washed. Garbage disposal Bags not changed. Floors in D-5, D-9, D-13, D-10 not being properly cleaned. Lavatory in D-18 not wet mopped. C-16 garbage was not emptied January 16, 1973 [identical to complaint in P-32, *ante*] Lavatory B-17 walls not being washed."

On January 18, 1973, the vice-principal sent a memorandum (P-14) to respondent in which respondent was reminded of the new work plan (P-7), and that any questions respondent might have regarding his responsibilities were to be brought to the head janitor, as set forth in the memorandum. (P-9) Finally, the vice-principal informed respondent: (P-14)

"\*\*\*\* If you feel that you cannot fulfill the work requirements in your area of responsibility as they are spelled out, then I suggest you ask for a transfer from the senior high school building."

The head janitor testified that he personally handed respondent the vice-principal's memorandum (P-14) and also told respondent that many complaints were being received about his work, and that he, the head janitor, personally inspected the assigned area of responsibility and found garbage cans not emptied and classrooms not properly cleaned. (Tr. I-139)

In support of its charges that respondent's conduct constitutes conduct unbecoming a school employee and/or insubordination, the Board offered as evidential a memo (P-36) from respondent to the vice-principal, dated January 19, 1973, in which respondent discusses an incident which had just occurred between the vice-principal and respondent in regard to the head janitor's time card. The head janitor's time card was not in its proper place on the time-card rack, and respondent asked the vice-principal where it was. Respondent also asked the vice-principal if he had a double standard of rules which all janitors, except the head janitor, had to follow. While the hearing examiner could not find that the content of this memorandum (P-36), by itself, is evidence of insubordination and/or conduct unbecoming a school employee, he does find that the behavior manifested herein is part of a pattern obviously adopted by respondent in which he perceived himself as being discriminated against. However, respondent has presented no credible basis upon which to support a claim of discrimination. Accordingly, the hearing examiner finds that the content of the memorandum (P-36) manifests an attitude not conducive to harmonious working relationships among the various staff members with whom a school janitor must deal on a daily basis.

After respondent's request for a meeting (R-4) with the vice-principal was

denied, respondent, by letter dated January 22, 1973 (R-6), requested a meeting with the Board to discuss what he considered to be his over abundance of work. Respondent concluded this written request to the assistant board secretary by stating: (R-6)

“\*\*\* P.S. In the past 2 weeks under heavy harassment verbally as written by Mr. Weber & Mr. Wojacyzk. As of this date [January 22, 1973] I will no longer correspond with Mr. Weber [the vice-principal] and Mr. Wojacyzk [head janitor], but will follow their orders by the letter or memo. Request the above to be present at this meeting.”

A meeting did occur near the end of January 1973, among the head janitor, the vice-principal, the Board Secretary, and the assistant board secretary regarding respondent's alleged overload of work. (Tr. IV-121) Although respondent was not present (Tr. V-14), it was decided to give respondent more time to improve.

In this regard, an evaluation of the entire high school's janitorial services (P-6) was submitted to the principal by the head janitor on February 26, 1973 for the period covering the week of February 19, 1973. This report has six major categories: classrooms, corridors and stairs, cafeteria and all purpose room, maintenance work, toilet rooms, and general services with various sub-categories. The rating scale consists of four categories: excellent, good, fair, and poor. In regard to the evaluation (P-6), all sub-categories of the major categories were rated “good,” except “minor repairs” under general services, and furniture” under classrooms. However, in the category “corridors and stairs” the sub-category “floors” was rated “good” with the notation “excepting C-D.” Furthermore, the following note was made part of the entire evaluation of janitorial services performed at the high school:

“It has been brought to my attention that D-5—D-13 are not being cleaned properly. On inspecting these sections I find that Mr. Chrzan is not doing a good job. I find the Hallway is smeared and not being done properly. This report on Mr. Chrzan is for the week of February 19, 1973.” (P-6)

Respondent, on direct examination, testified specifically that subsequent to the effective date of the custodial work plan (P-7) on January 8, 1973, he was required to sweep classrooms C-2, C-6, C-9, C-16, and C-19. Respondent admits that he did not, in fact, sweep these five classrooms subsequent to January 8, 1973, because he alleges that he had an excessive work load. (Tr. VI-66-69)

Respondent disputes the vice-principal's alleged exchange of duties as set forth in the memorandum (P-8) dated January 4, 1973. Respondent testified that he had always been responsible for cleaning the B-22 lavatory and, accordingly, could not understand why the vice-principal described the exchange of “A” corridor lavatories and the “assignment” of the B-22 lavatory.

Although respondent claims that he could not perform his assigned responsibilities as set forth in the custodial work plan (P-7) because of an

overload of work (Tr. VI-150, 155), the head janitor testified that the work load is evenly divided among all janitors (Tr. II-71), and respondent has sufficient time, within his seven-and-a half-hour work day to accomplish his duties set forth in the work plan. (P-7) The hearing examiner finds the testimony of the head janitor is more credible on this point than that of respondent.

The hearing examiner finds the weight of credible evidence supports the charge of insubordination in that respondent admittedly refused to carry out his known responsibilities as set forth in the custodial work plan. (P-7)

#### Charge 2c

“Oral notices given to employees [respondent] through Lead man Custodian [head janitor], Charles Wojaczyk as to inefficiencies in work for the last six months.”

The hearing examiner recommends dismissal of this charge because: (1) no testimony was provided by the head janitor to support the charge; (2) the charge as it relates to inefficiency has been previously recommended for dismissal on the grounds that written notice was not provided (*N.J.S.A.* 18A: 6-12); and (3) no showing has been made by the Board that the acts alleged in this charge rise to the level of insubordination.

#### Charge 2d

“Memoranda from school personnel on February 1, 1973 and other dates concerning inefficient work performance of employee [respondent].”

This charge was previously recommended for dismissal as to inefficiency, *ante*. The hearing examiner also recommends this charge to be dismissed for failure of the Board to carry the burden of proof.

In final summary, the hearing examiner finds the weight of credible evidence to support the following sub-charges: 1 a(1) and 1 a(2) as to March 12, 1973, 1 a(3) as to March 12 and March 13, 1973 in regard to conduct unbecoming a school employee; 1b and 2b as to insubordination. The hearing examiner recommends dismissal of the following charges: 1 a(1) and 1 a(2) as to March 13, 1973; and 1 a(3) as to insubordination; 1 a(4) and 1 a(5); 1c, 1d, 1e, 2a, 2b, 2c, and 2d as to inefficiency; 2a, 2c, and 2d as to insubordination.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions thereto submitted by the Board and respondent pursuant to *N.J.A.C.* 6:24-1.16.

The Commissioner concurs with the findings and recommendations of the hearing officer, and, accordingly, dismisses the following charges: 1a (1) and 1a (2) as to March 12 and March 13, 1973; 1a (3) as to insubordination; 1a (4) and

1a (5); 1c; 1d; 1e; 2a; 2b as to inefficiency; 2c; and 2d. In regard to the charges of inefficiency that permeate the whole of major Charge 2, *ante*, the Commissioner points out that the Board failed to provide proper notice pursuant to *N.J.S.A. 18A:6-2*. See *In the Matter of the Tenure Hearing of Robert M. Wagner, School District of the Township of Millburn, Essex County*, 1972 *S.L.D.* 650; *In the Matter of the Tenure Hearing of Consuelo Garcia, School District of Midland Park, Bergen County*, 1970 *S.L.D.* 335.

From the record before him, the Commissioner finds and determines that respondent did display conduct unbecoming a school employee by absenting himself from his employment without permission, by taking a lunch period beyond the time allotted, by using loud and abusive language to the science teacher on the evening of March 12, 1973, and by repeating his abusive attack upon that individual on the afternoon of March 13, 1973.

The Commissioner also finds and determines that respondent's insistence that, even if he were to be reinstated, he would continue to take more than the allotted time for lunch displays an attitude of insubordination. Respondent's refusal to carry out his assigned responsibilities as set forth in the custodial work plan (P-7, *ante*) is also found by the Commissioner to constitute insubordination.

The janitor in a public school plays an important role in the educational program in addition to maintaining the schoolhouse in a safe, clean, and efficient manner. He must come into regular contact with members of the school staff, and he is expected to comport himself in a manner which will reflect dependability and inspire confidence. The use of rough language and acting in a manner as exhibited herein with respect to teachers are grave offenses, which fall far short of conduct for a janitor in a public school.

Furthermore, the Commissioner cannot condone respondent's failure to perform assigned duties. *In the Matter of the Tenure Hearing of Adam Rogalinski*, 1967 *S.L.D.* 110; *In the Matter of the Tenure Hearing of Joseph Fortuna*, 1967 *S.L.D.* 150; *In the Matter of the Tenure Hearing of Theresa Cobb*, 1966 *S.L.D.* 197

The Commissioner holds that the conduct of respondent, in a series of instances, has been so gross as to warrant the forfeiture of his tenure status and his employment with the Board of Education of the Borough of Sayreville. Accordingly, the Commissioner of Education orders respondent's dismissal as of the date of his suspension by the Board.

COMMISSIONER OF EDUCATION

September 23, 1974



Henry Butler, Hans-Ulrich Karau, Eugene Bannon and Paul McElaney,

*Petitioners,*

*v.*

Board of Education of the City of Jersey City, Hudson County,

*Respondent.*

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioners, Thomas F. Shebell (Robert A. Conforti, Esq., of Counsel)

For the Respondent, William A. Massa (Louis Serterides, Esq., of Counsel)

Petitioners, four persons assigned to the Manpower Development and Training Center, Jersey City, hereinafter "M.D.T.C.," by resolution of the Jersey City Board of Education, hereinafter "Board," during a period of years beginning in 1965, allege that they were teachers in the employ of the Board and, therefore, were entitled to holidays and leave of absence for illness benefits which were denied to them. They demand judgment to this effect. Additionally, Petitioner Karau requests a judgment that he has acquired a tenure status as an employee of the Board. The Board denies that it is or has been the employer of petitioners, and maintains instead that the M.D.T.C. is funded by a federal grant and is not part of the regular public school program under the control of the Board.

At this juncture, petitioners have advanced a Motion for Summary Judgment on the pleadings, which is grounded on the decisions of the Commissioner and the State Board of Education in *Jack Noorigian v. Board of Education of Jersey City, Hudson County*, 1972 S.L.D. 266; affirmed in part, reversed in part, State Board of Education, 1973 S.L.D. 777. The Board has filed a Notice of Cross-Motion with respect to the tenure rights claimed by Petitioner Karau and has stated its opposition to the remaining claims advanced by petitioners. The Board, too, relies on the decision of the Commissioner of Education and the State Board of Education in *Noorigian, supra*. The relevant facts are not in dispute and are stipulated by the parties.

An oral argument on these Motions was conducted on June 3, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. The entire record in this matter, including the transcript of the oral argument, is presently before the Commissioner for his determination.

The principal issue herein, which gives rise to petitioners' claims, is whether or not the Board stands as petitioners' employer.

Petitioners assert that their employer is the Board, since all of their assignments to the M.D.T.C. were made as the result of formal resolutions

similar to one received in evidence (P-1) concerning the assignment of Petitioner Karau. The Board admits that such resolutions were passed with respect to each of the petitioners, but denies that its action adopting such resolutions is proof that it is the employer of petitioners, since the total funding of the M.D.T.C. was provided by federal grants. The resolution adopted by the Board with respect to the employment of Petitioner Karau (P-1) is recited in its entirety as follows:

“BE IT RESOLVED, that a course entitled Diesel Mechanic (Any Ind.) be and it hereby is established under the provision of the Manpower Development and Training Act P.L. 87-415, and the following persons be and they hereby are assigned to said program to take effect December 10, 1965, at the hourly compensation as set forth below and to be subject to such further action as the Board of Education may direct:

“*** Hans Ulrich Karau, Teacher	\$6.00 per hour,
261 East James Place	when employed***”
Iselin, New Jersey	

While there is agreement that each of the petitioners was employed by the Board by similar resolution, it is also stipulated that:

1. Each petitioner was regularly employed and performed teaching duties, according to the individual claims in this regard, which are set forth in separate Petitions of Appeal herein consolidated (Tr. 15), although none of the petitioners were issued contracts. (Tr. 6)
2. Each petitioner may be considered a “teacher” in the context of the Commissioner’s decision in *Noorigian, supra*. (Tr 15) (Note: The Board still maintains that petitioners may not be classified as “teachers” in the context of the school laws, Title 18A, Education.) (Tr. 15-16)
3. Petitioners, as claimed by their separate Petitions, were not afforded holidays or leave of absence for personal illness benefits during their employment at M.D.T.C.
4. With respect to Petitioner Karau’s claim of a tenured entitlement to his position, he does not possess a teaching certificate issued by the local board of examiners. (Tr. 15) (Note: Petitioner Karau’s Petition of Appeal requests the Commissioner to direct the Jersey City District Board of Examiners to issue him such a certificate. There is no evidence that he possesses a certificate of any kind issued by the State Board of Examiners; nor, does he advance any such claim in his Petition.)
5. All claims for holiday pay, herein, are confined to the period May 1965 to February 1972, since, in that latter month, the Board did authorize payment for eleven paid holidays per year. (Tr. 5) (See also P-2.)

The claims of each petitioner, as set forth in their respective Petitions of Appeal, are summarized as follows:

Eugene Bannon: employed at M.D.T.C. during the years 1966-67, claims the sum of \$1,624 as reimbursement for twenty holidays and nine days for personal illness.

Henry Butler: employed at M.D.T.C. during the years 1968-73, claims the sum of \$2,850 as reimbursement for forty-six holidays and twelve days for personal illness.

Hans-Ulrich Karau: employed at M.D.T.C. during the years 1965-72, claims the sum of \$4,894.50 as reimbursement for eighty-seven holidays and twenty-one days for personal illness, less deductions for the pension fund; also claims tenure.

Paul McElaney: employed at M.D.T.C. during the years 1967-69, claims the sum of \$2,856 as reimbursement for twenty-five days of holiday pay and twenty-six days for personal illness.

Petitioners also request reimbursement for all costs, including legal fees and interest on the moneys they allege are due them.

Petitioners aver that the resolutions adopted by the Board, which employed them in a program managed and governed by the Board, are proof of the fact that the Board is in fact the employing body. Petitioners argue that their regular employment to perform teaching duties entitled them to leave of absence for personal illness and holiday pay benefits. These claims, petitioners avow, are grounded in facts which are the same and “\*\*\*almost identical\*\*\*” to the facts of *Noorigian, supra*, and warrant a similar judgment by the Commissioner. (Tr. 4)

The Board asserts that none of the petitioners herein have been or are employed by the Board, regardless of the resolution. (P-1) The Board argues that all of petitioners’ work for the Board was performed in a multi-skills center, which is “\*\*\*a creature of a federal act\*\*\*,” (Tr. 8) and that none of the work was part of the “\*\*\*regular educational curriculum established by the Jersey City Board of Education in accordance with the New Jersey Statutes.\*\*\*” (Tr. 8) The Board further states that none of the petitioners are covered by the agreement between the Board and the negotiating unit for instructional personnel, and that the Board’s function with respect to the M.D.T.C. is to serve as the administrator of federal funds. While admitting that the Board has a “\*\*\*great deal of discretion\*\*\*” with respect to such fund administration, the Board’s basic contention is that the M.D.T.C. is a facility separate and apart from the Jersey City School System, and that this separateness is reason to warrant a judgment that petitioners are not entitled to the relief which they claim herein pursuant to the school laws. (Title 18A, Education) (Tr. 8-9)

The Commissioner has reviewed the facts and the arguments of the parties and finds nothing of consequence to distinguish the instant matter from the

facts of *Noorigian, supra*. There, as here, petitioner was employed by resolution of the Board and assigned to the M.D.T.C., was paid entirely from federal funds, and denied leave of absence for personal illness and holiday benefits to which he claimed an entitlement. There, as here, the principal issues presented to the Commissioner were essentially the same. These issues are whether or not the Board is in fact the employer of petitioners, and whether or not petitioners may be classified as teachers according to the education statutes. It follows that, if the answers to such basic questions are in the affirmative, the relief requested by Noorigian and afforded by the Commissioner (namely, reimbursement for sick leave days), and by the State Board of Education (namely, reimbursement for holiday pay), must likewise be afforded herein.

The Commissioner has examined the principal issues and determines that the matter, *sub judice*, has been rendered *stare decisis* by the decisions of the Commissioner and the State Board of Education in *Noorigian, supra*, and further determines that the requested relief with respect to leave of absence for personal illness and holiday pay must be granted to petitioners. Portions of the Noorigian decision pertinent to the instant matter are recited as follows:

(a) With respect to whether or not the Board was the employer of Noorigian:

“\*\*\* Despite the Board’s contention that local taxes were not the source of petitioner’s compensation, the Commissioner finds no merit in its argument that petitioner’s position was maintained solely with Federal funds. Once funds are made available to a local school district from any source, those funds become resources of the district receiving them, and *persons employed with those funds may not be separated by category from other persons employed by the Board.*

“The Commissioner holds, therefore, that petitioner was a teacher in the employment of the Board.

“\*\*\* Any employment arrangement into which the Board enters, irrespective of the source of the funding, binds the Board and its employees to all the terms and conditions of employment as set forth by the Legislature in the school laws. (*N.J.S.A. 18A:Education*) \*\*\*”  
(*Emphasis supplied.*) (at pp. 269-270)

(b) With respect to whether or not Petitioner Noorigian was a teacher in the purview of the school laws, citing *Schulz v. State Board of Education*, 132 *N.J.L.* 345 (*E. & A.* 1944):

“\*\*\*\* The Courts have condemned evasions of the tenure statute and refused to countenance the subterfuge of designating a teacher as a substitute where the service rendered and intended to be rendered was that of a regular teacher. ‘It clearly appears that \*\*\* the action of the Board was the merest subterfuge to defeat the legislative purpose \*\*\*.’ *Downs v. Board of Education of Hoboken*, 13 *N.J. Mis. R.* 853 (1935). ‘The petitioner, like many of the other

so-called substitutes, was assigned to a regular position in the same manner as teachers with tenure. The device cannot defeat the purpose of the act \*\*\*. Had the proofs not shown continuous employment for the statutory period, the result would have been otherwise.' *Board of Education of Jersey City v. Wall*, 119 N.J.L. 308 (1938).\*\*\* The offense in the cited cases was the attempt to conceal the real situation by employing in the guise of substitute teachers those who were really teachers, doing the work of teachers.'\*\*\*

"Such is the case, herein. By Board resolution, *supra*, petitioner was employed on a *per diem* basis, despite the fact that his assignment was made to a class that was to meet continuously and did, for four years before he was terminated by the Board.\*\*\*

"In the instant matter the Board employed petitioner by the hour, notwithstanding the fact that his employment as a teacher was continuous for almost four years. The statutes include 'teacher' within the definition of 'teaching staff member,' which is clearly set forth in N.J.S.A. 18A:1-1\*\*\*.

\*\*\*\* The Commissioner holds, therefore, that petitioner was a *teacher* in the employment of the Board.\*\*\*\*" (*Emphasis supplied.*) (at pp. 268-270)

(c) With respect to the entitlement of a teacher to sick leave:

\*\*\*\* Petitioner, requests back pay for twenty days of absence because of sick leave from August 4, 1969 to August 29, 1969, to which, he avers, he is entitled. N.J.S.A. 18A:30-2, which reads as follows, requires that a teacher be given a minimum of ten sick days per year without loss of compensation:

" 'All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.'

"Accumulation of unused days of sick leave is provided for by N.J.S.A. 18A:30-3, which reads as follows:

" 'If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.'

"Having determined that petitioner was a teacher 'steadily employed' by

the Board ( *N.J.S.A.* 18A:30-2), he is entitled to that back pay, which was withheld during his hospitalization and recovery period, if he had accumulated a sufficient number of unused sick leave days prior to the time of illness, a fact not contested by the Board.\*\*\*” (at pp. 271-72)

(d) With respect to the entitlement of Noorigian to holiday pay, the State Board said:

“\*\*\* We hold that petitioner-appellant is entitled to and should be paid for those holidays occurring during the course of time he was employed by respondent-appellee\*\*\*.”

Having determined that petitioners are entitled to leaves of absence for personal illness and holiday pay as teachers regularly employed by the Board, it remains to be determined whether or not Petitioner Karau has earned a tenure status, and whether or not petitioners are entitled to reimbursement for costs, legal fees, and interest as the result of the present litigation. In these respects, the Commissioner finds, as in *Noorigian, supra*, for the Board.

There is no evidence that Petitioner Karau has obtained a State teaching certificate, and by his own admission, he has never been granted one by the local board of examiners. Thus, one of the precise conditions necessary for a tenure accrual, namely, the holding of a teaching certificate in “full force and effect” (*N.J.S.A.* 18A:28-5), has not been met and tenure has not accrued. *Noorigian, supra*; *Ahrensfield v. State Board of Education*, 126 *N.J.L.* 543 (*E. & A.* 1941); *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65 (1962) The Commissioner also reiterates his previous determination that there is no authority in the statutes for the payment of legal fees, costs, and interest as damages. *Noorigian, supra*; *Fred Bartlett, Jr. v. Board of Education of the Township of Wall*, 1971 *S.L.D.* 163, affirmed State Board of Education, 1971 *S.L.D.* 166; *David v. Cliffside Park Board of Education*, 1967 *S.L.D.* 192

In summary, the Commissioner determines that petitioners were regularly-employed staff members who performed teaching duties in the employment of the Board for extended periods of time during the period beginning May 1965 through February 1972, and that they were entitled to leaves of absence for personal illness and holiday pay as enjoyed by other teaching staff members in the school district. Therefore, the Commissioner directs the Board of Education of the City of Jersey City to pay these benefits to petitioners, retroactively to the respective beginning dates of their employment.

COMMISSIONER OF EDUCATION

September 23, 1974  
Pending before State Board of Education

**Lewis Moroze,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the Essex County Vocational School District,  
Essex County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, July 20, 1973

For the Petitioner-Appellant, Morton Stavis, Esq.

For the Respondent-Appellee, Essex County Law Department (Felix A. Martino, Esq., of Counsel)

We remand this matter to the Commissioner of Education for compliance with the following: that, pursuant to *N.J.A.C. 6:24-1.16 (b)*, copies of the Report of the Hearing Examiner be made available to both parties, who may then file written exceptions, objections, or replies thereto with the Commissioner.

June 26, 1974



**Lewis Moroze,**

*Petitioner,*

*v.*

**Board of Education of the Essex County Vocational School District,  
Essex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioner, Morton Stavis, Esq.

For the Respondent, Essex County Law Department (Felix A. Martino, Esq., of Counsel)

The Petition in this matter having been dismissed by the Acting Commissioner of Education for the reasons set forth in the Decision dated July 20, 1973; and,

The Decision of the Acting Commissioner having been appealed by petitioner (Morton Stavis, Esq., Attorney for petitioner) to the New Jersey State Board of Education; and

The matter having been remanded to the Commissioner of Education by the New Jersey State Board of Education in order that opportunity should be afforded to the litigants to file exceptions to the report of the hearing examiner, pursuant to *N.J.A.C. 6:24-1.16*; and

Such opportunity having been provided for the filing of exceptions to the report of the hearing examiner; and

Exceptions to the report of the hearing examiner having been filed by petitioner; and

These exceptions having been carefully read and considered, together with a thorough and independent review of the Petition, the Answer to the Petition, the memoranda submitted by counsel, the extensive testimony of four days of hearing, and the documents entered in evidence; and

The Commissioner having determined that the findings of fact set forth by the hearing examiner are free of bias and distortion as charged by petitioner in his exceptions to the hearing examiner's report; and

The Commissioner having carefully analyzed the documentary evidence and the testimony of numerous youthful and adult witnesses set forth within the record; and

The Commissioner having concluded that the Board's determination not to reemploy petitioner was not made in violation of petitioner's constitutional rights, but for proper, good and sufficient reasons; therefore,

For those precise reasons as previously set forth in the Decision of July 20, 1973, relative to the instant matter, the Commissioner determines that petitioner's cause of action is groundless and his allegations without merit; therefore,

IT IS ORDERED that the Decision of the Acting Commissioner of Education, dated July 20, 1973, is reaffirmed.

Entered this 24th day of September, 1974.

COMMISSIONER OF EDUCATION

Pending before State Board of Education

**In the Matter of the Tenure Hearing of Paul Laden,  
School District of the City of Bayonne, Hudson County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, John J. Pagano, Esq.

For the Respondent, Paul Laden, *Pro Se*

This matter having been opened before the Commissioner of Education by the Board of Education of the City of Bayonne, hereinafter "Board," through its certification on June 13, 1974 of a written charge of conduct unbecoming a janitor, hereinafter "charge," against Paul Laden, a janitor with a tenure status in its employ for nineteen years, hereinafter "respondent," and respondent's suspension from his employment with the Board on the same date, and respondent, through his two previously engaged attorneys both of whom have since withdrawn, entered a denial of the charge herein; and

It appearing that a conference of counsel was conducted in this matter on September 5, 1974 among the Commissioner's representative assigned, counsel to the Board, and respondent representing himself *pro se* and:

It appearing that the Commissioner's representative advised respondent that the purpose of the conference of counsel was to refine the issues, discuss discovery proceedings if necessary, agree to stipulations if possible, set tentative hearing dates on the allegation herein, and it appearing that the Commissioner's

representative also advised respondent that the burden of proof in regard to the allegation against him rested solely upon the Board and no requirement exists for him to acknowledge the veracity of the charge herein; and

It appearing that respondent, notwithstanding the Commissioner's representative's explanation of the purpose of the conference of counsel and the advice given respondent that he was under no requirement to acknowledge the veracity of the charge herein, did, in fact, admit to the substance of the charge as certified by the Board; and

It appearing that the record reflects that respondent asserted mitigating circumstances surrounding his behavior as manifested through the charge, as well as his regret in regard to his action therein and his determination to comport in a civil manner in the future; and

It appearing that the Board did not dispute respondent's assertion in regard to mitigating circumstances, his regret, nor his statement regarding his future behavior; and

It appearing that in light of the circumstances as set forth above it was agreed by the parties that a plenary hearing is unnecessary in this matter; and

It appearing that no hearing examiner's report pursuant to *Marilyn Winston v. Board of Education of the Borough of South Plainfield*, 125 N.J. Super. 131 (App. Div. 1973), affirmed 64 N.J. 582 (1974) is necessary and, accordingly, was waived by the parties; and

It appearing that the matter has been referred to the Commissioner for adjudication on the basis of the record and transcript of testimony taken subsequent to the conference of counsel, *ante*.

The Commissioner observes that the charge, *sub judice*, was forwarded to the Board by Evelyn Meehan, an employee of the Board assigned to the Bayonne High School cafeteria as a per diem worker. The substance of the charge is as follows:

\*\*\*\*

"3. On or about May 9th, 1974, at or about 2:00 P.M., in the parking lot of the Bayonne High School, Paul Laden [respondent] approached me, and accused me of saying in the dining-room of the cafeteria that he was drinking, which I denied and thereupon, without cause or provocation, he struck me on the side of the mouth, causing me to bleed. I was examined by the School Nurse, washed my mouth with water, and I was given gauze and ice to place on the wound. Then Mrs. Kathleen A. Brogowski, Director of Food Services, drove me to Dr. Freeman's office where I had two stitches taken in my mouth.\*\*\*"

The Commissioner observes that respondent admitted the behavior as set forth in the charge, *ante*, which behavior, in the Commissioner's judgment, constitutes a serious breach of conduct. School janitors occupy a sensitive role in

the public schools and, as such, have the responsibility to adhere to basic standards of proper behavior which exclude the conduct exhibited by respondent on May 9, 1974.

However, the Commissioner also observes that it is agreed by the parties that mitigating circumstances surround this incident by way of alleged provocative accusations which it is not denied were directed at respondent. Respondent likewise exhibits a proper degree of regret for his imprudent behavior. The Commissioner views the matter within the context of respondent's nineteen years of service to the Board, which Board, herein, does not press for his dismissal. The Commissioner determines that the penalty of dismissal would be unduly severe in this instance.

Therefore, the Commissioner determines that Paul Laden shall forfeit any claim to compensation he may have had from the date of his suspension to October 1, 1974 at which time the Board of Education is ordered to restore him to his position of janitor.

COMMISSIONER OF EDUCATION

September 30, 1974

**Norma Whitcraft and Cherry Hill Education Association,**

*Petitioners,*

*v.*

**Board of Education of the Township of Cherry Hill, Camden County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Ruhlman and Butrym (Cassell R. Ruhlman, Jr., Esq., of Counsel)

For the Respondent, Hyland, Davis and Reberkenny (William C. Davis, Esq., of Counsel)

Petitioner, a tenured teacher, contests the action of the Board of Education of the Township of Cherry Hill, hereinafter "Board," reassigning her to a position of half-time kindergarten teacher at half pay, from the full-time positions she held continuously during her employment for the past six years.

Respondent Board admits that petitioner was transferred from a full-time position to a half-time position at half pay, but asserts that the transfer was made at petitioner's request. The Board avers, however, that upon learning that the half-time position was not in accordance with petitioner's wishes, she was again reassigned to a full-time kindergarten position at full salary.

Petitioner prays that the Commissioner of Education direct the Board to pay her the difference between the salary she actually received and the salary she would have received had she remained a full-time teacher.

A hearing in this matter was held in the Extension Services Building, Mount Holly, on June 4, 1974 before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

The following facts are not in dispute:

1. Petitioner has been continuously employed by the Board as an elementary teacher (kindergarten) since September 1, 1967. (Board's Answer, at p. 1)
2. Petitioner has a tenure status in the school district. (Board's Answer, at p. 1)
3. Petitioner requested a transfer on April 2, 1973 to a position of "Learning specialist or any full time kindergarten \*\*\* or related elementary position." (R-2a, b, c, d)
4. Petitioner signed a statement of salary issued by the Board for the

position of "kindergarten teacher" on June 4, 1973, at a salary commensurate with full-time employment at her proper step on the salary guide. (R-3)

5. Petitioner was transferred on August 30, 1973 from a full-time kindergarten teacher at the Paine School to a half-time kindergarten teacher at the Malberg School. (Board's Answer, at p. 2)
6. Petitioner was paid as a half-time teacher from September 1, 1973 to October 28, 1973. (Board's Answer, at p. 2) (R-7)
7. Petitioner was reassigned to a full-time kindergarten position on or about October 28, 1973.

Petitioner testified that she needed a change in assignment for her "physical and mental well being" (R-2) as advised by her physician. She testified further that she accepted the half-time position offered her and felt that the only other alternative would be to resign because she would not go back to the Paine School (her former assignment). (Tr. 42)

After her reassignment to the half-time position on August 30, 1973, petitioner testified, she learned that a full-time position had been available earlier (Tr. 13), and she avers that she had the right to be assigned to that position because of her tenured status. (Tr. 4)

Petitioner testified that she made a timely protest when she learned about the availability of the full-time position and that she had an informal conference with the principal during the last week in September (1973). (Tr. 20)

She testified further that she filed a formal grievance with the Board on October 9, 1973, pursuant to the terms of the Board's policy for grievances. (Tr. 22)

The record shows that the Board created another kindergarten class because of State mandated restrictions on size (as controlled by the County Superintendents of Schools) (R-11, 12), and that petitioner was thereafter reassigned to a full-time kindergarten position. (Board's Answer, at p. 3) (R-9, 10)

Petitioner rested her case and the Board offered a Motion to Dismiss stating that petitioner's reassignment was voluntary, based on her request (R-2), her absolute refusal to remain at the Paine School as a full-time teacher, and her acceptance of the half-time position. (R-2, 5, 6, 7)

The hearing examiner reserved decision on the Motion for the Commissioner. The Board proceeded with its case.

In the judgment of the hearing examiner the proper resolution of this matter can be made only after the factual situation contained in Board records are examined for the purpose of determining if a full-time position was available

for petitioner and if she was denied a right to reassignment to that position. It appears to the hearing examiner that a tenure teacher cannot be dismissed or suffer reduced compensation absent certification of charges by the Board which are sustained by the Commissioner. (*N.J.S.A. 18A:28-5; N.J.S.A. 18A:6-10 et seq.*)

Although petitioner was unable to prove there was a full-time vacancy to which she should have been assigned, the hearing examiner continued the hearing so that the Board could present its defense and the factual truth about the availability of positions for which petitioner applied.

The Assistant Superintendent of Schools in charge of Administrative Affairs, hereinafter "Superintendent," testified that there was no full-time kindergarten position available on August 30, 1973. After a conference with petitioner on that date, he thereafter notified her about the half-time position at the Malberg School. (R-5) He testified further that there had been a full-time and a half-time kindergarten position available on or about August 20, 1973, and that he told petitioner that she should go to the Malberg School to be interviewed for the positions. (Tr. 93)

Thereafter, an administrative decision was made and accepted by petitioner, reassigning her to the Malberg School to a half-time position. The Superintendent testified, also, that a teacher initially employed in the district from April 2, 1973 to June 30, 1973 (three months) was assigned to the full-time kindergarten position on or about August 28, 1973. (Tr. 90-91)

The hearing examiner finds, therefore, that the Board knew of and accepted petitioner's request for a transfer on April 2, 1973. (R-2) The hearing examiner finds no statutory authority which would compel a board of education to transfer a teacher upon receiving a transfer request; however, a board clearly has the statutory authority to transfer personnel within the scope of their certificates. (*N.J.S.A. 18A:11-1*) *N.J.S.A. 18A:25-1* reads as follows:

"No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed."

The record does not show that petitioner's transfer had prior approval of the Board as required by *N.J.S.A. 18A:25-1*. However, the Board did meet to approve the transfer to the half-time position on September 17, 1973. (R-6)

In summary the hearing examiner finds:

1. Petitioner requested a transfer on April 2, 1973, which was honored by the Board through its administrators. (R-2, 5)
2. A position was available on or about August 20, 1973, which met petitioner's honored request for a full-time reassignment. (Tr. 93)



3. The full-time position was given to a non-tenure teacher and petitioner was reassigned to a half-time position. (Tr. 93)
4. Petitioner was reassigned to a full-time position on October 28, 1973. (Board's Answer, at p. 3)

In the hearing examiner's judgment, the Board was duty bound to transfer petitioner to a full-time position as she requested, and for which she was eligible, after it accepted her request in good faith and when an appropriate position was available. The hearing examiner finds further that petitioner was transferred without regard to *N.J.S.A. 18A:25-1*, *ante*. The hearing examiner finds, also, that a full-time position was available after August 20, 1973, to which petitioner should have been assigned, and the administration erred in assigning this full-time position to a nontenured teacher rather than petitioner. The result of this improper reassignment was, in effect, a reduction in pay in violation of *N.J.S.A. 18A:28-5*.

The hearing examiner recommends, therefore, that the Commissioner direct the Board to pay petitioner the difference between her half-time salary and the full-time salary she should have received for the period September 1, 1973 to October 28, 1973.

This concludes the hearing examiner's report.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto which have been filed by the Board. Such exceptions are concerned, in effect, with the procedural implications and legal obligations which are implied or required at the time a request for a transfer is forwarded to school officials by a teaching staff member. The Board takes particular exception to that portion of the hearing examiner's report which finds that petitioner was transferred "without regard to *N.J.S.A. 18A:25-1*." (at p. 6)

The Commissioner determines that the argument, in this respect, is not whether the Board did or did not take an action to approve the transfer of petitioner as required, since the hearing examiner found at page 5 that the Board "did meet to approve the transfer to the half-time position on September 17, 1973." The argument, instead, is concerned with the timing of such approval and in this regard the Commissioner has already interpreted the statute of reference (*N.J.S.A. 18A:25-1*) to mean that an action of the local board of education, not a decision by a school administrator, is required prior to the time when the transfer is to be effective. *James Mosselle v. Board of Education of the City of Newark*, 1973 *S.L.D.* 197; affirmed State Board of Education, January 9, 1974. However, in *Mosselle*, *supra*, the transfer was an involuntary one while the one considered, *sub judice*, is one to which petitioner gave her consent. In such circumstances the Commissioner finds no procedural fault *per se* but instead a need to examine the weight which should be afforded the "consent" which petitioner admittedly gave on August 30, 1973 to a transfer to a half-time position.

It is clear that petitioner had applied for a transfer on April 2, 1973 to a full-time alternative position and that such application was approved by her principal. (R-2A) Thereafter, she was informed that her salary for school year 1973-74 was established as that of a full-time teacher. (R-3)

At that juncture, the Commissioner holds petitioner had every right to expect that she would be apprised of vacancies as they developed in full-time positions and given an opportunity to apply for them. Her application for transfer had never been rejected. It had been approved.

Nevertheless, such expectation was not realized since an appropriate vacancy did develop on August 20, 1973, but petitioner was not afforded a prompt opportunity to apply for it, and it was awarded instead to a non-tenured teacher. As a consequence, the administrative transfer of August 30, 1973 to a half-time position was, in its practical effect, a demotion for petitioner and contrary to the statutory prescription. *N.J.S.A. 18A:28-5* The Commissioner so holds.

The Commissioner concurs with the hearing examiner that the Board was under no compulsion to transfer petitioner, even though she requested such transfer, but that when the transfer was made the Board could not, with propriety, make it to a position other than that of full-time teacher unless no such position were available and petitioner consented to the action. Pursuant to this determination, petitioner's consent in the instant matter must be rendered a nullity since she was not fully apprised of the true factual situation at that point in time. A full-time position was available. Petitioner's consent to a part-time position was rendered in a vacuum of knowledge for which she was not responsible.

Accordingly, the Commissioner directs the Board of Education of the Township of Cherry Hill to compensate petitioner for the difference between her half-time salary and the full salary to which she was entitled as an employee of the Board during the period September 1, 1973 to October 28, 1973.

COMMISSIONER OF EDUCATION

October 7, 1974

Mildred Givens,

*Petitioner,*

*v.*

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

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Arthur M. Shara, Esq.

For the Respondent, Barry A. Aisenstock, Esq.

Petitioner alleges that she had acquired a tenure status as a teacher in respondent's schools and that she was illegally given notice on July 21, 1972, without certification of charges to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-11, that she would not be reemployed for the 1972-73 academic year.

Respondent, the Board of Education of the City of Newark, hereinafter "Board," admits that petitioner was employed for three and one-half years as a teacher in the Board's school system, but denies that she had achieved a tenure status and that her termination by the Board was improper.

On April 17, 1974, the Board filed a Motion to Dismiss the Petition for failure to state a cause of action and for failure to comply with *N.J.A.C.* 6:24-1.3. Thereafter, petitioner filed a Cross-Motion to Dismiss on May 1, 1974. At a conference of counsel it was agreed that petitioner should file an Amended Petition. This resulted in a Consent Order of the Commissioner dated May 21, 1972, requiring the filing of an Amended Petition and an Answer to the Amended Petition and denying the Motions to Dismiss. A hearing in this matter was held at the offices of the Union County Superintendent of Schools, Westfield, on June 13, 1974 by a hearing examiner appointed by the Commissioner of Education. Both parties to the dispute waived the requirement of a hearing examiner's report.

Petitioner is a teacher of music who began her services with the Board on February 3, 1969. Thereafter, she taught without interruption until the end of the 1971-72 academic year, a period of three and one-half academic years. Petitioner prays for reinstatement to her position, payment of her salary from the date of her termination, and the award of costs and attorney's fees.

The Board states that petitioner did not acquire a tenure status and that the Board was not under requirement to either reappoint petitioner to her teaching position or to certify charges against her pursuant to *N.J.S.A.* 18A:6-11. The Board's position is based upon the following two contentions:

Board Contention No. 1

Petitioner failed to acquire a tenure status regardless of her employment for a period of three and one-half consecutive academic years, because she held no certificate of any kind for the first half of the first academic year. (Respondent's Memorandum of Law, at p. 1, paraphrased)

In this regard the Board cites *N.J.S.A.* 18A:28-5 which states that teaching staff members:

*“\*\*\* excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency\*\*\*after employment in such district or by such board for:*

- “(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purposes; or*
- “(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or*
- “(c) the equivalent of more than three academic years within a period of any four consecutive academic years.”\*\*\* (Emphasis supplied.)*

The Board contends that petitioner held no appropriate teaching certificate from February 1969 through June 1969, and therefore that period of time may not be calculated toward meeting the statutory time requirement for tenure, thus leaving petitioner with at most a total of only three academic years of service, one day short of the statutory time requirement. (Tr. 6)

The Commissioner does not agree that petitioner is barred from counting toward tenure the period of five months from February 3, 1969 through June 30, 1969. The record shows that petitioner's application for a music teacher's certificate was filed with and evaluated by the Essex County Superintendent of Schools by January 29, 1969, prior to her reporting to her teaching duties for the Board. (P-2) Thereafter, in September 1969 she was issued by the New Jersey State Board of Examiners a provisional certificate as a "Teacher of Music." (Exhibit A-6) Subsequently, she was issued by the Board of Examiners in April 1970 a permanent "Secondary School Teacher of Music" certificate (Exhibit A-5) and in August 1970 a permanent "Teacher of Music" certificate (Exhibit A-4) effective for grades K-12 inclusive.

During this entire period of time, petitioner neither made application for nor took additional courses. The delay in issuance of the permanent "Teacher of Music" certificate was occasioned by the time required by registrars of petitioner's colleges to forward official transcripts of her credits and degrees, and evidence of her student teaching experience to the Bureau of Teacher Education and Academic Credentials of the New Jersey Department of Education. Additional time was consumed in the evaluation of her academic credentials by this agency and in the issuance and transfer of the certificate. However, it is clear that petitioner applied in timely fashion for the required certification prior to

reporting to work and that she possessed at that time the necessary requirements for a permanent certificate.

School boards in our highly mobile society are frequently faced with the necessity to fill teaching positions which become vacant unexpectedly. It is imperative that local boards of education select the best qualified teachers. The best qualified persons may not possess New Jersey teaching certificates but would be eligible to obtain them. Fairness alone dictates that such teachers ought not be penalized by the administrative delay which necessarily exists in processing great numbers of applications for certificates by teachers required to staff public schools serving nearly one and one-half million New Jersey school children.

While it is true that petitioner was not the "holder of a proper certificate in full force and effect" from February 1, 1969 through June 30, 1969, her inability to obtain it was not of her own doing. Had the County Superintendent chosen to do so, he could have issued her an interim music teacher certificate. (*N.J.A.C. 6:11-4.6*) However, he saw no necessity for doing so and merely awaited the forthcoming certificate for which he believed she was eligible. Such delay is not unusual and frequently affects many persons. Petitioner served in the school district as a teacher in a position requiring a certificate issued by the Board of Examiners. This being so, the Commissioner determines that the tolling of days toward tenure began for petitioner on February 3, 1969, the first day of her employment by the Board and continued through the controverted period until the close of school in June 1969.

#### Board Contention No. 2

The Board of Education did not appoint petitioner to a teaching position for the 1969-70 school year in conformance with *N.J.S.A. 18A:27-1*; therefore, her function as a teacher was a nullity for that period and may not be calculated for tenure purposes. (Respondent's Memorandum of Law, at p. 4, paraphrased)

*N.J.S.A. 18A:27-1* provides that:

"No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the Board of education appointing him."

While petitioner does not contest the Board's claim that it did not formally appoint her as a teacher for the 1969-70 school year, she argues that the Board's failure to make the appointment does not excise that period of her service from the time period required for her to acquire a tenure status.

The Board attributes its failure to appoint petitioner for the 1969-70 academic year to "low level administrative failure." (Respondent's Memorandum of Law, at p. 4) However, it is admitted that petitioner performed her teaching duties and was paid for the 1969-70 academic year.

A similar situation was considered by the Commissioner in *Juanita Zielenski v. Board of Education of the Township of Guttenberg, Hudson County*, 1970 S.L.D. 202, reversed New Jersey State Board of Education, 1971 S.L.D. 664. Therein it was shown that Zielenski taught continuously in the school district from February 1, 1966 to June 30, 1966 without a contract but was paid the salary of a regular teacher. The Board of Education of Guttenberg disclaimed the controverted period as being applicable to the establishment of tenure since Zielenski had been hired as a substitute by the Superintendent and not by board action. However, the State Board of Education said:

“\*\*\* [W]hether an employment is as a regular teacher or substitute teacher is not to be determined by the designation given the employment by an employing board, but by an examination of the factual picture presented. *Downs v. Board of Education of Hoboken*, 13 N.J. Misc. 853 (1935); *Board of Education of Jersey City v. Wall et al.*, 119 N.J.L. 308 (Sup. Ct. 1938)\*\*\*” (at p. 665)

And,

“\*\*\* We find it difficult, in evaluating the actions of the Board in so tender and sensitive an area as expenditure of public funds entrusted to it for the administration of public schools, to accept the argument that such pay and other benefits as were given to petitioner during the five months period were more a mark of beneficence than the recognition of a status.\*\*\*” (at p. 667)

And,

“\*\*\* These statutes [N.J.S.A. 18A:27-1 and N.J.S.A. 18A:28-4] lead us to conclude that it was not intended to deny tenure to a teacher, otherwise eligible, who taught continuously and performed all the duties of a regular teacher\*\*\*.” (at p. 668)

The statute, N.J.S.A. 18A:28-5, in describing periods of service applicable to tenure uses the phrase “\*\*\* *after employment in such district or by such board.*” By so doing the Legislature clearly recognized the validity of employment within a district as distinguishable from employment by a Board. Such employment pertained in the instant matter.

Our examination of the factual picture presented shows that petitioner was notified to report to work and did so for the entire 1969-70 academic year as a teacher of classes regularly assigned to her. She was paid those emoluments afforded to teachers by the Board’s salary policy. She had no way of knowing that the Board did not include her name in its lists of appointments, nor was she notified by the Board that she had not been reemployed. The failure of the Board to act to validate the payment of public funds to petitioner may in no way work to the detriment of petitioner.

It was said by the Supreme Court in its affirmation of *Wall, supra*:

“\*\*\* The device adopted cannot defeat the purpose of the act, which was designed to give a measure of security to those who served as teachers three consecutive academic years.\*\*\*” (at p. 309)

The Commissioner determines that petitioner’s service as a teaching staff member from September 1969 through June 1970, during which she was eligible for and had applied but had not received her teaching certificate, shall be counted in determining whether her total service meets the precise conditions laid down in the statute, *N.J.S.A. 18A:28-5*, for the acquisition of a tenure status. *Ahrensfield v. State Board of Education et al.*, 126 *N.J.L.* 543 (*E. & A.* 1941)

It is clear in the instant matter that the Board had ample opportunity to evaluate petitioner’s ability to teach, since subsequent to the controverted periods, *ante*, she was awarded two contracts by Board appointment in the regular manner. Thus, the purpose of the probationary period was fulfilled as was enunciated in *Schulz v. State Board of Education*, 132 *N.J.L.* 345 (*E. & A.* 1944):

“\*\*\* The three year period which is \*\*\*a necessary antecedent to the acquisition of tenure, gives, if served under conditions of regular employment, an opportunity for demonstration of character, teaching qualities and ultimate influence upon the personality and mentality of the student.\*\*\*” (at p. 354)

The Commissioner, having weighed the evidence as here set forth, concludes that the necessary probationary period in excess of three academic years within a four-year period was completed by petitioner. This being so, petitioner was at the time of her termination by the Board a tenured teaching staff member and could properly and legally be terminated only upon certification of charges pursuant to *N.J.S.A. 18A:6-11*. The Commissioner previously stated in *Nicoletta Biancardi v. Board of Education of the Borough of Waldwick*, 1974 *S.L.D.* 360 that:

“\*\*\* The Board could easily have avoided the acquisition of tenure by petitioner, had it so chosen, by the termination of her employment at any time prior to April 27, 1973. As was said by the Court in *Canfield v. Board of Education of the Borough of Pine Hill*, 97 *N.J. Super.* 483, 490 (*App. Div.* 1967); reversed 51 *N.J.* 400 (1968):

“\*\*\* tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure.\*\*\*” (at p. 490)

“It was likewise stated by the Commissioner in *Cornelius T. McGlynn v. Board of Education of the Township of Lumberton*, 1972 *S.L.D.* 28 that:

“\*\*\* where service of a teaching staff member has been rendered for the complete period required by statute a tenure status is accrued at the precise moment when the requisite period has expired. From that time



forward, in the Commissioner's view, the teaching staff member has tenure.\*\*\*' (at p. 33)\*\*\*" (at p. 367)

Petitioner in the instant matter, was improperly terminated from her teaching position. The Commissioner orders the Board to reinstate her to her teaching position forthwith with such salary and other emoluments consistent with the Board's policies as would have pertained had she not been terminated. It is further ordered that she be paid her salary, less any earnings she may have had for the period that school was in session during the academic years from her termination of employment until the date of her reinstatement.

Finally, the Commissioner knows of no statutory or other authority that would empower him to grant petitioner's request for counsel fees and costs. *Fred Bartlett, Jr. v. Board of Education of the Township of Wall, Monmouth County*, 1971 *S.L.D.* 163, *David v. Board of Education of the Borough of Cliffside Park*, 1967 *S.L.D.* 192. Accordingly, this prayer of the Petition is denied.

COMMISSIONER OF EDUCATION

October 7, 1974

**Board of Education of the Borough of Spotswood,**

*Petitioner,*

*v.*

**Board of Commissioners of the Borough of Spotswood, Middlesex County,**

*Respondent.*

**CONSENT ORDER**

This matter being opened to the Commissioner by Philip H. Shore, Esq., of Golden, Shore and Paley, Esqs., attorneys for the Board of Education of the Borough of Spotswood, the petitioner herein, and Guido J. Brigiani, Esq., attorney for the Board of Commissioners of the Borough of Spotswood, the respondent herein, and it appearing that the parties have agreed upon a settlement of the matter, and all parties having consented to the entry of this Order; and good and sufficient cause having been exhibited for the entry of this Order;

IT IS, on this 7th day of October, 1974, ORDERED and ADJUDGED, as follows, to wit:

That the Respondent, Board of Commissioners, is directed to certify to the Middlesex County Board of Taxation the additional amount of FIFTY-SIX THOUSAND ONE HUNDRED and 00/100 ----- (\$56,100.00) DOLLARS for current expenses, to be raised by local taxation for the support of the Spotswood Public School System for the school year 1974-1975.

COMMISSIONER OF EDUCATION

**Board of Education of the City of Plainfield,**

*Petitioner,*

*v.*

**City Council of the City of Plainfield, Board of School Estimate  
and County Board of Taxation, Union County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, King and King (Victor E. D. King, Esq., of Counsel)

For the Respondents, Crane, Beglin and Vastola (Edward W. Beglin, Jr., Esq., of Counsel)

Petitioner, the Board of Education of the City of Plainfield, hereinafter "Board," appeals from an action of the City Council of Plainfield, hereinafter "Council," wherein Council certified to the Union County Board of Taxation a lesser amount of appropriations for school purposes for the 1974-75 school year than was proposed by the Board in its budget. A hearing on the Board's Petition of Appeal was conducted on June 27, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

Plainfield is a city district classified for school purposes as Type I and, pursuant to law, the Board submitted its school budget for the 1974-75 school year to the Board of School Estimate in early February 1974. This budget, exclusive of Federal, State, County, and other funds proposed that the sum of \$8,892,000 be appropriated from local taxation to operate the schools of the district for the ensuing year.

Thereafter the Board of School Estimate certified a lesser amount totaling \$8,014,500 to Council, and Council considered this amount at its own meeting on March 19, 1974. However, such sum was found to be inadequate by Council on that date, and it resolved that the sum of \$8,300,000 was required for school purposes in the 1974-75 school year, and certified this sum to the Union County Board of Taxation. Subsequently, the Board again reviewed its programmed needs for the ensuing year and determined, in the context of Council's determination, that a sum of at least \$8,729,000 was required to insure the operation of its schools and that the sum of \$8,300,000 certified by Council was not commensurate with its requirements. The instant Petition of Appeal was subsequently filed. The amount of money in contention herein is \$429,000.

Subsequent to the filing of the Board's Petition, an Answer was filed by Council. This Answer, and a later supplement, comprise a general policy statement in support of Council's certification together with specific suggested

reductions in a total of twenty-four line items. These specific reductions which total \$429,000, are set forth as follows:

CHART I

Acct. No.	Item	Board's Proposed Budget	Council's Determi- nation	Amount of Reduction
J110I	Bus. Off. Sals.	\$ 159,138	\$ 149,138	\$ 10,000
J110L	Pers. Off. Sals.	113,475	83,475	30,000
J120b	Legal Fees	30,000	25,000	5,000
J120d	Other Fees	6,000	1,000	5,000
J130a	Bd. Exp.	5,900	5,200	700
J130b	Bd. Secy. Exp.	3,100	1,100	2,000
J130I	Pers. Off. Exp.	17,750	13,750	4,000
J130p	Off. Exp.	9,800	6,800	3,000
J211	Prins. Sals.	617,120	474,710	142,410
J215	Secy. Sals.	351,083	272,213	78,870
J220	Textbooks	112,798	108,110	4,688
J230a	Lib. Books	47,602	41,602	6,000
J230c	A-V Mats.	43,075	30,125	12,950
J240	Teaching Supls.	229,612	218,430	11,182
J250c	Misc. Exp.	98,855	78,855	20,000
J420a	Health Supls.	8,000	6,500	1,500
J620	Contr. Servs.	3,500	2,500	1,000
J660c	Contr. Cleaning	2,500	1,500	1,000
J720a	Contr. Grounds Maint.	24,700	16,200	8,500
J720b	Contr. Bldg. Maint.	281,032	211,032	70,000
J720c	Contr. Rep. Equip.	29,200	26,000	3,200
J730c	New Equip.	61,437	58,437	3,000
J740a	Grounds Maint. Exp.	2,000	1,000	1,000
J740b	Bldg. Maint. Exp.	58,000	54,000	4,000
	Totals	\$2,315,677	\$1,886,677	\$429,000

The argument of the parties with respect to such budget items is both general and specific and will be concisely set forth at this juncture by the hearing examiner.

The Board maintains that Council's determination fails to take into account "\*\*\*\*demands for services and programs made for the schools by the Community\*\*\*\*" and the Board concludes that a reduction in educational programs "\*\*\*\*will result in even greater costs to the City and to society in general." (Reply to Respondent's Supplemental Answer, at p. 3) Part of this "greater cost" envisioned by the Board is made necessary by the fact that the incentive-equalization formula employed by the State in the apportionment of State funds will produce a reduction in State support for the Plainfield schools if Council's determination is allowed to stand. In the Board's calculation the net effect of such reduction in State support will exceed \$100,000. Accordingly, in the Board's argument, the Commissioner should order Council "\*\*\*\*to direct its

attention to the provision of the necessary services and programs and either (a) show how they can be delivered at lower cost, or (b) appropriate the funds necessary to deliver them.\*\*\*" (Reply to Respondent's Supplemental Answer, at p. 3)

In Council's view, however, there is a limit to school and municipal expenditures beyond which further expenditure "\*\*\*\*cannot be tolerated\*\*\* without causing irreparable permanent damage to the City including its entire educational program." (Supplement to the Answer of Respondent, at p. 2) Furthermore, Council maintains that it has had to curtail existing programs and delay initiating new ones but has been able to take such action without impairing basic efficiency. It avers similar approaches should be employed by the Board.

While challenging the requirement of the State Department of Education that Council must specifically delineate those areas of the Board's budget wherein economies may be effectuated, Council nevertheless sets them forth. These specific delineations of major importance will be discussed *seriatim* and following such discussion, the hearing examiner will include his recommendations. Subsequently, recommendations with respect to smaller reductions deemed appropriate by Council will be itemized in chart form.

Initially, however, the hearing examiner observes that an overview of the Board's budget proposals for the 1973-74 school year creates an impression of a conservative sustenance of the present program of public education in Plainfield. There are no new and costly major programs. There is no significant increase in the number of professional staff or other personnel to be employed. The prime effort appears to be to maintain the *status quo* in an inflationary time.

In contrast, Council's proposals, if adopted, represent a retrenchment of effort, a significant reduction in the number of personnel from those previously employed, a lessening of support for the program of public education which Council had supported in prior years. If given effect these proposals would require a restructuring of the Plainfield school system in accordance with the discretion of Council, rather than the discretion of the Board.

In general, the hearing examiner finds no reason to support Council's proposals since it is the Board which is entrusted by law with the "government and management" of its schools in Plainfield, and such authority may not be delegated or usurped.

A review of budgetary line items now follows:

*J1101 Business Office Salaries*

*Reduction \$10,000*

The Board actually expended a total of \$131,932.33 for the salaries of its business office personnel during the 1972-73 school year and proposed to expend \$141,759 in school year 1973-74. Thus its proposed allocation of \$159,138 for school year 1974-75 represents a budgeted increase of approximately \$18,000. Such expenditures are programmed for salaries of

employees in the business office; supervisors, bookkeepers, secretaries, and substitutes. The work of such employees is involved with every facet of a total school budget programmed by the Board at \$13,743,147 for school year 1974-75. In the Board's view, a reduction in expenditure for this line item would impair the effectiveness of the operation.

Council maintains the Board has failed to carry its burden of proof with respect to this line item and grounds such argument on the fact that the Board has simply listed employees and set forth their duties and salaries.

The hearing examiner observes that there is no contention that the number of business office employees has been increased by the Board, and it appears that the proposed increase is generally for salary increments for present personnel. However, such increment totals are nowhere specifically delineated.

In the absence of such specificity, the hearing examiner finds it difficult to assess the need. However, he recommends that the increase in this line item be limited to the same approximate increase deemed appropriate by the Board in the 1973-74 school year, as compared with the 1972-73 school year, plus \$1,000. Thus, this recommended amount to insure a continued effective business operation is \$152,750.

Summary: Proposed Reduction	\$10,000
Amount Restored	3,612
Amount Not Restored	6,388

*J110L Personnel Office Salaries*

*Reduction \$30,000*

The Board budgeted \$67,915 for the salaries of this office for the 1973-74 school year and proposes to increase the allocation to \$113,475 for school year 1974-75, without the addition of new personnel. However, the Board documents a need for only \$102,716 for the salaries of six employees and for substitutes and overtime.

Council avers the Board has failed to document the reasons why such a budgeted sum is required.

The hearing examiner finds that the expenditures proposed by the Board in the amount of \$102,716 for personnel office salaries is the sum required for a continued effective operation in the 1974-75 school year.

Summary: Proposed Reduction	\$30,000
Amount Restored	19,241
Amount Not Restored	10,759

*J211 Principals' Salaries*

*Reduction \$142,410*

The reduction proposed by Council herein would, if allowed, require the Board to considerably alter its administrative staffing pattern, to refrain from hiring three new vice-principals for elementary schools, and to reduce the

number of administrators in other schools. The Board maintains that the total amount of money requested is necessary.

A total of \$518,689.30 was actually expended for school principals' salaries during the 1972-73 school year. The amount of \$549,022 was budgeted by the Board for school year 1973-74, and a total of \$617,120 for school year 1974-75. Thus, if Council's total reductions were allowed, the Board would be forced to cut back its expenditures for the 1974-75 school year to a total which is \$40,000 less than the Board expended in 1972-73.

The hearing examiner can find no justification for such a reduction in this large city school system with all the inherent problems requiring administrative expertise. He recommends instead, that the budgeted amount reflect a sum of money for salary increases within this line item plus the sum of \$14,000 for the addition of one vice-principal position in the largest of the elementary schools where such position is absent, but that two other vice-principal positions proposed by the Board not be funded.

Summary: Proposed Reduction	\$142,410
Amount Restored	114,410
Amount Not Restored	28,000

*J215 Secretaries' Salaries*

*Reduction \$78,870*

The Board proposes to implement a general policy provision with respect to secretarial help which, in essence, would provide a full or part-time secretary/clerk for each elementary school of less than 400 pupils and an additional person when enrollment exceeds such figure. However, no new additional personnel are to be employed for the coming school year.

Council proposes to eliminate ten positions at an average salary of \$7,887.

For reasons stated, *ante*, the hearing examiner finds no merit in Council's position with respect to this reduction. A rejection by Council for the 1974-75 school year of the very positions and programs of secretarial support it approved for the 1973-74 school year is an inconsistency in contravention of the requirement that schools be both thorough and efficient in their operation.

Summary: Proposed Reduction	\$78,870
Amount Restored	78,870
Amount Not Restored	—0—

*J230c Audiovisual Materials*

*Reduction \$12,950*

The Board's expenditures from this line item in previous years and proposed 1974-75 allocation are shown as follows:

Budgeted 1972-73	\$14,860.00
Actually expended 1972-73	22,996.99
Budgeted 1973-74	30,125.00
Proposed 1974-75	43,075.00



The Board grounds its argument of need on certain general budgetary policies which are employed and states that its costs per pupil for such materials are below the State average. It also avers that the expenditures of prior years have not been adequate.

Council avers that expenditures during the 1973-74 school year (less than the amount budgeted, *ante*) and a lack of justification for an increase herein attest to the propriety of its own determination.

The hearing examiner finds for Council with respect to this line item. There is no evidence of pressing need to justify the allocation which is proposed, and no evidence that the sum of \$30,125, which was budgeted for 1973-74 but not expended, will not be adequate for the 1974-75 school year.

Summary: Proposed Reduction	\$12,950
Amount Restored	—0—
Amount Not Restored	12,950

*J240 Teaching Supplies*

*Reduction \$11,182*

The Board actually expended the sum of \$153,952.31 for teaching supplies during the 1972-73 school year. The Board budgeted \$188,450 for school year 1973-74, and proposes the amount of \$229,612 for 1974-75, an increase in excess of twenty percent. The Board argues that these provisions are based on specific budgetary policies and maintains that its per pupil expenditures are reasonable.

Council maintains that the increase may be limited to one which is made necessary by an inflation of costs.

The hearing examiner observes that Council's proposal would allow an increased expenditure of more than fifteen percent which, compared to the Board's actual expenditures to February 1974 (\$149,320), appears ample. Therefore, he recommends that Council's determination be allowed to stand.

Summary: Proposed Reduction	\$11,182
Amount Restored	—0—
Amount Not Restored	11,182

*J250c Miscellaneous Expenses*

*Reduction \$20,000*

Council proposes to reduce the allocation in this line item which the Board had already reduced from the \$128,034 budgeted in 1973-74 to \$98,855 proposed for 1974-75. Thus, if Council's determination prevails, the Board would be left with the sum of approximately \$80,000, far less than the \$101,629.14 it required for such expenses in 1972-73. The argument of the parties is principally concerned with past budget practice and whether or not such practice has been to build a budget surplus within this line item.

The hearing examiner has reviewed the arguments and facts and finds some

merit in Council's argument that this line item was overbudgeted in prior years, but he finds no correlation with such years and these proposed expenditures. The Board had already recognized the validity of Council's argument at the time it considered this line item, and its reduction was considerable. A further reduction would be unwarranted.

Summary: Proposed Reduction	\$20,000
Amount Restored	20,000
Amount Not Restored	-0-

*J720b Contracted Services, Buildings* *Reduction \$70,000*

The Board's proposal is to increase these services from a budgeted amount of \$101,354 for school year 1972-73 to \$281,032 in school year 1974-75. Specifically, the Board states that the great increase is justified to compensate for the neglect of prior years, to replace rotted windows, to provide mechanical ventilation wherever it is not now provided, to retire splintered seats, etc.

Council, while apparently recognizing much of the need, avers that the budget increase is too great and that the total budgeted amount should be limited to \$211,000.

The hearing examiner finds that the Board's proposals have merit, but he cannot find that past neglect must all be remedied in this one budget year. Instead, he finds that Council's determination is a reasonable one, and he recommends that it be allowed to stand.

Summary: Proposed Reduction	\$70,000
Amount Restored	-0-
Amount Not Restored	70,000

Other recommendations of the hearing examiner are contained in the following chart.

CHART II

Acct. No.	Item	Proposed Reduction	Amount Restored	Amount Not Restored
J120b	Legal Fees	\$5,000	\$5,000	-0-
J120d	Other Fees	5,000	5,000	-0-
J130a	Bd. Exps.	700	-0-	700
J130b	Bd. Secy. Exp.	2,000	2,000	-0-
J130l	Pers. Off. Exp.	4,000	4,000	-0-
J130p	Office Expense	3,000	-0-	3,000
J220	Textbooks	4,688	-0-	4,688
J230a	Lib. Books	6,000	4,000	2,000
J420a	Health Supls.	1,500	-0-	1,500*
J620	Contr. Servs.	1,000	1,000	-0-**
J660c	Contr. Cleaning	1,000	-0-	1,000
J720a	Contr. Grounds Maint.	8,500	700	7,800

Acct. No.	Item	Proposed Reduction	Amount Restored	Amount Not Restored
J720c	Contr. Rep. Equip.	3,200	-0-	3,200
J730c	New Equip.	3,000	-0-	3,000
J740a	Grounds Maint. Exp.	1,000	1,000	-0-
J740b	Bldg. Maint. Exp.	4,000	1,000	3,000
	Totals	\$53,588	\$23,700	\$29,888

\* The Board conceded this reduction.

\*\* The Council conceded this restoration.

The recommendations of the hearing examiner are summarized as follows:

### CHART III

Acct. No.	Item	Amount of Reduction	Amount Restored	Amount Not Restored
J110i	Bus. Off.	\$ 10,000	\$ 3,612	\$ 6,388
J110l	Pers. Off.	30,000	19,241	10,759
J211	Prins. Sals.	142,410	114,410	28,000
J215	Secy. Sals.	78,870	78,870	-0-
J230c	A-V Mats.	12,950	-0-	12,950
J240	Teaching Supls.	11,182	-0-	11,182
J250c	Misc. Exp.	20,000	20,000	-0-
J720b	Contr. Bldg. Maint.	70,000	-0-	70,000
	Totals	\$375,412	\$236,133	\$139,279

CHART II Totals	\$ 53,588	\$ 23,700	\$ 29,888
Grand Totals	\$429,000	\$259,833	\$169,167

In conclusion, the hearing examiner recommends that a total of \$259,833 of the budgetary reduction deemed appropriate by Council be restored for use by the Board for the 1974-75 school year, and that the local tax requirement shall be \$8,559,833.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and considered the exceptions filed by counsel with respect to the report. It is observed that such exceptions, contained in a document submitted by Council entitled Reply Brief, are both specific and general in their import. Specifically, Council complains of the findings with respect to items J110L, J211, J215, and J250C.

The Commissioner finds no merit in such complaints. While the constitutional requirement which imposes on local school districts the obligation

to conduct "thorough and efficient" programs of education is nowhere precisely defined, the Commissioner holds that it must be interpreted to mean that as a minimum such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation of effort. He finds evidence herein that the recommendations are commensurate with this goal, both generally and specifically.

Indeed, with respect to the four items specifically mentioned by Council there is no recommendation that there be an expansion of the Board's educational effort, except that with respect to item J211 the hearing examiner recommended the addition of one school administrator. The Commissioner concurs with this recommendation in the context of *Mary C. Donaldson v. Board of Education of North Wildwood*, 65 N.J. 236 (1974). It appears clear that an increased supervisory effort will be required of all local school districts by this court opinion.

It is also observed by the Commissioner that Council objects to the recommendation of the hearing examiner with respect to item J250C. The objection is that the Board has not delineated its need for all of the budgeted amount which the hearing examiner recommended for approval. However, the recommended appropriation is commensurate with prior required expenditures for miscellaneous materials and services and, in the context of the total budget for instruction (J200), the contested sum for unexpected contingencies is a small one which the Commissioner holds is required.

Accordingly, the Commissioner directs the City Council of the City of Plainfield to certify to the Union County Board of Taxation an additional sum of \$259,833 for use by the Board in school year 1974-75. Such sum, when added to the \$8,300,000 previously certified by Council, establishes the tax requirement for the year for the current expenses of the school district as a total of \$8,559,833.

COMMISSIONER OF EDUCATION

October 15, 1974

**Joseph Gabriel and the Manchester Regional High School Education Association,**  
*Petitioners,*

*v.*

**Board of Education of the Manchester Regional High School District,  
Passaic County,**

*Respondent.*

## **COMMISSIONER OF EDUCATION**

### **DECISION**

For the Petitioners, Ruhlman and Butrym (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Samuel A. Weiner, Esq.

Petitioners, the Manchester Regional High School Education Association, hereinafter "Association," and Joseph Gabriel, chief negotiator for the Association, allege that the Board of Education of Manchester Regional High School District, hereinafter "Board," improperly refused to allow the Association to process a grievance on its own behalf and on behalf of one of its members. The Board, while admitting that it did decline to process the grievance, disclaims any improper or illegal action in such refusal.

The matter was submitted on a statement of facts and Briefs of counsel. Oral argument on Motion for Summary Judgment by petitioners was heard on March 25, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

It is undisputed that the Association and the Board negotiated an agreement effective for the period September 1, 1971 to August 31, 1972. Included therein was "Schedule C" providing the dollar amounts of stipends to be paid for twenty-seven co-curricular assignments, including that of marching band director, which was listed at \$600.

Subsequent to the execution of the agreement, the then marching band director, Alyn Heim, resigned and Michael Lisena, a beginning teacher, was hired and appointed to the position of marching band director at an agreed-upon stipend of \$400. The adjusted figure was not the subject of renegotiation. Thereafter the Association sought to file a grievance, alleging that the Board had violated the negotiated agreement by paying a lesser stipend than that set forth in "Schedule C." The Board denied the right of the Association to file the grievance on grounds that the negotiated grievance procedure did not provide that the Association could properly initiate such a grievance without the prior written statement of grievance by the alleged aggrieved person. There is within the record no showing that the marching band director has ever filed a written grievance with the Board. He did, however, file with the Superior Court of New

Jersey, Law Division, an affidavit of consent that the Association should file such a grievance.

Thereupon, the Association brought suit in Superior Court, Law Division, Passaic County, seeking an order that the Association had the right to grieve in its own name and a ruling on the merits of the grievance. The Court determined that it was a matter within the jurisdiction of the Commissioner, and in accord with that determination, the instant Petition was filed.

The Association argues that *Chapter 303, P.L. 1968 (N.J.S.A. 34:13A-5.3)* guarantees the Association the substantive right to itself file grievances and, to the extent that the negotiated grievance procedure herein fails to assure this right, the statute must govern. Section 7 of the Act provides, *inter alia*:

“\*\*\* Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or *representatives of employees* may appeal the\*\*\*violation of\*\*\*agreements\*\*\*.” (*Emphasis supplied.*)

The Association contends that the legislative intent was that either the aggrieved or the representative organization must be allowed the right to initiate grievances and that any restriction on the type of grievance or circumstances under which grievances may be filed is *ultra vires*. *Donnelly v. United Fruit Co.*, 40 N.J. 61 (1963) Petitioners contend that such substantive right to grieve may not be restricted or bargained away in that it is statutorily guaranteed.

According to the Association, the parties to the negotiated agreement established the precise figure of \$600 as a stipend for the marching band director. In that no provision was made in the agreement for a lesser figure in the event of a change of personnel, the parties are bound by the expressed terms of the agreement.

The Association avers that the Board unilaterally determined to pay its newly-hired marching band director \$400 as a stipend without renegotiating that item of the agreement which called for a payment of \$600, thus modifying a term and condition of employment.

The Association asserts that it had the right to itself file the grievance as provided by paragraph F of Article VII of the agreement as follows:

“F. *Miscellaneous*

(1) If in the judgment of the PR&R Committee, a grievance affects a group of eight (8) or more employees covered by this agreement or an entire department, the PR&R Committee may submit such grievance in writing to the superintendent directly and the processing of such grievance shall be commenced at level two. The PR&R Committee may process such a grievance through all levels of the grievance procedure provided that the person or persons aggrieved desire to do so and so informed the board in writing thereof.\*\*\*”

In this regard petitioners assert that, in the judgment of the PR&R Committee, the grievance not only affected eight employees but the entire negotiating unit in that a provision as basic as compensation was unilaterally modified by respondent, thus threatening the integrity of the entire agreement. In this light, petitioners characterize the Association as the aggrieved party with the right to initiate a grievance beginning at level two of the procedure. (Tr. 16)

For the foregoing reasons petitioners pray for a judgment that the Association had, in the instant matter, the right to grieve and be heard by the Board. Additionally, they seek an order from the Commissioner that the Board pay the marching band director for the 1971-72 school year a total of \$600, the stipend specified in the negotiated agreement.

The Board argues that it entered into an agreement with the Association that set forth the procedures and steps of the grievance process and that both parties are bound thereby. In this regard the Board states that Michael Lisena, the marching band director, has never filed a grievance with the Board in his own name as required by Article VII-F of the agreement, *ante*. The Board contends that the Association may process a grievance on his behalf only if he first files a grievance on his own behalf and that mere "consent" on the part of Mr. Lisena does not fulfill the requirement of Article VII-F of the agreement which provides that the PR&R Committee may process a grievance:

“\*\*\* provided that the person or persons aggrieved desire to do so and so informed the board in writing thereof.\*\*\*”

The Board maintains that the agreement is in compliance with the enabling statute *N.J.S.A. 34:13A-5.3* which states:

“\*\*\*Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation\*\*\*provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization.\*\*\*”

Accordingly, the Board avers that the marching band director has only to file his grievance and thereafter pursue it on his own or be represented by the Association. Absent his initial filing of the grievance, the Board maintains that it is not required to process the grievance.

The Board holds that the negotiated agreement makes all necessary provisions to give its employees the right to grieve individually or through their representatives in a simply and easily carried out procedure with no abridgment of employees' rights.

The Board cites the 1973 decision of the Appellate Division of the Superior Court in *Winston and South Plainfield Education Association v. Board of Education of the Borough of South Plainfield*, 125 *N.J. Super.* 131, affirmed Supreme Court of New Jersey, Docket Nos. A-101, A-102, May 7, 1974, wherein it is said:



“\*\*\* In a particular case, however, such disputes might also be the proper subject of grievance procedures adopted pursuant to *N.J.S.A. 34:13A-5.3*. If a dispute is grievable in accordance with the terms of a collective bargaining agreement between a board of education and the exclusive employee representative, the latter not only has the right but indeed may be under a duty to process such a grievance and to do so fairly and impartially, *where the contract so provides*.\*\*\*” (*Emphasis added.*)

(at pp. 140-141)

In this regard, the Board holds that the negotiated agreement herein does not so provide that the Association may process a grievance on behalf of one of its members without his first having submitted his grievance in writing.

Additionally, the Board, while admitting that the agreement provides for \$600 for the marching band director, states that this sum was intended for its former, more experienced, employee and that, when he resigned unexpectedly, it was fair and proper to negotiate a lesser amount with his less experienced successor.

Finally, the Board argues that Article IV-F of the agreement provides that:

“The Association shall not restrict the voluntary contribution of services or work of any member of the professional staff without remuneration or compensation\*\*\*.”

In this regard, the Board maintains that:

“\*\*\* doing something for less than the amount called for by Schedule C, voluntarily, is no different than performing the same service ‘voluntarily’ for no remuneration.\*\*\*” (Defendant’s [Respondent’s] Brief, at p. 17)

The hearing examiner finds that Michael Lisena at no time filed a written grievance with the Board or its agents. While it is recognized that he filed an affidavit of consent with the Superior Court, there is within the record no convincing evidence that he felt himself to be an aggrieved person. Therefore, it is recommended that the Commissioner view the Association as having considered itself the sole aggrieved party in that it believed the Board’s action, in unilaterally negotiating a lesser figure than that specified as a stipend in the agreement, threatened the integrity of the entire agreement.

The hearing examiner recommends that the Commissioner find no merit in the Board’s argument that the sum of \$600 may be considered to have been a sum intended only for its former more experienced employee. Had such been so, it should have been clearly set forth in the words of the agreement. The Board argues that it should be viewed in similar fashion to teachers’ salary schedules recognizing years of service. Again, if such had been the intent, it should have been so stated in “Schedule C” of the agreement with minimum, maximum, and intermediate intervals, if desired. While the Board’s position is not without logic, it should have set forth its position at the time of negotiations. Absent such clear provisions, the hearing examiner recommends that this argument of the Board be found without merit.

It is additionally recommended that the Commissioner find as without merit the Board's argument that the marching band director contributed his services in part on a voluntary basis. No evidence exists in the record to show that this was so, but rather that he accepted the \$400 agreed-upon figure in full payment for his extracurricular assignment.

It remains for the Commissioner to determine whether the Board's refusal to process the grievance filed by the Association was valid or improper in the light of Article VII-F, *ante*, and additionally, whether the marching band director was entitled to a total stipend of \$600 for the school year 1971-72.

Such determination should be made in recognition of the fact that Article VII-F, *ante*, does not require that eight or more employees shall be affected by a grievance in order for the Association to itself file the grievance beginning at level two, but that eight or more employees, *in the judgment of the PR&R Committee*, be affected thereby. As was previously shown, Article VII-F, *ante*, includes the requirement that the aggrieved persons inform the Board in writing of their desire to have a grievance processed.

Finally, it remains for the Commissioner to determine whether such requirements as set forth in Article VII-F, *ante*, are *ultra vires*, in that, as alleged by petitioners, they limit the substantive right of the representative Association to itself appeal a violation of the contract.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter.

The precise question to be determined is whether the Board's action granting an honorarium of \$400 for the cocurricular band activity, instead of \$600 as set forth in the negotiated salary policy, constituted an improper action. Secondly, the issue is raised whether the Association could properly file a grievance on behalf of the teaching staff member assigned the cocurricular band activity.

In this case, the Board argues that part of the service rendered by the band director should be categorized as voluntary. The part in question, of course, would be that represented by the difference of \$200, which is one third of the scheduled honorarium. The Board also argues that the band director's affidavit of consent to a grievance filed on this behalf is inappropriate.

In regard to the grievance, the Commissioner cannot agree with the Board's position. To the contrary, the Commissioner determines, under the circumstances herein, that the band director's affidavit of consent must be considered an affirmative complaint which meets the conditions of the grievance policy. By the submission of this affidavit, the director joined his own grievance with that of the Association. Together, the grievances were valid and should have been processed as such at the time of presentation. The Commissioner so holds.

However, the Commissioner finds no reason to remand the matter for consideration by the Board at this juncture, since the applicable language of the salary policy with respect to the honorarium due for the services of a band director is clear and unambiguous. The honorarium for a band director had been one item negotiated as a term and condition of employment, and the established sum for the duties to be performed was \$600. This is the amount that must be paid. The Commissioner so holds since a local board of education, in the exercise of its authority, is constrained to act reasonably and in ways which are not arbitrary or capricious. *Angell et al. v. Board of Education of the City of Newark, County of Essex*, 1959-60 *S.L.D.* 141, 143, dismissed by State Board of Education, October 7, 1964. A salary policy, once adopted, has a binding effect:

“\*\*\* When a scale or schedule of salaries is adopted by a board, as one of its rules, it becomes binding on the board until modified or repealed.\*\*\*”  
*Lena v. Morgenweck, et als. v. Board of Education of Gloucester City*, 1938 *S.L.D.* 412 (1930), reversed State Board of Education 419  
(at p. 421)

Accordingly, and in summary, the Commissioner determines that Joseph Gabriel and the Manchester Regional High School Education Association are properly joined herein as petitioners with standing to attack the Board's action, and that the schedule of honoraria for cocurricular activities negotiated and adopted as a salary policy the 1971-72 school year must be given effect. Therefore, he directs that Joseph Gabriel be paid the difference between \$400 and the negotiated honorarium of \$600 for his duties as band director during that year.

COMMISSIONER OF EDUCATION

October 21, 1974

Joseph Gabriel and the Manchester Regional High School Education Association,  
*Petitioners,*

*v.*

Board of Education of the Manchester Regional High School District,  
Passaic County.

*Respondent.*

**COMMISSIONER OF EDUCATION**

**ORDER**

On October 21, 1974, the Commissioner of Education handed down a decision in this matter which was in favor of petitioners. The decision directed, *inter alia*, that “\*\*\* Joseph Gabriel be paid the difference between \$400 and the negotiated honorarium of \$600 \*\*\*” for certain duties he had performed. This directive was, however, in error since petitioners had not pressed the claim on behalf of Joseph Gabriel but for Michael Lisena, director of the Manchester Regional High School’s marching band.

Accordingly, the Commissioner hereby orders that the final sentence of the decision be amended to substitute the name of Michael Lisena for that of Joseph Gabriel.

ORDERED this 15th day of November 1974.

COMMISSIONER OF EDUCATION

Eugene Vigna et al.,

*Petitioners,*

*v.*

Board of Education of the Township of Lakewood, Ocean County,

*Respondent.*

COMMISSIONER OF EDUCATION

ORDER

For the Petitioners, Bathgate, Wegener & Sacks (Timothy P. Neumann, Esq., of Counsel)

For the Respondent, Rothstein, Mandell & Strohm (Peter R. Strohm, Esq., of Counsel)

This matter having been opened before the Commissioner of Education (Joseph F. Zach, Deputy Assistant Commissioner, Division of Controversies and Disputes) by Bathgate, Wegener and Sacks, Esqs. (Timothy P. Neumann, Esq., appearing), counsel for petitioners, on a Notice of Motion for Interim Relief dated August 23, 1974, requesting temporary restraint, *pendente lite*, to prevent the Board of Education of the School District of the Township of Lakewood, hereinafter "Board," from implementing an interim plan of pupil transportation for correcting racial imbalance in two of the Board's elementary schools known as Plan B, which plan is scheduled for implementation at the opening of the 1974-75 academic year; in the presence of Rothstein, Mandell and Strohm, Esqs. (Peter R. Strohm, Esq., appearing), counsel for Respondent Board; and

The arguments of counsel having been heard, testimony of witnesses received, and documentary evidence and certain stipulations of facts entered in the record at an oral argument held on August 28, 1974, the circumstances of this matter are as follows:

Petitioners have filed a formal Petition of Appeal dated August 23, 1974, alleging that Plan B was not conceived nor adopted in accordance with the rules of the State Department of Education; such plan is contrary to the laws of the United States of America wherein there is no requirement for precise mathematical balancing of racial composition of public school enrollments among various schools in a district; certain members of the Board were not adequately informed of all relevant facts prior to voting upon the implementation of Plan B; and that the pupil enrollment and attendance statistics presented to the Board do not accurately depict the true statistics which will be experienced in the respective elementary schools for the 1974-75 academic year. The Petition requests that the Commissioner order, *inter alia*, that Plan B be set aside.

Petitioners allege, at this juncture, that irreparable harm will result to their affected children if Plan B is permitted to be implemented, and request an Order

of the Commissioner restraining such implementation pending a plenary hearing and final determination on the merits of their Petition of Appeal.

The Board's position is that Plan B was conceived and adopted in the best interests of the school children, and in conformance with the State's policy to eliminate racial imbalance in the public schools.

Petitioners aver, through the testimony of witnesses, including one member of the Board and two petitioners, that Plan B is based upon enrollment statistics from June 1974, which will be drastically changed as the result of newly-occupied housing and the entrance and exit of pupils during the summer recess. In sum, it is petitioners' contention that changes in pupil enrollment will obviate the necessity for Plan B for the 1974-75 academic year.

Petitioners' additional argument, that the Board failed to adopt a proposed resolution to rescind Plan B at its meeting held on August 26, 1974, because of procedural irregularities, is irrelevant and immaterial to the instant application, and the Commissioner so holds.

The Commissioner observes that Plan B was approved as an interim plan by letter dated July 24, 1974, addressed to the President of the Lakewood Board of Education and signed by the Commissioner. (Exhibit J-2) This plan is in conformity with the policy of the State Board of Education for correcting racial imbalance in the public schools of New Jersey. The implementation in the public schools of a plan to correct racial imbalance is a matter of public interest, and has been required by the public policy of this State for a period of years.

See *Morean et al. v. Board of Education of the Town of Montclair et al.*, 42 N.J. 237 (1964); *Booker et al. v. Board of Education of the City of Plainfield, Union County*, 45 N.J. 161 (1965); *Byers et al. v. Board of Education of the City of Bridgeton, Cumberland County*, 1966 S.L.D. 15, affd. 1967 S.L.D. 341, cert. denied 51 N.J. 179 (1968); *Jenkins v. Township of Morris School District*, 58 N.J. 483 (1971). The Board's plan has the presumption of correctness, and will not be restrained or overturned absent clear proof that it is arbitrary or unreasonable. *Thomas v. Morris Township Board of Education*, 89 N.J. Super. 327 (App. Div. 1965)

The Commissioner, having considered the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint (*United States v. Pavenick*, 197 F. Supp. 257, 259-60 (D.N.J. 1961) and *Communist Party of the United States of America v. McGrath*, 96 F. Supp. 47, 48 (D.D.C. 1951); and

The Commissioner having balanced the interests of the pupils, parents and community at large against the interests of petitioners; the Commissioner having found that petitioners' arguments are speculative in regard to the absence of need for Plan B, and having found that no irreparable harm will befall petitioners and their children by permitting the implementation of Plan B, which the Board has determined to be in the public interest and which is entitled to a presumption of correctness (*Thomas, supra*); therefore,

IT IS ORDERED that petitioners' request for interim relief, *pendente lite*, is denied; and

IT IS ORDERED that this matter proceed to plenary hearing as expeditiously as possible.

Entered this 30th day of August 1974.

COMMISSIONER OF EDUCATION

Eugene Vigna et al,

*Petitioners,*

*v.*

Board of Education of the Township of Lakewood, Ocean County,

*Respondent.*

COMMISSIONER OF EDUCATION

#### DECISION

For the Petitioners, Bathgate, Wegener and Sacks (Richard K. Sacks, Esq., of Counsel)

For the Respondent, Rothstein, Mandell & Strohm (Edward M. Rothstein, Esq., of Counsel)

Petitioner, a resident of the Township of Lakewood, filed a Petition of Appeal on August 24, 1974 against the Board of Education of the Township of Lakewood, hereinafter "Board," alleging that the Board's adoption and proposed implementation of a plan of pupil transportation and assignment to insure a more precise racial balancing within its schools was improperly devised and contrary to law. The principal prayer of the Petition was that the Commissioner of Education prohibit the implementation of the plan. A Notice of Motion filed with the Petition requested interim relief.

An oral argument with respect to the Motion was conducted on August 28, 1974, and on August 30, 1974, the Motion was denied by Order of the Commissioner.

Subsequently, the controverted plan of pupil transportation and assignment went into effect at the beginning of the 1974-75 school year, and a hearing on the merits of petitioner's claims was scheduled. However, on September 9, 1974, the Board adopted a resolution in support of the Petition, *sub judice*, and removed the matter from the category of a dispute between adversary parties, although the resolution was conditioned upon an approval by the State Department of Education.



Thereafter, a hearing examiner appointed by the Commissioner requested the Board to furnish certain basic data with respect to pupil enrollment. He also scheduled a hearing of inquiry in order that petitioner and the Board might set forth their views. The hearing was held on October 2, 1974 at the State Department of Education, Trenton. At that time a total of eleven documents was received in evidence. The report of the hearing examiner is as follows:

The Petition, *sub judice*, was amended at the hearing. It now contains a request that the Commissioner rescind his prior approval of the Board's plan of pupil transportation and assignment with respect to its elementary schools. The plan, designated "Plan B" by the Board, and hereinafter so identified, is one wherein the Board had proposed, in response to a directive of the Commissioner, to more precisely apportion white pupils and pupils other than white in grades kindergarten through four.

At this juncture petitioner and the Board aver that Plan B is not necessary to achieve a racially integrated school system and should be abandoned. The hearing was concerned with this avowal and with the factual data pertinent to Plan B. Such data and the contention will be set forth, *post*. However, it is required initially herein that Plan B be set in an historical context with respect to its adoption by the Board.

On November 14, 1969, the Commissioner addressed a memorandum to certain school officials throughout the State of New Jersey. The memorandum was specifically concerned with "State-wide School Desegregation Efforts." The Commissioner specifically requested the Board to submit before February 4, 1970, the following:

- "1. a statement of policy by your Board of Education with respect to correcting racial imbalance.
- "2. plans for future action to remove racial imbalance which may exist in your schools including an estimate for additional costs, if any, and the time required for carrying out your plans."

Thereafter, the Board did submit a document, as requested, which described the Board's desegregation efforts to that date. However, no plan for future action was submitted since none had, at that juncture, been developed.  
(R-3)

Subsequently, the Board did adopt on December 13, 1971, a policy on Equal Educational Opportunity. This policy stated:

"The Lakewood Board of Education believes that each and every individual shall have an equal opportunity to develop the full potential of his capabilities.

"The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to such opportunities.

"The Lakewood Board of Education, therefore, concludes that the continued disparity of any ethnic group representation in a school substantially different from that of its district composition leads to an eventual deprivation in 'quality' educational opportunity and achievement." (R-3)

Thereafter, in the years 1971, 1972 and 1973, the Board considered its position with respect to a desegregation plan, consulted with officials of the State Department of Education and conducted various studies. On March 5, 1973, the Board directed its Superintendent of Schools to develop a series of desegregation plans, and such plans were developed and submitted to the Board in March 1973.

These plans totaled four in number and were designated Plans A, B, C and D. Ultimately, the Board adopted Plan A for implementation on September 1, 1974, but rescinded that adoption in July 1974, and adopted Plan B instead.

Thereafter, by letter of July 24, 1974 (J-2), the Commissioner rendered the following decision:

"\*\*\* Plan B is approved as an Interim Plan for correcting the racial imbalance existing in the elementary schools of Lakewood and is to be implemented in September 1974.\*\*\*"

The Commissioner also requested a series of periodic reports from the Board, which reports were concerned with the implementation of the plan in the 1974-75 school year and with any proposed changes in the succeeding year. However, on September 9, 1974, the Board approved by a vote of five to four a resolution which joined the Board with petitioner in the principal plea of the instant Petition for a rescinding of Plan B. The Board's resolution of that date (R-8) provided:

"BE IT RESOLVED, by the Board of Education as follows:

"That the provisions of Plan B, requiring forced transportation, be rescinded because of the small percentage or number involved at this time, subject nevertheless, to first obtaining approval of the Department of Education of the State of New Jersey."

A second resolution of the same date to form a larger committee to develop a "\*\*\* method by which the racial imbalance in the schools be corrected\*\*\*" was also approved by the Board. (R-8)

At this juncture, the Board and petitioner are united in their avowal that even without Plan B the elementary schools of Lakewood would be appropriately balanced in their racial compositions. In support of this avowal, they submit pupil enrollment statistics of September 30 and October 1, 1974 (R-5) under Plan B and without Plan B in effect. Such statistics are reproduced as follows in summary form:

Enrollment Data Elementary Schools With Plan B					
School	Pupils Other Than White		White Pupils		Total Number
	No.	Percent	No.	Percent	
Spruce Street Totals	394	46.6	451	53.4	845
Ella G. Clarke Totals	222	43.9	284	56.1	506
Clifton Avenue Totals	<u>379</u>	47.1	<u>426</u>	52.9	<u>805</u>
District Totals	995	46.2	1,161	53.8	2,156

Enrollment Data Elementary Schools Without Plan B					
School	Pupils Other Than White		White Pupils		Total Number
	No.	Percent	No.	Percent	
Spruce Street Totals	335	40.0	503	60.0	838
Ella G. Clarke Totals	281	54.8	232	45.2	513
Clifton Avenue Totals	<u>379</u>	47.1	<u>426</u>	52.9	<u>805</u>
District Totals	995	46.2	1,161	53.8	2,156

The hearing of October 2, 1974, was principally concerned with an assessment of such statistics. In the view of petitioner and the Board they do not justify a continuance of Plan B even if the criteria developed by officials of the State Department of Education are employed as a guide.

However, the Director of the Office of Equal Educational Opportunity, State Department of Education, disagreed with such a view. She maintained instead that a correction was in order whenever the percentage of pupils other than white in any school of a district exceeded the percentage of such pupils in the district as a whole by more than three to five percent. This view is embodied, in part, in a general definition of racial imbalance which, she testified, was used as a guideline by State officials. This definition (R-9) provides:

“Our working definition is that each district strive to establish school attendance areas that make possible wherever feasible a student body that represents a cross section of the population of the entire district.

“If in the elementary grades, for example, the minority population is 25 per cent, then each building and each class should try to reflect this percentage as is feasible.”

Petitioner and the Board maintain that the statistics, *ante*, are in general conformity with such criteria. Perhaps this view can best be expressed in narrative form with respect to the statistics, *ante*, without Plan B. If Plan B were not in effect:

1. the deviation in the Spruce Street School would be only 1.2 percent if, for instance, the district wide percentage of 53.8 percent white pupils plus 5 percent is compared with the 60 percent white pupils who would actually be enrolled there.
2. the deviation in the Ella G. Clarke School would be only 3.6 percent if, for instance, the district wide percentage of 53.8 percent white pupils plus 5 percent is compared with the 45.2 percent white pupils who would actually be enrolled there.
3. the enrollment in the Clifton School would not change.

Further, petitioner and the Board aver that such percentages when translated into actual pupils provide even less reason to mandate a continuance of Plan B. Such translation shows that if Plan B were not in effect:

1. the over-enrollment of white pupils in the Spruce Street School would approximate 10 pupils (1.2 percent x 838)
2. the over-enrollment of non white pupils in the Ella G. Clarke School would approximate 18 pupils (3.6 percent x 513)

These enrollments do not, in the view of petitioner and the Board, justify the present busing of 115 pupils out of their normal attendance areas. Furthermore, they aver that other efforts the Board has encouraged with respect to amity among racial groups together with a more balanced configuration of racial groups because of changing residence patterns are reasons for the revocation of Plan B.

Additionally, petitioner and the Board join in an assertion that neither the Constitution of the United States nor of the State of New Jersey, nor court decisions, require any precise and exact balance of the races in the public schools. In support of this view they specifically cite *Charles B. Booker et al v. Board of Education of the City of Plainfield, Union County*, 45 N.J. 161 (1965) wherein the Court said with respect to plans to promote an integrated school system:

“\*\*\* the goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures. This brings into play numerous factors to be conscientiously weighed by the school authorities. Considerations of safety, convenience, time economy and other acknowledged virtues of the neighborhood policy must be borne in mind.\*\*\*”  
(at p. 180)

Further, the Board avows that its resolution, *ante*, to rescind Plan B is not

arbitrary or capricious in the context of the statistical evidence and its own efforts in other areas to foster racial amity and that, accordingly, its discretion should be given effect by the Commissioner.

Thus, the question for determination by the Commissioner at this juncture is whether or not the current statistics pertinent to racial balance in the elementary schools of the Township of Lakewood justify and require a continuance of Plan B for the 1974-75 school year.

The parties herein have waived receipt of this report of the hearing examiner.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and examined the statistical data on which the request of the Board and petitioner is based. He has also observed the narrow statistical margin to which petitioner and the Board refer as evidence that a racial imbalance of rather insignificant proportions will exist if Plan B is abandoned at this juncture. Except for one other factor, it would appear that the arguments pertinent thereto have merit.

However, it is also true, and of great importance, that if Plan B is abandoned one of the schools of the district, the Ella G. Clarke School, will remain this year, as it has in the past, as a school wherein a majority of the pupils will be other than white. (54.8 percent) This situation, in contrast to that of two other schools which would be predominantly composed of white pupils, attests to a judgment that the racial imbalance in the elementary schools of Lakewood would be of major and not minor consequence. The Commissioner so holds.

In such circumstances the Commissioner can find no reason to rescind the prior approval given to the Board's adoption of Plan B in July 1974. The reasons for the adoption of the plan were evident to the Board and the Commissioner then and, the Commissioner holds, they are no less evident now. Indeed, it would appear that the statistics upon which Plan B was grounded have not changed in any appreciable way in the interim since its adoption by the Board.

Accordingly, the Commissioner determines that a decision to abandon Plan B at this juncture would be a vacillation which cannot be condoned. The segregation in fact which would otherwise exist has been eliminated by Plan B, and it must be continued in conformity with New Jersey's strong policy against racial discrimination in the public schools. This policy is of long standing and, as outlined by the Court in *Booker, supra*, it calls for vigorous effort:

“\*\*\* Our own State's policy against racial discrimination and segregation in the public schools has been long standing and vigorous, and our Commissioner of Education has been vested with broad power to deal with the subject; indeed, his power in this regard may fairly be viewed as no less comprehensive in nature than that possessed by New York's Commissioner

and exercised by him in *Vetere*. Cf. *Blumrosen, Securing Equality: The Operation of the Laws of New Jersey Concerning Racial Discrimination*, 71 *et seq.* (1964); *Blumrosen, 'Anti-discrimination Laws in Action in New Jersey: A Law-Sociology Study,' 19 Rutgers L. Rev.* 189, 261 (1965). As early as 1881 there was legislation in New Jersey declaring it unlawful to exclude a child from any public school because of his race (*L. 1881, c. 149*) and this appears in broadened form in our current statutes. *N.J.S.A. 18:14-2*. When called upon, our courts have not hesitated to strike down direct and indirect efforts to circumvent the legislative direction. See *Pierce v. Union District School Trustees*, 46 *N.J.L.* 76 (*Sup. Ct.* 1884), *aff'd* 47 *N.J.L.* 348 (*E. & A.* 1885); *Raison v. Bd. of Education, Berkeley*, 103 *N.J.L.* 547 (*Sup. Ct.* 1927); *Patterson v. Board of Education*, 11 *N.J. Misc.* 179, 164 *A.* 892 (*Sup. Ct.* 1933), *aff'd* 112 *N.J.L.* 99 (*E. & A.* 1934); *Hedgepeth v. Board of Education of City of Trenton*, 131 *N.J.L.* 153 (*Sup. Ct.* 1944).

"New Jersey's strong policy against racial discrimination and segregation in the public schools finds further expression in *Article 1, paragraph 5* of the 1947 *Constitution* which provides that '[n]o 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.' In 1949 the Legislature broadened its earlier law against discrimination (*L. 1945, c. 169*) to embody provisions against discrimination in places of public accommodation. *L. 1949, c. 11*. See *Levitt & Sons, Inc. v. Div. Against Discrimination, etc.*, 31 *N.J.* 514, *appeal dismissed*, 363 *U.S.* 418, 80 *S.Ct.* 1257, 4 *L. Ed. 2d* 1515 (1960); *Jones v. Haridor Realty Corp.*, 37 *N.J.* 384 (1962). As thus broadened, the law provides that all persons shall have the opportunity to obtain 'all the accommodations, advantages, facilities, and privileges of any place of public accommodation,' including any public school, 'without discrimination because of race.' *N.J.S.A. 18:25-4; N.J.S.A. 18:25-5*. In *Walker v. Board of Education of the City of Englewood* (decided May 19, 1955), the Attorney General advanced the contention before the Commissioner of Education that this law, in itself, precluded a board of education 'from permitting the existence of segregation-in fact' when it could reasonably be eliminated. See *Greenberg, Race Relations and American Law* 251 (1959).\*\*\*" (45 *N.J.*, at pp. 173-175)

The identical principles have application herein since segregation can "reasonably be eliminated" and in fact this result is already achieved.

The Commissioner's determination in this matter is made in cognizance of the Board's other efforts to promote amity among racial groups within its school population and he commends such efforts. If continued, and if combined with efforts to equalize educational opportunity through such programs as Plan B, it may well be that enrollments will continue the present trend toward racial balance and that future special plans will prove unnecessary.

At this juncture, the Commissioner directs the Board to provide the data

requested in his letter to the Board under date of July 24, 1974. (J-2) The Commissioner further directs the Board to consider its pupil assignment plan for school year 1975-76 at an early date and to submit its final determination, in this regard, to the office of the Commissioner in timely sequence thereafter.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

October 21, 1974

Pending before State Board of Education

**Board of Education of the City of New Brunswick,**

*Petitioner,*

*v.*

**Board of Education of the Township of North Brunswick,  
Middlesex County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**ORDER**

It appearing that pursuant to a stipulated agreement resulting in a Commissioner's Order dated June 21, 1971, the North Brunswick Township Board of Education was restrained from awarding contracts or commencing construction or on-site improvements without approval of the bids by the Commissioner of Education; and it appearing that the North Brunswick Township Board of Education on July 13, 1971, by a 7 to 2 vote, passed the following Resolution:

"In consideration of the approval by the State Commissioner of Education to this Board to award construction contracts for the North Brunswick Township High School in accordance with the bids received, the North Brunswick Township Board of Education recognizes that racial imbalance is a problem in the New Brunswick High School and that the North Brunswick Township Board of Education will work actively with the New Brunswick and Milltown Boards of Education toward an equitable solution thereof in the utilization of the proposed North Brunswick Township High School facility"

and it appearing that all parties in this matter have, through their attorneys, individually agreed to permit the awarding of bids without prejudice to its final determination, now therefore IT IS ORDERED on this 14th day of July 1971, that all restraints against authorizing the awarding of bids and construction of



on-site and off-site improvements of the proposed North Brunswick High School facility be and are hereby removed.

July 14, 1971

COMMISSIONER OF EDUCATION

Board of Education of the City of New Brunswick,

*Petitioner,*

*v.*

Board of Education of the Township of North Brunswick, Middlesex County.,

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, Terrill M. Brenner, Esq.

For the Respondent City of New Brunswick, Franklin F. Feld, Esq.

For the Respondent Milltown Board of Education, Sailer and Fleming  
(Russell Fleming, Jr., Esq., of Counsel)

For the Respondent Board of Education of the Township of North  
Brunswick, Borrus, Goldin and Foley (Jack Borrus, Esq., of Counsel)

The Commissioner on his own Motion called for oral argument with respect to the question of the projected availability of the new high school facility presently being constructed in the Township of North Brunswick and the position of the parties as to the use of those facilities in light of the application that had been made by the Board of Education of North Brunswick Township, hereinafter "North Brunswick Board," for the withdrawal of their tenth grade pupils as of September 1972. Argument was heard in the offices of the State Department of Education, Trenton, July 11, 1972, by a hearing officer appointed by the Commissioner. The following is the report of the hearing officer:

At oral argument the North Brunswick Board stated that in accordance with their latest projections, part of the facilities of the high school presently under construction in the Township of North Brunswick would be ready for pupil occupancy by December 14, 1972 or by December 22, 1972 at the latest. The part of the facilities that would be ready at that time would be second-floor classroom space, enough to accommodate 818 pupils. The remainder of the building is not scheduled to be completed until approximately April 1, 1973. This remainder includes most of the first-floor facilities such as the auditorium, gymnasium, shop, home economics and business education facilities.

The North Brunswick Board proposes that its tenth grade pupils be withdrawn from New Brunswick High School as of September 1972, and that they be housed along with North Brunswick ninth grade pupils in its Lynwood School. The Lynwood School, presently on three staggered sessions, could then accommodate two groups of North Brunswick pupils on split sessions—one group being their ninth and tenth grades and the other being their seventh and eighth grades. Upon the completion of the first part of the new high school facilities, the ninth and tenth grades could be shifted there, and the Lynwood School could return to single session.

The North Brunswick Board maintains that it is not feasible to send all tenth grade pupils, who would otherwise attend New Brunswick High School to the new facility in December, because — apart from other difficulties — there will not then be enough space to accommodate North Brunswick's ninth and tenth grades (570), New Brunswick's tenth grade (372), and Milltown's tenth grade (69). (The total would be 1,011, whereas only 818 spaces are available.)

The advantages to New Brunswick of the proposed plan of reassignment as envisioned by the North Brunswick Board are a lower school population in New Brunswick High School and an increased teacher-pupil ratio. In addition the North Brunswick Board offers to avoid any substantial change in the ratio of white to nonwhite pupil population by receiving 75 nonwhite New Brunswick pupils in its ninth grade and another 75 such pupils in its tenth grade.

The Board of Education of the City of New Brunswick, hereinafter "New Brunswick Board," argues that the *status quo* should be maintained pending the ultimate decision in the case. It expresses doubt as to the expressed availability projections and points to the potential waste in general and bad effects on pupils in particular if the shifting will ultimately have to be repeated or undone.

It is the New Brunswick Board's position that, in the event any tenth grade pupils are to be withdrawn from New Brunswick High School, then all tenth grade pupils of the three school systems should be withdrawn together. It is pointed out in effect that it would be simpler, in the event of a relocation, for New Brunswick's staff and materials which have already been arranged and budgeted, to be shifted in mass, rather than to deal with the complexities and uncertainties of having the North Brunswick Board program, staff and arrange for all or part of the tenth grades.

The City of New Brunswick governing body expresses doubt as to the reliability of construction completion projections and emphasizes the difficulties to be encountered by the communities should interim arrangements have ultimately to be undone. Its main point is that if there is to be use of the new facilities, that use should be by the three communities jointly.

The position of the Milltown Board of Education is that if North Brunswick pupils are to be permitted to withdraw from New Brunswick High School, then Milltown pupils should likewise be given permission to withdraw. If withdrawal is not favored by the Commissioner at this point, then the high school pupils of the three districts should be kept together. Milltown outlined a

number of concerns and complexities involving the use of the new school and questioned the desirability of planning on the utilization of facilities whose completion date is so uncertain.

Upon review of the expressed positions of the parties, and in light of the stated completion schedule of the new facilities in North Brunswick, it is the hearing officer's recommendation that no changes in the sending-receiving relationships among the three districts or in the attendance patterns of their respective high school pupils be made at this point in time.

To plan for the education, within the new North Brunswick facilities, of part or all of the tenth grade pupils presently programmed to be sent to New Brunswick High School, would involve a major amount of reorganization done out of the context of normal budgeting and preparation procedures. It would also involve drastic dislocation of materials and school personnel, as well as of pupils. Additional expense would be incurred in this process and in the potential provision of new materials and personnel. It is neither quick nor easy to determine exactly who would go where, how, under whose direction and at whose expense. To undergo major decisions and dislocations against the background of the uncertainty of availability of facilities would seem unwise.

Uncertainty of availability of facilities must be deemed to exist—given the nature of the construction process—despite good faith efforts to project completion schedules. It should be noted that the best projections do not call for the first part of the building—some 818 classroom spaces—to be ready until mid December. It should be further noted that a fully-rounded program cannot be offered until, at the earliest, April of 1973, when the building is expected to be fully functional.

To subject the three districts to the contortions of reorientation of part or all of their tenth grades at this point would seem especially unwise in light of the fact that the question of the ultimate use to which the new facilities will be put is still before the Commissioner and has yet to be determined. Three out of the four parties gave voice to the undesirable effects upon pupils and communities of having subsequently to modify or undo whatever interim arrangements might be made, should the final determination in this case require it.

Even though overcrowding does exist at New Brunswick High School and new high school facilities will likely be ready before the end of the 1972-73 school year, the hearing officer, for the reasons expressed, recommends that no order changing the present sending-receiving relationships be made at this time.

\* \* \* \*

The Commissioner has reviewed the report of the hearing officer and concurs in its conclusions and recommendations.

The Commissioner is concerned that the pupils of all three districts be provided with as full and continuous an education as possible. The major dislocations that would result under North Brunswick's proposed plan against

the background of the uncertainties of construction and of the pending litigation would not serve the best interest of the pupils or the communities.

Accordingly, the original application of the Board of Education of North Brunswick Township to remove its tenth grade pupils as of September 1972 is denied, and any relocation of pupils programmed to attend New Brunswick High School to the new facilities in the Township of North Brunswick shall await further order.

COMMISSIONER OF EDUCATION

August 10, 1972

**Board of Education of the City of New Brunswick,**

*Petitioner,*

*v.*

**Board of Education of the Township of North Brunswick, Middlesex County.**

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioner, Terrill M. Brenner, Esq.

For the Respondent City of New Brunswick, Franklin F. Feld, Esq.

For the Respondent Milltown Board of Education, Sailer and Fleming  
(Russell Fleming, Jr., Esq., of Counsel)

For the Respondent Board of Education of the Township of North  
Brunswick, Borrus, Goldin & Foley (Jack Borrus, Esq., of Counsel)

For the Respondent Township of North Brunswick, Mayo, Lefkowitz &  
Shihar (Ralph Mayo, Esq., of Counsel)

The North Brunswick Board of Education by letter of September 11, 1973, sought an immediate hearing on its application to withdraw its tenth grade pupils from New Brunswick High School and have them attend a new school facility in North Brunswick. This Board had sought by earlier petition to withdraw its tenth grade pupils as of the 1972-73 school year. The Commissioner, on his own motion, had called for argument on this prior application in July 1972, and rendered a decision in August 1972, denying the relief sought. The denial was based on the unreadiness of the North Brunswick facilities as well as the undesirability of interrupting a continuous educational process. The Commissioner retained jurisdiction stating that the sending-

receiving relationship should continue as it was until the Commissioner's further order. In September 1972, North Brunswick filed another petition seeking the early termination of the sending-receiving contractual relationship between North Brunswick and New Brunswick; part of the relief sought in this latter petition was the early withdrawal of tenth grade pupils. The September 11, 1973 letter of the North Brunswick Board called for hearing on the petition "[b]ecause of the availability of the North Brunswick Township High School at this time."

In response to North Brunswick's letter request, a hearing was held on September 19, 1973 before a hearing officer appointed by the Commissioner. At that time evidence was produced and arguments offered on the question of the withdrawal of North Brunswick's tenth grade pupils. Each of the parties to the main litigation was present and heard: North Brunswick Board of Education, New Brunswick Board of Education, Milltown Board of Education and the City of New Brunswick.

The North Brunswick Board states that the crucial new fact that should lead to a different result at this point in time is the readiness of the new North Brunswick school facility. According to representations made at the hearing the school is presently housing North Brunswick's seventh, eighth and ninth grades, a total of 1,031 students. It is asserted that, while the completed school will be able to accommodate 1,600 to 1,700 students, in its present state of readiness it can hold satisfactorily 1,365.

The number of North Brunswick tenth grade students presently attending New Brunswick High School is 234. As alternatives to the withdrawal of North Brunswick students only, the North Brunswick Board indicates that it will also accept 50 (alternative 1) or, as a further alternative, 100 New Brunswick minority students (alternative 2). North Brunswick's 234 plus New Brunswick's 100 plus the 1,031 seventh, eighth and ninth graders already at the school totals the 1,365 that North Brunswick asserts is the maximum number that can be accommodated at present.

The impact of the withdrawals upon the racial balance at New Brunswick High School is asserted to be as follows: withdrawal of North Brunswick students only would change the present 60-40 white to non-white ratio to 55-45; withdrawal of 50 non-white New Brunswick students in addition would yield a 57-43 percentage ratio; withdrawal of 100 non-white New Brunswick students would yield a 59-41 ratio.

The sending-receiving contract between New Brunswick and North Brunswick ends in June 1974. In support of its request for early termination of that contractual relationship respecting tenth grade pupils, the North Brunswick Board refers to other factors besides the readiness of the new school. It asserts that the New Brunswick High School is overcrowded and that the withdrawal sought will better utilize both the new school and the New Brunswick High School. In particular, it would permit elimination of the present double sessions at New Brunswick High School.

The North Brunswick Board also cites instances of disruption and school closings and asserts that tension and fear exists at New Brunswick High School. The Board further alleges that because of the failure of the New Brunswick Board to provide adequate facilities and supervision, the New Brunswick Board is not providing a thorough and efficient system of education for North Brunswick students and, therefore, grounds exist for early termination. Finally, the North Brunswick Board asserts that the welfare of the pupils in all districts demands that the best use of all facilities be made, and the best use is to permit North Brunswick pupils to withdraw.

The Board of Education of New Brunswick and the City of New Brunswick together argue against the withdrawal of North Brunswick pupils. They rely on the integrity of the contractual relationship and say that a decision permitting the withdrawal of North Brunswick pupils would be determinative of the main case.

They defend the education being provided at the New Brunswick High School, pointing to the record of college admissions of New Brunswick High School graduates. In addition, they note the quality of the new administration and the improvement in the record of disturbances. They liken New Brunswick's problems to those generally experienced by center cities and assert that a separation will deprive both groups of pupils of the advantage inherent in a fully integrated educational experience.

The New Brunswick Board states that reversion to single sessions at the High School would not be possible unless at least 300 to 350 students were withdrawn. Although preferring the status quo, the Board suggests that, if any tenth grade pupils are to be withdrawn from New Brunswick High School, then *all* tenth grade pupils should be withdrawn.

The New Brunswick Board of Education makes the point that the application by North Brunswick for immediate withdrawal of its tenth grade is untimely. It states that such application should have been pressed before budgets were set, teachers hired, materials supplied and the school year prepared for.

The Board of Education of Milltown takes a position supporting the withdrawal of the North Brunswick tenth grade so long as its own ninth and tenth grades would be given permission to withdraw to the school of their own choice. If not, the Milltown Board prefers to maintain the status quo.

Since the hearing, the hearing officer has directed qualified representatives of the Department of Education to make independent analyses regarding the capacities of both the new facility and the New Brunswick High School and regarding the essential programmatic aspects of both schools. Those reports are attached hereto as Appendix A and B.

Upon the review of the materials contained in the record and in the annexed reports of the Department of Education, the hearing officer makes the following findings of fact:

1. Procedurally, the question of the withdrawal from New Brunswick High School of tenth grade pupils is properly before the Commissioner for determination.

2. New Brunswick High School presently houses 1,879 students from New Brunswick, North Brunswick and Milltown. The numbers attending are in excess of its recommended operating capacity of 1,469. (Tr. 11) The school is on double session. The breakdown of students by grade and race is shown on Appendix C.

3. The racial composition of New Brunswick's High School is 60% white and 40% non-white. The racial make-up by municipality and grade is shown in Appendix C.

4. Withdrawal of all North Brunswick's tenth grade pupils only would change the racial balance of the school to 55%-45%. Under North Brunswick's proposed alternative 1 (50 New Brunswick black students also withdrawn) the ratio would be 57-43. Under their alternative 2 (100 New Brunswick black students also withdrawn) the ratio would be 59-41.

5. The tenth grade ratios under the three alternatives would be as follows:

	North Brunswick withdrawn	Alternative 1	Alternative 2
New Brunswick High School	37-63%	43-57%	53-47%
North Brunswick School	96- 4%	79-21%	67-33%

6. If the entire tenth grade were transferred to the North Brunswick school, the ratio of white to non-white pupils remaining at New Brunswick would remain 60-40%. If Milltown ninth graders were also withdrawn, the ratio would be 59-41%.

7. If only North Brunswick tenth graders were permitted to withdraw the racial make-up of the North Brunswick school would be 96% white and 4% non-white. With 50 New Brunswick black pupils added the North Brunswick school would have a ratio of 93-7%. With 100 New Brunswick black pupils added, it would become 89-11%. If the entire tenth grade were sent to the North Brunswick school, the ratio would become 84-16%. The addition of the Milltown ninth grade changes the ratio by less than one half of one percent.

8. There have been disruptions at New Brunswick High School and school closings as there have been in a number of schools in the State. There has been a beneficial change in the situation of the school in the past year. Some degree of undesirable racial tension seems, nevertheless, to persist with an attendant adverse impact on the educational processes.

9. There would be undisputed advantages if New Brunswick High School



could return to single session as the result of a reduction in the overcrowded conditions.

10. The North Brunswick School is now ready to accommodate 1,597 students using a formula of calculation that yields a number 20% less than actual capacity. This "functional capacity" will be 1,697 when the final details of construction are complete. The facility is clearly under-utilized.

11. In June of 1971, the Board of Education of New Brunswick brought an Order to Show Cause why the North Brunswick Board should not be enjoined from receiving, accepting and opening bids for the construction of their new high school facility. Upon consent of the parties the Commissioner on June 21, 1971, allowed the bids to be received but temporarily enjoined the awarding of contracts and the commencement of construction, without the specific subsequent approval of the Commissioner. *All parties then consented to the lifting of all restraints regarding the award of bids and the commencement of construction upon: (1) the specific recognition by the Board of Education of North Brunswick that a racial balance problem existed at New Brunswick High School; and (2) the representation by the Board of Education of North Brunswick that use of the contemplated North Brunswick facility to help alleviate that problem would be seriously explored.*

The North Brunswick Board passed the following resolution on July 13, 1971:

"In consideration of the approval by the State Commissioner of Education to this Board to award construction contracts for the North Brunswick Township High School in accordance with the bids received, the North Brunswick Township Board of Education recognizes that racial imbalance is a problem in the New Brunswick High School and that the North Brunswick Township Board of Education will work actively with the New Brunswick and Milltown Boards of Education toward an equitable solution thereof in the utilization of the proposed North Brunswick Township High School facility."

The restraints were removed by the Commissioner's Order of July 14, 1971, which noted that the bids would be awarded without prejudice to the final determination regarding the use of the new facility.

Consistent with the above facts it is the recommendation of the hearing officer that the following pupils be permitted to withdraw from New Brunswick High School to attend the new North Brunswick school facility:

1. All North Brunswick tenth grade pupils currently enrolled in New Brunswick High School whose parents or guardians so elect.
2. All Milltown ninth and tenth grade pupils currently enrolled in New Brunswick High School whose parents or guardians so elect.

3. As many New Brunswick tenth grade pupils currently enrolled in New Brunswick High School, whose parents or guardians so elect, as the Board of Education of New Brunswick shall determine.\*

It is further recommended that the Boards of Education of New Brunswick, North Brunswick and Milltown be directed to immediately work out an arrangement whereby the North Brunswick Board shall have responsibility for the operation of a secondary program for the pupils assigned to North Brunswick pursuant to this recommendation. In working out this agreement, which shall be reduced to writing and submitted to the Commissioner no later than December 3, 1973, the parties shall take into consideration the existing staff contracts and fiscal constraints. In the event that the three boards of education cannot work out satisfactory arrangements as to the personnel, materials, supplies, equipment, transportation and so forth necessitated by the Commissioner's decision by December 3, 1973, then the Commissioner shall direct the parties to accomplish the transition as best he sees fit.

It is further recommended that the Board of Education of North Brunswick be directed to expedite completion of the building and delivery of all basic equipment so that the school may be fully operable and able to accommodate its full potential of students.

It is further recommended that the Commissioner's decision be an interim order only and shall be without prejudice to the outcome of the litigation among the parties that is presently pending before the Commissioner. In this way the ultimate question of racial balance within and among the three school districts may be reserved for final determination after full hearing and upon the submission of legal briefs.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner, the responses to that report filed by each of the five parties and the record in the instant matter.

The narrow issue to be decided by the Commissioner at this juncture is whether or not the application by the North Brunswick Board of Education for the transfer of its tenth grade pupils should be granted, and whether or not the concurrent application by the Milltown Board of Education, for the transfer of its ninth and tenth grade pupils, should be granted.

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\* It is noted that the maximum possible enrollment pursuant to this recommendation is 1,636 which is 39 over the functional capacity reported by Irving M. Peterson. In my judgment this possibility is tolerable for the following reasons: (1) pupils in special programs can be expected to remain in New Brunswick High School for those programs; (2) the actual capacity is 20% greater than the "functional capacity"; and (3) the ultimate functional capacity is 1,697 and, according to the statements made at the hearing, the full capacity of the building will shortly be available.

The relevant facts set forth in the report of the hearing examiner need not be repeated. It will suffice to say that the responses to the hearing examiner's report, which were filed by the five parties in this matter, generally reinforce their respective positions as argued at the hearing held September 19, 1973.

As background for the narrow issue now before the Commissioner, several observations are of value.

In the first instance, the narrow issue herein controverted is an interim problem, clearly delimited from the larger case which has been in litigation for over seventy hearing days, with additional hearing sessions still to be concluded.

Secondly, although a somewhat similar application by the Boards of Education of North Brunswick and Milltown for the transfer of pupils from the New Brunswick High School was previously denied by the Commissioner on August 10, 1972 (*Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick, Middlesex County*, Decision on Motion) the facts now before the Commissioner disclose a significant change in circumstances, particularly in regard to the availability of high school facilities within the School District of North Brunswick.

Thirdly, a paramount factor in this dispute is that the New Brunswick High School is presently operating on a two-session basis as the result of overcrowding.

In numerous previous instances, the Commissioner has been called upon to decide questions concerning the transfer of pupils attending an overcrowded high school operating on a two-session basis, within the framework of a sending-receiving relationship. See, for example: *Board of Education of the Township of Frankford v. Board of Education of the Town of Newton, Sussex County*, 1939 S.L.D. 653 (decided January 23, 1935); *Board of Education of the Township of Green v. Board of Education of the Town of Newton, Sussex County*, 1939 S.L.D. 656 (decided January 7, 1937); *Board of Education of the Borough of Middlesex v. Board of Education of the Borough of Dunellen*, 1939 S.L.D. 658 (decided June 21, 1934), affirmed State Board of Education 1939 S.L.D. 660 (November 3, 1934); *Board of Education of the Township of South Brunswick v. Board of the Borough of Princeton* and *Board of Education of the City of New Brunswick*, 1939 S.L.D. 663 (decided April 2, 1936); *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, Monmouth County*, 1959-60 S.L.D. 159; *Board of Education of the Borough of Allenhurst v. Board of Education of the City of Asbury Park, Monmouth County*, 1963 S.L.D. 167; *Board of Education of the Borough of Allenhurst v. Board of Education of the City of Asbury Park, Monmouth County*, 1964 S.L.D. 110; *Board of Education of the Borough of Deal v. Board of Education of the City of Asbury Park, Monmouth County*, 1964 S.L.D. 111; *Board of Education of the Borough of Interlaken, Monmouth County*, 1964 S.L.D. 115; and *Board of Education of the City of Asbury Park v. Boards of Education of the Shore Regional High School District, Borough of Deal and Borough of Interlaken, Monmouth County*, 1971 S.L.D. 221.

New Brunswick High School presently has on roll a total of 1,879 pupils in grades nine, ten, eleven and twelve, including its resident pupils and those received from the North Brunswick and Milltown School Districts. (Appendix C) This number is in excess of the functional capacity of the New Brunswick High School, which is reported as 1,447 by the Facility Planning Services of the State Department of Education. As was previously stated, this school is operating on a two-session basis.

The high school facility in North Brunswick is clearly under-utilized at this time. The present functional capacity of this schoolhouse is 1,597, and upon total completion, the functional capacity will be 1,697. (Exhibit Appendix A) This schoolhouse presently accommodates North Brunswick's seventh, eighth and ninth grade pupils in the total number of 1,031.

The Commissioner's statement regarding double sessions in *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, Monmouth County, supra*, is applicable to the instant matter, as follows:

“\*\*\* The Commissioner is aware that, in recent years, many factors (often unforeseeable and beyond local control) have operated to force high school districts to organize their program on a double session basis and that most of them are making diligent efforts to develop facilities which will permit a return to the more complete and adequate educational opportunities possible in a one-session day. That this is so establishes even more reason for the Commissioner to exercise his discretion carefully to avoid any impending or harmful effects that might be incurred by a change of designation, no matter how temporary. At the same time, the Commissioner is convinced 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 inconvenience which are placed on pupils, homes and staff, the Commissioner deplors 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.\*\*\*”

(at pp. 162-163)

Notwithstanding the above-cited statement, the Commissioner is consistently reluctant to approve any change of designation of a substantial number of pupils, either permanently or temporarily, during the course of a school year. The obvious reason for this position is that a dislocation of a number of pupils involves changes in scheduling of pupils and staff, transportation and financial arrangements, which usually cannot be successfully planned and implemented except in advance of the succeeding school year.

In this regard, the exceptions to the hearing examiner's report filed by the New Brunswick Board describe for the first time in a specific manner the serious financial problems which could confront New Brunswick if the recommendations contained in the hearing examiner's report were implemented. These financial problems include, *inter alia*, the loss of tuition payments from its sending districts, which have been anticipated as revenue for the 1973-74 school year, unanticipated increased costs for bus transportation to accommodate New Brunswick pupils who would be transferred to the North Brunswick High School for the remainder of the 1973-74 school year, increased per pupil costs for this school year, and possible unanticipated tuition payments to North Brunswick for the remainder of the 1973-74 school year.

The Commissioner is aware of the above-stated financial problems which could beset the New Brunswick Board as the result of a transfer of pupils at this time, and is constrained to state that if he approves any transfer of pupils in this matter, such approval would only be granted under a plan which would minimize the possible financial losses and increased costs of the New Brunswick School District.

In the instant matter, the North Brunswick Board has given assurances that it is prepared to accommodate on short notice, the 234 North Brunswick pupils in the tenth grade and an additional 100 New Brunswick pupils also enrolled in the tenth grade. According to the North Brunswick Board, the availability of sufficient school facilities to adequately provide an appropriate educational program, in addition to its willingness to make the necessary arrangements with the New Brunswick Board, make the proposal for a transfer of the aforementioned pupils feasible, practical and advantageous for pupils at this time.

The Commissioner has reviewed all the relevant facts, weighed the arguments propounded by the various parties, and evaluated whether the possible benefits to the pupils would be overbalanced by any harmful effects that might be incurred by a change of designation of pupils at this time. Also, the Commissioner has considered whether any action on his part to change pupil designations would be prejudicial to any, several or all of the school districts and municipalities participant to the larger pending case of which this is only a part.

The Commissioner finds and so holds that, under the specific circumstances of this particular matter, a change of designation of pupils which will provide both a resumption of a normal school day with the attendant full educational opportunities thereby provided, in the New Brunswick High School, also a more complete utilization of the North Brunswick High School, will best serve the interests of all of the pupils, their parents and the communities at large.

In order to accomplish these salutary objectives, the Commissioner must modify several of the recommendations of the hearing examiner.

In the judgment of the Commissioner, the transfer of pupils on a voluntary basis, as recommended by the hearing examiner, would not guarantee that a

sufficient number would voluntarily request a transfer so as to insure that the New Brunswick High School would return to a normal school day. Also, it could reasonably be assumed that some curricular offerings could not be continued in New Brunswick High School since the remaining number of enrolled pupils would be too few to justify the cost. For example, if only two or three tenth grade pupils remained in a second year foreign language class as the result of voluntary transfers, the New Brunswick Board would be in the untenable position of having to continue the instruction of these pupils at prohibitive cost.

If the Commissioner were to agree to a voluntary transfer plan, such a decision would require the condition that sufficient pupils elect to transfer to insure the important objective that the New Brunswick High School would return to a normal school day. That condition would effectively remove most of the element of choice sought to be gained by means of a voluntary transfer plan, because the overwhelming majority of the total tenth grade enrollment would have to volunteer in order to insure that the New Brunswick High School would return to a normal school day. The Commissioner cannot approve any plan which would not guarantee a return to a normal school day in the New Brunswick High School, because such a defect would, in the Commissioner's judgment, create sufficient chaos in the daily instructional program of the affected children to overbalance any advantage gained by a more complete utilization of the North Brunswick High School facility.

The Commissioner determines that the best means to accomplish the above-stated objective is to transfer the entire tenth grade, consisting of 234 North Brunswick pupils and 338 New Brunswick and Milltown pupils, with certain exceptions considered, *post*, to the North Brunswick High School. This will provide an enrollment of approximately 1,603 pupils in the North Brunswick High School, a number only six (6) greater than the present functional capacity of the schoolhouse. The enrollment of the New Brunswick High School will then be approximately 1,307, which is below the functional capacity of 1,447, thus assuring a normal school day program in that high school.

The Commissioner takes notice that, although the New Brunswick Board prefers no transfer of pupils at this time, in the alternative, it suggests that the entire tenth grade enrollment be transferred instead of a portion thereof.

This solution also includes the additional advantage of maintaining the status quo regarding the positions of the various litigants in the main issues of this case.

Since the transfer of the entire tenth grade will alleviate the overcrowding of the New Brunswick High School and effectuate a greater utilization of the North Brunswick High School, the Commissioner finds no reason to approve the transfer of the Milltown Board's ninth grade pupils.

The exceptions of certain pupils, hereinbefore mentioned, will consist of those presently enrolled in the tenth grade in New Brunswick High School, who are receiving an educational program which cannot be provided during the 1973-74 school year by the North Brunswick High School. This factor will



reduce, by a relatively small number, the total number of tenth grade pupils who will be transferred to the North Brunswick High School. The Commissioner is aware of the fact that approximately seventy (70) North Brunswick tenth grade pupils and approximately seventy-one (71) Milltown tenth grade pupils are presently enrolled in nonpublic schools. In the judgment of the Commissioner, it is reasonable to assume a small likelihood, that all of these nonpublic school, tenth grade pupils would transfer in midyear to the North Brunswick High School.

From the record before him, the Commissioner finds that the parties to these proceedings are relatively close to agreement regarding the numbers of pupils which each of the respective high schools can accommodate.

Accordingly, for the reasons stated above, the Commissioner directs the following:

1. All tenth grade pupils presently enrolled in the New Brunswick High School will be transferred to the North Brunswick High School, excepting those pupils presently receiving an educational program which cannot be provided in the North Brunswick High School during the 1973-74 school year.

2. The Boards of Education of the City of New Brunswick, Township of North Brunswick and Borough of Milltown, shall submit to the Commissioner no later than December 31, 1973, a suitable plan, in writing, to effectuate this interim decision. This plan will include, but not be limited to, all arrangements for pupil programming, assignment and supervision of teaching staff members, distribution of equipment, instructional materials and supplies, pupil transportation and financial matters. This written plan must be designed to minimize the amount of financial loss and increased costs to the New Brunswick School District. The written plan will also include the earliest possible, mutually agreeable date that the Boards can implement this interim decision, which date shall be no later than the beginning date for the second semester of this 1973-74 school year. This written plan shall guarantee all existing employment rights of all teaching staff members presently employed by the respective Boards of Education of the City of New Brunswick and the Township of North Brunswick.

3. The Board of Education of the Township of North Brunswick will make every effort to expedite the completion of the new schoolhouse, including delivery of all equipment items, in order that this facility will be fully operable at the earliest possible date.

4. In the event that the Boards of Education of the School Districts of New Brunswick, North Brunswick and Milltown fail to agree upon satisfactory arrangements in their written plan, as hereinbefore directed, the Commissioner will review the areas of disagreement and direct the Boards to implement this interim decision in accordance with sound educational procedures which he will set forth, including possible postponement of the implementation date.

The Commissioner is constrained to state that this decision constitutes an interim order only, and nothing contained herein shall prejudice the interests of



the parties in regard to the final determination of the larger issues in this case.

COMMISSIONER OF EDUCATION

November 30, 1973

**Board of Education of the City of New Brunswick,**

*Petitioner,*

*v.*

**Board of Education of the Township of North Brunswick and  
Board of Education of the Borough of Milltown,**

*Respondents.*

COMMISSIONER OF EDUCATION

**ORDER**

For the Petitioner, Terrill M. Brenner, Esq.

For the Respondent North Brunswick Board, Borrus, Goldin & Foley  
(Jack Borrus, Esq., of Counsel)

For the Respondent Milltown Board, Russell Fleming, Jr., Esq.

For the Intervenors, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of  
Counsel)

This matter having been brought before the Commissioner of Education by Terrill M. Brenner, Esq., attorney for petitioner, the New Brunswick Board of Education, hereinafter "New Brunswick," on a Notice of Motion for Interim Relief accompanied by a verified Petition of Appeal, and a Cross-Motion for Interim Relief accompanied by verified Answer and affidavit by Jack Borrus, Esq., attorney for respondent North Brunswick Board of Education, hereinafter "North Brunswick"; Russell Fleming, Jr., Esq., having filed a formal Answer and appearing for respondent Board of Education of the Borough of Milltown, hereinafter "Milltown"; Emil Oxfeld, Esq., appearing for the Intervenors, New Brunswick Education Association *et al.*, hereinafter "N.B.E.A.," having filed a formal Petition of Appeal; and the several parties having presented oral argument on Thursday, May 16, 1974 at the State Department of Education, Trenton, before a representative of the Commissioner; the relief sought by the various parties is summarized as follows:

New Brunswick requests that North Brunswick be restrained from planning the withdrawal of its tenth, eleventh, and twelfth grade pupils from New Brunswick High School for the succeeding 1974-75 school year, and hiring teaching staff members and making other preparations in connection with such planned withdrawal.

New Brunswick further requests an Order of the Commissioner requiring that: (1) North Brunswick cancel any employment contracts of teaching staff members engaged to date to serve its tenth, eleventh and twelfth grade pupils; (2) North Brunswick cooperate with petitioner, New Brunswick, in planning and scheduling for the 1974-75 school year insofar as tenth, eleventh, and twelfth grade pupils are concerned; (3) Milltown cooperate with petitioner in planning for the 1974-75 school year, insofar as ninth, tenth, eleventh, and twelfth grade pupils are concerned; and (4) that the existing sending-receiving relationship between petitioner and North Brunswick and Milltown be preserved until such time as the main case presently pending before the Commissioner reaches a final determination, or until such time as the Commissioner shall deem necessary and proper.

North Brunswick requests that New Brunswick be restrained from interfering with the withdrawal of North Brunswick's tenth, eleventh, and twelfth grade pupils from New Brunswick High School for the 1974-75 school year, and that New Brunswick be ordered to cooperate with North Brunswick's plans for such withdrawal, including the furnishing of pupil records of North Brunswick's tenth, eleventh, and twelfth grade pupils by New Brunswick to North Brunswick.

North Brunswick further requests that the Commissioner order New Brunswick to cease and desist from engaging any teaching staff members and making any preparations for the express purpose of servicing North Brunswick's tenth, eleventh, and twelfth grade pupils for the 1974-75 school year, including canceling the contracts for any personnel employed for this purpose for the 1974-75 school year.

Respondent Milltown requests that New Brunswick's prayer for relief be denied on all counts by the Commissioner, and that it be permitted to withdraw all of its pupils enrolled in grades nine, ten, eleven, and twelve from New Brunswick High School for the 1974-75 school year.

Intervenors, N.B.E.A. *et al.*, request that the hearings in the main case of *Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick, Middlesex County*, be reopened in order that it may participate to the end in protecting the rights of teachers presently employed by New Brunswick, whose employment status may be jeopardized if North Brunswick prevails in the main case and is permitted to withdraw its tenth, eleventh, and twelfth grade pupils from New Brunswick High School beginning with the 1974-75 school year.

The Commissioner has reviewed the moving papers filed by the parties and has considered the arguments set forth by each. Accordingly, he makes the following findings and determinations:

The instant matter is an interim problem, and the Commissioner's determination is not intended to be dispositive of the larger case which has been in litigation for over eighty hearing days. In the larger case, hearings have been concluded and the several participant school districts and municipalities are now

in the process of filing Briefs. Further, it is necessary at this juncture to maintain the *status quo* among the parties in order that a determination herein not be prejudicial to any or all of the parties. To this end, the school districts of both New Brunswick and North Brunswick must be permitted to formulate plans and schedules for the 1974-75 school year which could be implemented should either party prevail in the larger pending case; therefore,

IT IS ORDERED as follows:

1. The Boards of Education of North Brunswick and Milltown shall cooperate fully with the Board of Education of New Brunswick in its planning and scheduling for the accommodation of all tenth, eleventh and twelfth grade pupils and Milltown's ninth grade pupils, utilizing both New Brunswick and North Brunswick High Schools for the 1974-75 school year.

2. The Board of Education of North Brunswick shall be permitted to concurrently plan and schedule for the accommodation of its tenth, eleventh and twelfth grade pupils for the 1974-75 school year, including the conditional and tentative employment of teaching staff members.

3. The request of the N.B.E.A. to reopen the hearings in the larger pending case is hereby denied. The Commissioner is well aware of the legal rights of all teaching staff members employed by the participant boards of education, and it is his judgment that reopening the hearings would not add any significant or vital information not presently in the record. Also, the delay which would be caused by granting this request could prevent a final determination of the larger pending case until after the commencement of the 1974-75 academic year. The resultant harm to the educational programs of the pupils within the school districts would greatly overbalance any gain resulting from additional hearings. The Commissioner will, however, permit the N.B.E.A. to file a Brief within fifteen days, which shall be limited to the narrow issue raised in its Petition of Appeal.

4. The sending-receiving relationship between the Boards of Education of New Brunswick, North Brunswick, and Milltown shall remain in full force and effect until a final determination in that matter is made by the Commissioner.

IT IS FURTHER ORDERED that all other requests for interim relief, *pendente lite*, are hereby denied.

Entered this 24th day of May 1974.

COMMISSIONER OF EDUCATION

**Board of Education of the City of New Brunswick,**

*Petitioner,*

*v.*

**Board of Education of the Township of North Brunswick and  
Board of Education of the Borough of Milltown,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioner, Terrill M. Brenner, Esq.

For the Respondent (North Brunswick), Borrus, Goldin & Foley (Jack Borrus, Esq., of Counsel)

For the Respondent (Milltown), Russell Fleming, Jr., Esq.

For the Intervenor, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

This matter having been brought before the Commissioner of Education by Terrill M. Brenner, Esq., attorney for petitioner, the Board of Education of the City of New Brunswick, hereinafter "New Brunswick," on a Motion for an Order clarifying the Order of the Commissioner issued May 24, 1974, Jack Borrus, Esq., appearing on behalf of respondent Board of Education of the Township of North Brunswick, hereinafter "North Brunswick," and Russell Fleming, Jr., Esq., appearing on behalf of respondent Board of Education of the Borough of Milltown, hereinafter "Milltown," and the several parties having presented oral argument on Friday, July 19, 1974 at the State Department of Education, Trenton, before a representative of the Commissioner, the relief sought by the various parties will be summarized, *post*. A brief explanation of the main case is necessary at this juncture.

The main issues of the above-captioned matter consist of an application by North Brunswick for termination of the existing sending-receiving relationship with New Brunswick, pursuant to *N.J.S.A.* 18A:38-13, a Petition of Appeal by New Brunswick requesting that the Commissioner deny the application of North Brunswick and instead order the merger of the New Brunswick and North Brunswick School Districts, and a Petition of Appeal by Milltown requesting a change of designation from being solely a sending district to New Brunswick to a status whereby Milltown could have the choice of sending its pupils to either New Brunswick or North Brunswick. Milltown also has a separate Petition of Appeal pending for termination of its sending-receiving relationship with New Brunswick. By letter dated April 23, 1974, Milltown was notified by the then Acting Commissioner of Education that its application for termination would be held in abeyance until the main issues of this case have been decided.

The Order dated May 24, 1974, which is the subject matter of the present application for relief, resulted from a Motion filed by New Brunswick wherein it was alleged that North Brunswick was planning, *inter alia*, to unilaterally withdraw its tenth, eleventh and twelfth grade pupils from the New Brunswick High School in September 1974.

The May 24, 1974 Order anticipated that a final determination would be made of the entire case prior to the opening of the public schools for the 1974-75 academic year in the participant districts. Therefore, the Commissioner's Order endeavored to maintain the *status quo* of the sending-receiving relationship, and also directed both New Brunswick and North Brunswick to formulate plans and schedules for the 1974-75 academic year which could be implemented should either party prevail in the larger case.

Accordingly, the Commissioner's May 24, 1974 Order directed that certain specific steps be taken by the parties in planning for the operation of both New Brunswick High School and North Brunswick High School for the 1974-75 academic year. These specific steps, set forth in Paragraphs No. 1 and No. 2, of the four numbered paragraphs at the conclusion of the Order, instructed the parties as follows:

"1. The Boards of Education of North Brunswick and Milltown shall cooperate fully with the Board of Education of New Brunswick in its planning and scheduling for the accommodation of all tenth, eleventh and twelfth grade pupils and Milltown's ninth grade pupils, utilizing both New Brunswick and North Brunswick High Schools for the 1974-75 school year.

"2. The Board of Education of North Brunswick shall be permitted to concurrently plan and schedule for the accommodation of its tenth, eleventh and twelfth grade pupils for the 1974-75 school year, including the conditional and tentative employment of teaching staff members."

New Brunswick now seeks an interpretation of Paragraph No. 1 and specific instructions to all parties regarding the method and manner of implementation for the 1974-75 academic year.

New Brunswick argues, in sum, that it cannot secure the cooperation of North Brunswick and Milltown in order to schedule the ninth grade pupils from Milltown, and the tenth, eleventh and twelfth grade pupils from both Milltown and North Brunswick, together with its own ninth, tenth, eleventh and twelfth grade pupils, on a single-session basis, utilizing both New Brunswick and North Brunswick High Schools, for the 1974-75 academic year.

New Brunswick requests that the Commissioner direct both parties respondent to cooperate in the aforementioned planning and scheduling of pupils with the clear understanding that: (a) the existing sending-receiving relationship remain in full force and effect; (b) the *status quo* of the parties be preserved until a final determination is made by the Commissioner in the main case; (c) New Brunswick administer and supervise all of the above-named grades

of pupils for the 1974-75 academic year; (d) North Brunswick make available its high school facility in order to eliminate overcrowding and double sessions in the New Brunswick High School; and (e) all teachers for the above-named grades of pupils be employed and supervised by the New Brunswick Board of Education for the 1974-75 academic year.

North Brunswick argues an almost diametrically opposed interpretation of Paragraph No. 1 of the Commissioner's Order of May 24, 1974. North Brunswick's interpretation contemplates that: (a) all North Brunswick pupils enrolled in grades ten, eleven and twelve would be withdrawn from New Brunswick High School and housed in the North Brunswick High School for the 1974-75 academic year; (b) these grades of pupils would be in addition to the seventh, eighth and ninth grade pupils who would normally be assigned to the North Brunswick High School beginning in September 1974; (c) New Brunswick would schedule its own ninth, tenth, eleventh and twelfth grade pupils in its high school, together with ninth, tenth, eleventh and twelfth grade pupils from Milltown; (d) an undetermined number of Milltown's ninth grade pupils and tenth, eleventh and twelfth grade pupils from both Milltown and New Brunswick may be assigned on a voluntary basis, with parental consent, to the North Brunswick High School for the 1974-75 academic year in order to ensure a normal single-session program in the New Brunswick High School; (e) all pupils assigned to the North Brunswick High School for the 1974-75 academic year, as described above, would be taught by teaching staff members employed by the North Brunswick Board.

Milltown requests that Paragraph No. 1 of the Order of May 24, 1974, be interpreted to permit North Brunswick to operate its high school for its pupils enrolled in grades nine through twelve, for the 1974-75 academic year, and to permit Milltown's pupils the choice of enrollment in either New Brunswick High School or North Brunswick High School. Milltown's request for this election by its pupils and their parents is grounded on the assertion that only eighteen percent of its ninth grade pupils have indicated their intention to enroll in the New Brunswick High School for the 1974-75 academic year. This percentage, says Milltown, represents a downward reduction from the twenty-three percent of its 1973-74 ninth grade class who were enrolled in the New Brunswick High School. Milltown contends that a larger percentage of its pupils in grades nine through twelve will attend public school, if they are given the option of choice between enrolling in either the New Brunswick or North Brunswick High School.

The Commissioner has considered the positions taken by the parties and makes the following findings and determinations:

The issue presented at this juncture is clearly an interim problem, and the Commissioner's determination is not intended to be dispositive of the larger case which has been in litigation for approximately eighty-four hearing days. In the larger case, hearings have been concluded and the participant school districts and municipalities have filed Briefs. The intervenor, New Brunswick Education Association, hereinafter "N.B.E.A.," has also filed a Memorandum of Law pertinent to the narrow issue raised in its Petition of Appeal. The N.B.E.A. requests essentially that all teaching staff members presently employed by the

New Brunswick Board be guaranteed employment by either New Brunswick or North Brunswick, regardless of the outcome of the main case.

The hearing officer's report in the main case was submitted to the parties on Tuesday, August 13, 1974. The parties now have fifteen days, concurrently, within which to file exceptions or responses to the hearing officer's report. *N.J.A.C. 6:24-1.16* The last day for filing such responses is Wednesday, August 28, 1974. Following receipt of the responses from the parties, the Commissioner shall proceed to make a final determination of the entire case.

Given this chronology of events, the required time sequence will obviously result in the rendering of a final determination after the actual opening of the 1974-75 academic year scheduled for the first week of September 1974.

Therefore, in the Commissioner's judgment, the Order of May 24, 1974, including the requested interpretation of Paragraph No. 1, and instructions for implementation of that Order, are no longer sufficient to accomplish the original purpose of providing a dual set of plans, one of which could possibly be implemented as the result of a final determination of the main case. Instead, the changed time sequence makes it necessary at this point for the Commissioner to provide, as an interim measure, a scheduling plan for the accommodation of all pupils of the participant school districts for the 1974-75 academic year.

An essential element of such interim plan must be provision for the elimination of the overcrowding and the resultant two-session educational program in the New Brunswick High School. This factor was considered at length by the Commissioner in the Decision on Motion in this case which was issued on November 30, 1973. The implementation of that Order of November 30, 1973, was stayed pending an appeal to the State Board of Education, and the State Board dismissed the appeal on May 1, 1974, on the grounds of mootness.

At the time the November 30, 1973 Order was issued, the New Brunswick High School was operating on a two-session basis as the result of overcrowding, and the North Brunswick High School was clearly under-utilized. The Commissioner pointed out in the November 30, 1973 Order that he has been called upon in numerous previous instances to decide questions concerning the transfer of pupils attending an overcrowded high school operating on a two-session basis, within the framework of a sending-receiving relationship. Ten cases were cited, and need not be repeated here. The Commissioner held that his statement regarding double sessions in the case of *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, Monmouth County*, 1959-60 *S.L.D.* 159, is applicable to the instant matter. That statement is repeated here as follows:

“\*\*\* The Commissioner is aware that, in recent years, many factors (often unforeseeable and beyond local control) have operated to force high school districts to organize their program on a double session basis and that most of them are making diligent efforts to develop facilities which will permit a return to the more complete and adequate educational



opportunities possible in a one-session day. That this is so establishes even more reason for the Commissioner to exercise his discretion carefully to avoid any impending or harmful effects that might be incurred by a change of designation, no matter how temporary. At the same time, the Commissioner is convinced 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 inconvenience which are placed on pupils, homes and staff, the Commissioner deplors 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.\*\*\*"

(at pp. 162-163)

As a result, in his Order of November 30, 1973, the Commissioner held that, under the specific circumstances of this case, a temporary change of designation of pupils which would provide both a resumption of a normal school day with the attendant full educational opportunities thereby provided, in the New Brunswick High School, and also a more complete utilization of the North Brunswick High School, would best serve the interests of all of the pupils, their parents and the communities at large. A transfer of pupils was accordingly directed for implementation by the end of the first semester of the 1973-74 academic year. Appeals from that interim Order eventually rendered the matter moot in May 1974, because a transfer of pupils at that late time in the academic year would have been unreasonable for obvious reasons.

Thereafter, as was previously stated, the subsequent Order of May 24, 1974, contemplated a final determination of the main case prior to the opening of the 1974-75 academic year.

In the Commissioner's judgment, his previous determination that the double-session program in the New Brunswick High School must be remedied as set forth in his Order of November 30, 1973, remains pertinent to the present circumstances of this case.

The Commissioner finds and so holds that, under the specific circumstances of this matter at this juncture, an interim plan must be provided for the 1974-75 academic year only, which will provide both a resumption of a normal school day with the attendant full educational opportunities thereby provided, in the New Brunswick High School, and also a complete utilization of the North Brunswick High School. Such an interim plan will best serve the interests of all of the pupils, their parents, and the communities at large. An interim plan must be designed to adequately conform with the functional capacities of the two respective schoolhouses.

Accordingly, for the reasons stated above, the Commissioner orders the

following as an interim plan for the 1974-75 academic year only:

1. The Board of Education of New Brunswick will schedule a single-session program for all of its own pupils enrolled in grades nine, ten, eleven and twelve, and all of the Milltown Board's pupils enrolled in grades nine, ten, eleven and twelve. All of these pupils will attend the New Brunswick High School for the 1974-75 academic year.

2. The Board of Education of North Brunswick will schedule a single-session program for all of its own pupils enrolled in grades ten, eleven, and twelve. All of these pupils will be housed in the North Brunswick High School for the 1974-75 academic year.

3. Any North Brunswick pupils who were enrolled in the New Brunswick High School during the 1973-74 academic year may voluntarily continue such enrollment for the 1974-75 academic year.

4. New Brunswick will retain all of its present teaching staff members in its high school for the 1974-75 academic year. The Commissioner does not expect any reduction of New Brunswick teaching staff members as a result of this interim plan for the 1974-75 academic year.

5. The Commissioner directs the Division of Controversies and Disputes, State Department of Education, to permit the New Brunswick Board to amend its pleadings in its pending budget dispute for the 1974-75 school year, as a result of the changes which this interim plan will create in its financial planning.

Since the report of the hearing examiner in the main case is presently in the hands of the parties, and they have not had sufficient time, at this point, to submit their responses, the Commissioner deems it inappropriate to comment upon the findings of fact and recommendations contained therein. The Commissioner will reserve his final judgment in regard to the total case until he has had the opportunity to carefully review the record, the report, and the responses thereto which each party will submit.

The Commissioner is constrained to emphasize that the interim plan, hereinbefore described, is to be effective only for the 1974-75 academic year and, further, that nothing contained herein is intended to prejudice the interests of the parties in regard to the final determination of the larger issues in this case.

The Commissioner is concerned that there be no delay in the completion of the detailed planning and scheduling necessary to insure the opening of the public schools for the fall semester in accordance with the established school calendar. It is vital that there be no loss of schooling for the many affected pupils in these School Districts.

The Commissioner observes that the United States Supreme Court issued its decision in the case of *Ronald Bradley et al. v. William G. Milliken, Governor of Michigan et al.*, 418 U.S. 717, on Thursday, July 25, 1974. Because of the historic nature of that decision, the Commissioner notified the parties herein by

telephone on Friday, July 26, 1974, and by letter under same date, that each party could file a Memorandum of Law as to the possible application of the United States Supreme Court's decision to the instant matter. The submissions by the parties have been considered by the Commissioner in the formulation of this Order.

This Order is to take effect immediately and will continue in effect for the entire 1974-75 academic year.

The final determination of the larger case, which will be forthcoming according to the required time schedule as described herein, will make a final disposition of the issues and will become effective for the 1975-76 school year.

Entered this 15th day of August 1974.

COMMISSIONER OF EDUCATION

**Board of Education of the City of New Brunswick,**

*Petitioner,*

*v.*

**Board of Education of the Township of North Brunswick and  
Board of Education of the Borough of Milltown,**

*Respondents.*

COMMISSIONER OF EDUCATION

#### DECISION

For the Petitioner, Terrill M. Brenner, Esq.

For the Respondent North Brunswick Board, Borrus, Goldin & Foley  
(Jack Borrus, Esq., of Counsel)

For the Respondent Milltown Board, Russell Fleming, Jr., Esq.

For the Intervenors, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of  
Counsel)

#### PROCEDURAL STATEMENT

The original Petition in this matter was brought by the Board of Education of the City of New Brunswick, hereinafter "New Brunswick Board," seeking to block the receipt of bids for the planned construction by the Board of Education of the Township of North Brunswick, hereinafter "North Brunswick Board," of a new high school facility in the Township of North Brunswick, hereinafter "Township," and to prevent the termination of the sending-receiving

relationship between the New Brunswick Board and the North Brunswick Board and the subsequent withdrawal of North Brunswick's high school pupils from New Brunswick High School. The Board of Education of Milltown, hereinafter "Milltown Board," which also sends its pupils to New Brunswick High School under a sending-receiving relationship, and the City of New Brunswick, hereinafter "City," were permitted to join as parties to the litigation. Preliminary proceedings in June and July of 1971 resulted in an agreement among the parties and the entry of an Order of the Commissioner of Education dated July 14, 1971, permitting the construction of the new North Brunswick high school facility to proceed on the understanding that the parties would explore its use in relation to the recognized question of racial imbalance at New Brunswick High School.

These explorations did not prove fruitful, and hearings on the merits of the issues began February 2, 1972 before a hearing officer appointed by the Commissioner. In the meantime, the North Brunswick Board had filed a Petition to withdraw its tenth grade pupils as of September 1972. This Petition was joined with the main case and was denied after a hearing in July 1972. (See Decision on Motion dated August 10, 1972.)

Another hearing on the application of the North Brunswick Board to remove its tenth grade pupils was heard September 19, 1973. The new high school facility having been essentially completed at that time, the Commissioner, on November 30, 1973, ordered the interim transfer of the entire tenth grade of the three school districts to the new high school facility, for the purpose of eliminating overcrowding and double sessions at the New Brunswick High School. No final determinations were made with regard to the main case, pending completion of all hearings. The implementation of this November 30, 1973 Order, however, was stayed, pending an appeal to the State Board of Education. The appeal was dismissed by the State Board of Education on May 1, 1974 on grounds of mootness.

The progress of hearings was twice interrupted by restraining orders obtained by the Township in its attempts to be admitted as a party to the proceedings. Although the Township was not ultimately admitted as a party, it was afforded the right to participate in an *amicus* capacity and did in fact present witnesses at the hearings. (See Decision on Motion dated June 23, 1972.)

Both the North Brunswick and the Milltown Boards have filed Petitions seeking complete termination of their sending-receiving relationships with the New Brunswick Board which exist at the high school level. In regard to the Milltown Board's application for termination, the Commissioner issued a Decision on Motion dated March 27, 1973, which held that the Milltown Board's application would be held in abeyance until the matter involving the New Brunswick and North Brunswick Boards has been decided.

Extensive testimony was presented on behalf of each party. Witnesses included professional educators employed by the three involved Boards, Board members, representatives of various community groups, real estate and planning consultants, and experts in the fields of sociology, education and race relations.

Hearings were concluded on January 30, 1974. Briefs were filed on behalf of each party, the last having been filed on May 20, 1974.

### BASIC FACTUAL FRAMEWORK

A sending-receiving relationship exists between the New Brunswick Board and the Boards of Milltown and North Brunswick whereby New Brunswick High School accommodates pupils from all three school districts. North Brunswick's tenth, eleventh, and twelfth grade pupils have attended New Brunswick High School exclusively for approximately 100 years. Milltown's ninth, tenth, eleventh and twelfth grades have also attended the New Brunswick High School over a long period of time, but not exclusively until 1964. The two relationships were formalized in 1964 by ten-year, sending-receiving contracts. The contracts themselves expired in June 1974; but, as shall be discussed *post*, the sending-relationships cannot be altered or terminated without the approval of the Commissioner.

As of September 17, 1973, the school population at New Brunswick High was 1,879 and the racial composition was 60 percent white and 40 percent nonwhite.

The breakdown by school district, grade, number and racial makeup is shown on the chart below. (See Decision on Motion dated November 30, 1973, Appendix C.)

### ENROLLMENT – BY DISTRICTS AS OF SEPTEMBER 17, 1973

New Brunswick	White		Nonwhite		Total
	Number	Percentage	Number	Percentage	
Grade 9	88	28	225	72	313
10	79	27	213	73	292
11	106	38	174	62	280
12	98	46	115	54	213
<b>TOTAL</b>	<b>371</b>	<b>34</b>	<b>727</b>	<b>66</b>	<b>1,098</b>
<b>North Brunswick</b>					
Grade 9	—	—	—	—	—
10	225	96	9	4	234
11	160	98	3	2	163
12	177	95	9	5	186
<b>TOTAL</b>	<b>562</b>	<b>96</b>	<b>21</b>	<b>4</b>	<b>583</b>
<b>Milltown</b>					
Grade 9	33	100	—	—	33
10	46	100	—	—	46
11	54	100	—	—	54
12	65	100	—	—	65
<b>TOTAL</b>	<b>198</b>				<b>198</b>

**Total School**

Grade 9	121	35	225	65	346
10	350	61	222	39	572
11	320	64	177	36	497
12	340	73	124	27	464
TOTAL	1,131	60	748	40	1,879

The recommended functional operating capacity of New Brunswick High School is 1,469. (See Decision on Motion dated November 30, 1973, Appendix B.) The school is presently operating on a double session basis with the ninth and tenth grades attending together in one session, and the eleventh and twelfth grades attending together in the other.

The new high school facility in North Brunswick has a functional operating capacity of 1,697 pupils using a formula of calculation that results in a number 20 percent less than actual capacity. (See Decision on Motion dated November 30, 1973, Appendix A.)

If North Brunswick were permitted to withdraw its pupils, the resultant racial composition of the two high schools would be as follows:

New Brunswick High School: 44 percent white, 56 percent nonwhite  
North Brunswick High School: 96 percent white, 4 percent nonwhite

There would be at least 583 tenth, eleventh, and twelfth grade pupils at the North Brunswick facility, and the pupil population remaining at New Brunswick High School would be 1,296.

If, in addition, the Milltown pupils were permitted to withdraw, the racial composition of New Brunswick High School would be 34 percent white and 66 percent nonwhite, and the remaining pupil population in New Brunswick High School would be 1,098.

These figures are based upon enrollments as of September 1973, and do not take into account new pupils, pupils who might leave the public school system for any reason, or pupils who may return to the public schools from private and parochial institutions.

**FACTUAL CONTENTIONS OF THE PARTIES**

The New Brunswick Board and the City have joined together in presenting their factual contentions as well as stating the relief they mutually seek. In essence, they maintain that withdrawal of the North Brunswick pupils alone, or with the Milltown pupils, if they are also permitted to withdraw, would result in a racial imbalance among the three school districts. They assert that this racial imbalance would create an increasingly nonwhite pupil population in the New Brunswick High School and an overwhelmingly white pupil population in the North Brunswick High School. They contend that this imbalance will yield the harmful stigma and undesirable effects of racial segregation and prevent the beneficial effects of an integrated educational setting. They also maintain that

the effects of a reduction in the total number of enrolled pupils will seriously curtail the ability of the New Brunswick Board to present a complete, quality educational program in its high school. In particular, they allege that the withdrawal of the predominately white pupils will interfere with the depth and quality of the curricular offerings in the New Brunswick High School.

In support of their assertions, the New Brunswick Board and the City presented professional and expert witnesses. Their experts maintained that there were positive gains to be realized from integrated education; gains that would be sadly lacking if withdrawal were permitted. They insisted that some measure of progress in achievement for nonwhite pupils could be realized, including some narrowing of the recognized achievement gap between them and white pupils. Stressed were other benefits, to both white and nonwhite pupils, of exposure to one another in the educational context. Learning to live together was not the least of these. In particular, the experts decried the step backward in race relations that would result from a separation. They feared the trend toward "two Americas," one black and one white. They foresaw the potential frustration of the "American dream."

A good deal of time and attention were exerted by the New Brunswick Board and the City in attempting to establish that New Brunswick and North Brunswick comprised one community. The objective of this effort was to bring the facts of this case into line with the holdings and facts in the case of *Jenkins v. Township of Morris School District*, 58 N.J. 483 (1971), which will be discussed later. A number of witnesses, including city planning and real estate experts, testified that there were geographic and use relationships that made the borderline between the two municipalities unimportant in view of the nature of the case. Cooperative relationships regarding sewerage facilities and fire and police emergency procedures were stressed. Growth patterns and interdependencies were described. The City was portrayed as a center for support in areas of professional, commercial and governmental services, as well as a source of employment.

The viewpoints of various representatives of New Brunswick's religious and racial groups, as well as those of certain political leaders, were presented to show support for the concept of regionalization and a willingness to share the costs of regionalization.

The North Brunswick Board and the Milltown Board presented their own professional educators and experts in sociology and race relations. The testimony of these witnesses seriously discounted the asserted gains to be expected from desegregated or integrated education. They cited studies to show that no narrowing of the black-white achievement gap has occurred as a result of ordered desegregation. They testified that if the policy of keeping nonwhite and white pupils together was based upon an assumption that achievement gains for nonwhite pupils would result, the sociological data now available would not support that assumption—or, therefore, the policy. They stated their belief that little, if any, benefit would flow from mixing the races in an atmosphere of hostility. In fact, they testified that harm would result in the form of more polarization and hostility. They further testified that stereotypes would be



reinforced and that nonwhite pupils might suffer harm from competition with better achieving pupils.

A good deal of testimony was concerned with the “tipping point,” that is, the ratio of nonwhite to white pupils at which an irreversible trend occurs causing a school system to become increasingly comprised of nonwhite pupils. It was asserted that such a point has already been reached in the three-district area, and that there is no real solution available within the confines of the three school districts.

The North Brunswick and Milltown Boards took sharp issue with the “one community” concept put forward by the New Brunswick Board and the City. They denied any special relationship with New Brunswick that is not shared with many other similarly situated suburban communities. They described the material growth from the once central and vital center city, to the point where each surrounding municipality has established its own identity. The North Brunswick Board was careful to point out that it is merely providing its own high school facilities, and that this is justified by population growth and need, just as many school districts had done before them without objection. The North Brunswick Board asserted strongly that there are good and sufficient reasons for the termination of the sending-receiving relationship and the withdrawal of its pupils from the New Brunswick High School that have nothing to do with any racial motivation.

The North Brunswick Board produced black witnesses who are residents of New Brunswick. These witnesses were outspoken in their own distaste for merger with any other school systems. In particular, members of the New Brunswick Black Home and School Organization testified that their goal and obligation is to cater to the needs of their own black pupils and that any sharing of this responsibility with neighboring white municipalities would only further dilute and frustrate this prime objective. The President of the local chapter of the Urban League also testified against the concept of regionalization under present circumstances.

Finally, both the North Brunswick and Milltown Boards asserted that no harm would result to the New Brunswick school system by virtue of the withdrawal of their pupils. On the contrary, they argued that sufficient numbers of pupils would remain in New Brunswick High School to support a good educational program and that such an educational program could be more readily designed to meet the needs of New Brunswick’s pupils. They faulted the New Brunswick Board for not attracting back into the school district the many white New Brunswick pupils who do not attend the public schools. The North Brunswick and Milltown Boards asserted that they should not bear the burden of resolving a potential racial imbalance caused by failure on the part of the New Brunswick Board. Further, they argued that New Brunswick has the wherewithal to provide a quality educational system. The anticipated revision in the public school tax support system is cited as a further indication that New Brunswick will have available the necessary funds for this purpose. See *Robinson v. Cahill*, 62 N.J. 473 (1973).

In support of their own Petitions to terminate the existing sending-receiving relationships, the North Brunswick and Milltown Boards asserted that the New Brunswick Board is not providing adequate and suitable school facilities for the education of their children. They stated that New Brunswick High School is severely overcrowded. They alleged that the New Brunswick Board, despite past inquiries regarding plans to continue furnishing adequate receiving facilities and the announced intentions of North Brunswick to erect its own high school, failed to provide adequate high school facilities. It was also pointedly stated by the North Brunswick Board that New Brunswick knew of North Brunswick's plans to build its own high school and never objected until the filing of this action, which came at the point when North Brunswick received bids for construction of a new high school in accordance with plans and specifications approved by the State Department of Education.

Both Milltown and North Brunswick made clear that their citizens were very much concerned about unrest at the New Brunswick High School, and these two Boards offered testimony in regard to incidents of violence and resultant school closings. Concerned with the safety of their children, they maintained that the New Brunswick Board was not providing either protection or the proper environment for learning to take place.

Both Boards cited the overcrowding and unrest as reasons for the trend toward voluntary withdrawal from the public school system by those pupils who can afford to attend the area's private or parochial schools. They presented statistics to indicate dramatic withdrawal rates from the public schools over the past five years.

The New Brunswick Board asserted that any pupil unrest was not the fault of the school system itself, but reflected the sort of problems being experienced today by many urban school districts. It cited the improvements made under its new administration and the leadership of its new Superintendent of Schools. In any event, the New Brunswick Board and the City insisted that disengagement from urban problems by the suburbs is simply not the proper solution.

The New Brunswick Board and the City acknowledged the overcrowding of the New Brunswick High School and stated that it was unreasonable for them to expend funds for new high school facilities in the face of the announced intention of North Brunswick to withdraw its pupils and of the pendency of this litigation. New Brunswick's Mayor and the President of the City Council testified that they would be willing to expend the necessary funds if they were permitted to retain the North Brunswick and Milltown pupils.

The New Brunswick Board and the City also produced witnesses and cited statistics to support their contention that New Brunswick was providing a suitable education.

## LEGAL CONTENTIONS OF THE PARTIES

All parties seems to agree that, to date, no federal constitutional authority can be relied upon as solid support for a merger order in this case. The New Brunswick Board and the City insist strongly, however, that the New Jersey Constitution and State policy demand that the relief they seek be granted. They point to the sweeping powers of the Commissioner to take affirmative action in order to eliminate racial imbalance no matter how caused, even if such action requires crossing school district boundaries. They cite the case of *Booker v. Board of Education of the City of Plainfield*, 45 N.J. 161 (1965), and more particularly, *Jenkins, supra*. Having drawn factual parallels to *Jenkins*, they argue that the Commissioner must exercise his powers to keep the three school districts together.

The North Brunswick and Milltown Boards, on the other hand, argue that this case is clearly distinguishable from *Jenkins, supra*, in that it does not involve a single community, but multiple communities. *Jenkins*, they maintain, does not clothe the Commissioner with any power in the instant circumstances.

The two Boards argue further that there exist good and sufficient grounds under the New Jersey statutes to terminate the sending-receiving relationship. Pointing to the overcrowded conditions at New Brunswick High School, the double sessions, the disruptions of the educational process, and an unwholesome atmosphere of fear within the school, they conclude that the New Brunswick Board has failed to provide suitable school facilities. Therefore, New Brunswick cannot be permitted to continue to serve as a receiving district for their pupils.

In addition, the North Brunswick Board stresses that it took all appropriate legal steps in the development of its own high school facility, including securing approval of its plans from the State Department of Education and an affirmative vote by its citizens in a special election to approve a school bond issue. The North Brunswick Board emphasizes that the New Brunswick Board never voiced an objection to the intentions or procedures of the North Brunswick Board in seeking to provide its own high school facility. It argues, in effect, that the New Brunswick Board should be estopped from interfering at this late point in time with its plans for the use of its own high school facility.

## FINDINGS OF FACT

The statements contained in this section together with those set out above under the heading "Basic Factual Framework" constitute the factual findings of the hearing officer in this matter.

### A. Description of the Municipalities

New Brunswick is the Middlesex County seat. It is a fully-developed urban center consisting of 5.6 square miles with a population of 41,885. The City's racial composition is approximately 75 percent white and 25 percent nonwhite. Its overall public school population, however, is the reverse with 25 percent white and 75 percent nonwhite. For many years, New Brunswick was the hub of many activities serving a number of surrounding, smaller communities. It provided a primary commercial center, and it also served as the center for

county services and professional services.

Although it continues to function in some of these areas, the prominence of New Brunswick as the center for area-wide activities has decreased over the past 25 years. The development of highway systems, and growing use of and dependency on the automobile as a primary means of transportation, contributed to the growth of the suburbs and the decline of the center city as a focal point. The development of shopping centers has tended to de-emphasize the dependency on the urban center for commercial and household needs. New Brunswick does continue to serve as the center for county governmental services and as a center for legal and medical services (the area's two major hospitals are located in New Brunswick).

New Brunswick's overall population is not expected to increase substantially over the coming years; nevertheless, when compared to its suburban neighbors, it is the place most available to low-income people, since the cost of housing is considerably higher in North Brunswick and other suburban communities. It was testified that black families, because of housing costs and employment factors, will continually tend to locate in New Brunswick rather than North Brunswick.

North Brunswick was originally part of New Brunswick during the 1700's. It received its own charter at the end of the eighteenth century, and became a legitimately recognized Township in 1860 (it was then separated from East Brunswick). The Township was primarily agricultural until the twentieth century, when its location between New York and Philadelphia and its access to the Pennsylvania Railroad and developing major highway routes made it attractive for industrial and residential development. Its rapidly growing population is estimated to be well in excess of 17,000 (1970 census shows a population of 16,691). There remains a good deal of vacant land for future development within the Township.

North Brunswick is essentially a middle-class residential community with some significant industrial development. New homes are listed in the \$50,000 to \$80,000 price range. There is no public housing. Its population is expected to continue to grow substantially. Because of the cost of homes and apartments in the Township, low-income families cannot readily find housing within its borders.

Milltown was part of North Brunswick at one time and became a separate Borough in 1889. It is said to have developed as an industrial community and still has diversified industrial uses. It is thought of, however, as a residential community. Unlike North Brunswick, Milltown is essentially a fully-developed community which has no real room for further growth. Milltown has retail outlets, but no extensive shopping areas as exist in New Brunswick or in the shopping centers located along the highways. The Borough's population, according to the 1970 census, is 6,470.

Milltown has been described as a closely-knit community, relatively fully developed, not likely to grow nor acquire any significant black population.

In terms of racial makeup, Milltown and North Brunswick are essentially white. According to the 1970 census, there are 11 nonwhites out of a total population of 6,470 in Milltown and 380 nonwhites out of 16,691 in North Brunswick. New Brunswick, as noted above, is approximately 25 percent nonwhite.

#### B. The One-Community Concept

It is claimed by the New Brunswick Board and the City, that the interrelationship among the three municipalities, or at least between New Brunswick and North Brunswick, is extensive enough to bring the political entities within the ambit of the "one-community" concept described in *Jenkins, supra*. After close examination of the massive amount of evidence presented, the hearing officer cannot concur that the three, or any two of the municipalities involved in this litigation, comprise a single community as described in *Jenkins, supra*.

Each municipality possesses its own complex of governmental services. Milltown does not lie contiguous to New Brunswick, and no serious attempt has been made to prove that this community is identified with New Brunswick except as it forms part of a parcel with North Brunswick. The parties herein concentrated their focus on the alleged nexus between New Brunswick and North Brunswick.

North Brunswick Township provides the full panoply of governmental services normally found within a separate municipality: local tax assessment and collection; local building, housing, plumbing and electrical inspection; municipal court, zoning and planning boards; local street maintenance, etc. North Brunswick Township maintains its own police department and its own volunteer fire system. It operates its own rescue and ambulance squad and provides its own garbage collection system and garbage disposal. Its water supply source and filtration and delivery systems do not involve New Brunswick, although some of its water mains extend into New Brunswick. Its storm drainage system flows away from New Brunswick. With the exception of a small, natural flow into the Mile Run Brook between the two municipalities, there are no common collection points for storm drainage. North Brunswick has sanitary sewerage facilities and sends waste to the Middlesex County Sewer Authority along with many other Middlesex County municipalities. It has its own library system, public park system, and recreation program. It also has its own civil defense organization and industrial commission. With respect to education, it provides schoolhouses and a program for grades kindergarten through nine.

There are a number of social and service organizations which serve only North Brunswick: Chamber of Commerce, Junior Chamber of Commerce, League of Women Voters, Women's Club, Veterans of Foreign Wars, American Legion, Lions Club, Kiwanis Club, the Odd Fellows Club, Italian-American Club, and Senior Citizens Organization. Most of these have counterparts in New Brunswick. There are also separate organizations for Little League baseball, Pop Warner football, Boy Scouts and Girl Scouts.

With the exception of some churches and some YMCA, YWCA, and high

school programs all located within New Brunswick, there does not seem to be any significant machinery for joint sponsorship and joint participation in programs on a two-municipality basis. Sponsorship of and participation in cultural, social, and recreation programs are generally within municipal boundary lines. It is noted that there are regional programs involving residents of both New Brunswick and North Brunswick dealing with the hospitals and the county bar association and medical organizations, but these do not bespeak a special relationship between New Brunswick and North Brunswick.

There does exist a definite relationship to New Brunswick in terms of use of legal and medical services, and in terms of use of county facilities and hospital facilities located in New Brunswick. This relationship, however, is not unique between New Brunswick and North Brunswick, but exists between New Brunswick and many other surrounding municipalities. It does not, therefore, serve to single out North Brunswick as sharing a special community of interest with New Brunswick.

There are areas of cooperation between police and fire departments and joint use of county sewerage lines, but these do not infuse the relationship of North Brunswick and New Brunswick with any significant degree of uniqueness.

A good deal of attention was directed to the road systems of the two municipalities and to the nature of the boundary line between the two, and of the land uses on either side of the boundary. North Brunswick has a border of approximately 17.8 miles which adjoins Milltown, East Brunswick, South Brunswick, and Franklin Township, as well as New Brunswick. The section adjoining New Brunswick is 4.3 miles long. The boundary follows major streets, a portion of Mile Run Brook, and runs through Rutgers University property. The area of the most interaction along this boundary is the less than one mile section along Livingston Avenue. Neither the length of the borderline, nor the nature of the uses on both sides of it, however, serve to establish a special identity between the two municipalities.

Several major roads do run between New Brunswick and North Brunswick. They do not serve, however, to tie the municipalities inextricably to each other. The North Brunswick road pattern and land-use development did not derive from the extensions of these roadways. Instead, it was testified that North Brunswick's development has been and will continue to be determined by the area's highway pattern (Route 1 and Route 130):

“\*\*\* Taken as a whole, therefore, or from the point of view of the majority of its developed parts, North Brunswick's development pattern is best described as a continuation of the region's fragmented highway development pattern rather than as an extension of New Brunswick's.

\*\*\*

“New Brunswick's major traffic arteries are oriented toward its downtown. Those passing through North Brunswick, however, are not merely extensions of these arteries. Routes 1 and 130, although continuing on through New Brunswick, draw North Brunswick residents away from New



Brunswick's shopping, recreation, employment and other activities related to community life, rather than towards it.\*\*\*" (Exhibit R-26, at p. 10; Report to the North Brunswick Township Board of Education by Candeub, Fleissig and Associates)

The Candeub report (Exhibit R-26) observes some unifying effect of Livingston Avenue, Remsen Avenue and Georges Road, but then concludes:

“\*\*\* Despite the above exception the existing street and highway pattern overall is best characterized as a factor that separates the two municipalities and as an impediment to interaction. As North Brunswick's development continues, a relatively greater proportion of its population will be concentrated along the highways – in areas more distant from New Brunswick – and its population as a whole is likely to be even more strongly oriented away from New Brunswick and toward the highways than they are at present.\*\*\*” *Ibid.*, at p. 11

In sum, the hearing officer is convinced that New Brunswick, North Brunswick, and Milltown exist as independent municipalities with their own separate identities. Although, years ago, there was more dependence by North Brunswick and Milltown on the urban center of New Brunswick, it can no longer be stated that the remaining relationship serves to link the two suburbs so closely to New Brunswick that their own identities are subsumed. There is no single community between New Brunswick and North Brunswick or among New Brunswick, North Brunswick, and Milltown such as the Commissioner and the Court found between Morristown and Morris Township in *Jenkins, supra*. The same planning and community development consultant (Isadore Candeub) who testified in the *Jenkins* proceedings and found an identity of community there, testified, *sub judice*, that he found no comparable identity in the instant matter. (See Comparison of Selected Morristown-Morris Township Relationships with Those of New Brunswick-North Brunswick in Candeub Report, Exhibit R-26, at p. 16.)

#### C. De Facto Circumstances

To the extent that there may be racial imbalance among the populations of the three municipalities and, consequently, among the schools of the three districts, they are not caused by any discernible official acts of the parties. The residential housing patterns in the three municipalities have resulted in different concentrations of racial groups. The causes and reasons for this state of affairs are complex, but this record does not support a finding that these causes are deliberately based on racial factors of the sort generally accepted to constitute *de jure* as opposed to *de facto* segregation.

#### D. Further Educational Factors

As implied in the “Basic Factual Framework” section of this report, each school district maintains its own schoolhouses and educational programs for its respective elementary school pupils (Milltown, kindergarten through eighth grade; North Brunswick, kindergarten through ninth grade; New Brunswick, kindergarten through eighth grade). New Brunswick High School has served for



many years as a receiving school for a number of school districts including East Brunswick, Edison, Franklin, Highland Park, Piscataway, South Brunswick, and South River. Over a period of years, each of these school districts has established its own high school facility, terminated its sending-receiving relationship with New Brunswick, and withdrawn its pupils. Milltown and North Brunswick are the last remaining sending districts to New Brunswick High School.

Soon after the signing of the ten-year, sending-receiving contracts between the New Brunswick and the Milltown and North Brunswick Boards, North Brunswick began to have some concern over the provision of adequate facilities to house its high school pupils. The then Superintendent of Schools for North Brunswick, testified that New Brunswick opened its new high school in 1964, and within one year of that date discussions concerning enrollment data took place among the three boards of education. He had prepared and presented enrollment projections because he believed that “\*\*\*the high school enrollment would be such that we would be forced with double sessions or some sort of a staggered session as early as 1969. And as early as 1965, we began to develop some statistics and present them to the New Brunswick Board and the Milltown Board.\*\*\*” (Tr. February 1, 1973, at p. 90)

The three Boards asked the then Middlesex County Superintendent of Schools to confer with the superintendents of the three districts. These conferences regarding projected increased enrollments and possible solutions for the provision of additional school facilities took place between 1965 and 1968, at which time the three boards indicated a lack of interest in regionalization and any further study by the County Superintendent. The former North Brunswick Superintendent testified that, in July 1967, there was a meeting between the New Brunswick and North Brunswick Boards at which projected increased enrollments, resultant overcrowding, and alternative school facility solutions were discussed, including the possible withdrawal of North Brunswick pupils from New Brunswick High School. The record of events shows that no satisfactory solutions were provided by the New Brunswick Board. (Tr. February 1, 1973, at p. 95)

The North Brunswick Board then engaged Temple University to make a study of its school facility needs and to make recommendations. (Exhibit R-13-B) The report stated that the ideal solution would be regionalization of New Brunswick, North Brunswick, and Milltown. It then observed that the ideal at times was difficult to achieve and made its prime recommendation the construction by North Brunswick of its own high school. The Temple survey team recommended the establishment of a K-12 program within the Township for the following reasons:

“\*\*\* 1. North Brunswick Township has an adequate pupil population for a total school program.

“2. By offering a complete program, K through 12, the township can develop a better total program that can be created when the program is split between districts.

“3. By providing a total program K-12, the township can design the programs specifically for its own children.

“4. The establishment of a township program K-12 will permit long-range planning and program flexibility.

“5. Withdrawal of North Brunswick students from the New Brunswick High School would provide relief to that district in lessening the overcrowded conditions which currently exist.

“6. A district K-12 program will provide better opportunities for the township youth to identify with the community and school system.

“7. The district has the financial ability and the desire to provide a K-12 educational program.”\*\*\*”

(Tr. February 1, 1973, at pp. 106-107)

The Temple report was dated October 1969. In November 1969, the North Brunswick Board passed a resolution (Exhibit R-15) directing the preparation of educational specifications for a new high school in North Brunswick Township, authorizing the employment of an architect to prepare appropriate plans and specifications, and further authorizing the employment of an auditor and attorney to prepare the appropriate data and documents in connection with the proposed school construction program. The former North Brunswick Superintendent testified that he believed the North Brunswick Board Secretary sent a copy of this resolution to the New Brunswick Board. (Tr. February 1, 1973, at p. 113)

On December 11, 1969, there was a joint meeting between the North Brunswick and New Brunswick Boards at which time North Brunswick produced a document specifically referring to the November resolution and specifically announcing its intention to build its own high school and develop a K-12 school system for full operation no later than September 1974. The document asked several pointed questions including the following:

“\*\*\* What objection, if any, will the New Brunswick Board of Education raise to the ending of the sending-receiving relationship with North Brunswick at the expiration of our contract? \*\*\*

“In the event that the New Brunswick Board objects to ending the sending-receiving relationship with North Brunswick, we would appreciate receiving its objections in detail. We in turn would wish to know what additional facilities or what specific procedures for overloading are planned to be provided in the face of present and obviously increasing student population loads beyond the State Department of Education rated capacities of the New Brunswick Senior High School?\*\*\*” (Exhibit R-14)

No written reply was received by the North Brunswick Board. The former North Brunswick Superintendent testified that he had no recollection of any

oral response. There had been earlier correspondence between the Boards discussing various measures, short of school construction by New Brunswick, to provide adequate school space. Another joint board meeting, in February 1970, did not produce concrete assurances or proposals by the New Brunswick Board for additional school facilities to alleviate overcrowding.

In any event, the North Brunswick Board proceeded with its applications for approval by the State Department of Education to build a schoolhouse, and for approval of its financing arrangements by the Board of Local Finance in the Department of Community Affairs. North Brunswick received an endorsement certificate from the Commissioner dated June 1, 1970, and an endorsement certificate dated June 9, 1970 from the Board of Local Finance, which constituted approval to exceed its debt limitation. (*N.J.S.A. 18A:24-26, 27*) The plans and specifications for the new school were also approved by the State Department of Education. Neither the New Brunswick Board nor the Milltown Board appear to have been aware of these procedures at that time. No specific application for permission to terminate the sending-receiving relationship and to withdraw pupils was made by the North Brunswick Board.

In a referendum held June 24, 1970, the voters of North Brunswick approved the issuance of 9.8 million dollars of bonds to finance the construction of the new high school.

Bids for construction of the North Brunswick High School were received on June 10, 1971. It was just prior to that point in time that the New Brunswick Board filed the instant action.

It was the opinion of the then Middlesex County Superintendent of Schools that, “\*\*\*[d]espite repeated conferences with the New Brunswick Board of Education and Superintendent of Schools, the Board of Education of the City of New Brunswick has failed to build or plan adequate high school facilities to accommodate the tenth, eleventh, and twelfth grade students from New Brunswick, North Brunswick, and Milltown.\*\*\*” (Affidavit dated June 2, 1971, submitted in connection with a Superior Court, Chancery Division action instituted by the Milltown Board, which affidavit was made part of the record in the instant case)

The then Middlesex County Superintendent stated additionally in his affidavit that:

“\*\*\* At the present time the New Brunswick High School is severely overcrowded and on double sessions which prevents that school from providing adequately for the educational needs of the students attending it. This situation becomes worse each year as the high school enrollment increases.

“The overcrowding at the New Brunswick High School is primarily caused by the attendance of North Brunswick students and their increasing enrollment. The withdrawal of North Brunswick students will eliminate

the double sessions at New Brunswick High School.

\*\*\*

“Because of the failure of the New Brunswick Board of Education to build additional high school facilities to accommodate the students from the three districts, the only real alternative was the construction of a senior high school by North Brunswick Township and the withdrawal of its students from New Brunswick High School.\*\*\*”

It is perfectly clear and undisputed that there is serious overcrowding in New Brunswick High School. New Brunswick High School began to operate on double sessions in September 1970. A memorandum from the then principal of New Brunswick High School to the then Superintendent of Schools for New Brunswick, dated May 12, 1969 (Exhibit R-5), clearly indicated the existence of overcrowding. This overcrowding is definitely detrimental to the educational process.

The future growth of pupil population will occur primarily in North Brunswick where land is presently being developed and more land is available for future development. There are currently at least 4,000 pupils from North Brunswick enrolled in public schools. This figure is expected to increase to between 4,500 and 5,500 within two or three years. The number of high school pupils (grades nine through twelve) is expected to total between 1,200 and 1,500 in the same space of time. New Brunswick and Milltown are not expected to experience comparable growth in the foreseeable future.

The pattern of changing racial composition of the New Brunswick public schools can be seen from the following: (Exhibit R-34, at p. 3)

Elementary		
Year	Percentage White	Percentage Nonwhite
1968-69	37.0	63.0
1969-70	33.9	66.1
1970-71	30.8	69.2
1971-72	27.8	72.2
1972-73	23.6	76.4

Secondary		
Year	Percentage White	Percentage Nonwhite
1968-69	79	21
1969-70	77	23
1970-71	75	25
1971-72	70	30
1972-73	63	37
1973-74	60	40

Combined enrollment of all three districts, New Brunswick, North Brunswick, and Milltown, using figures of October 1972 and including North Brunswick's ninth grade, would be as follows: (Exhibit R-34, at p. 16)

	White	Percentage	Nonwhite	Percentage	Total
K-8	4,458	58.03	3,224	41.96	7,682
9-12	<u>1,548</u>	<u>67.33</u>	<u>751</u>	<u>32.66</u>	<u>2,299</u>
Total	6,006	60.17	3,975	39.82	9,981

Statistics were introduced by the Milltown and North Brunswick Boards indicating that large numbers of their pupils have been withdrawing from the public school system at the high school level.

North Brunswick pupils begin their high school relationship with New Brunswick at the tenth grade level. The chart showing ninth grade enrollment and tenth grade enrollment for North Brunswick pupils (Exhibit R-34, at p. 16) indicates that as of September 1965, 97.3 percent of North Brunswick's ninth grade enrolled in the tenth grade at New Brunswick High School. There was fluctuation within the range of 93 and 86 percent over the next six years. The chart indicates, however, that there was a precipitous drop to 66.2 percent at the beginning of the 1972-1973 academic year.

Milltown's statistics indicate an even sharper trend. (Exhibit PM-5) Milltown's ninth grade pupils attend New Brunswick High School. Between 1962 and 1968, the range of the percentage of Milltown ninth grade pupils enrolled in New Brunswick High School was 82 to 88. Since 1968, the decline in enrollment has been dramatic:

Academic Year	Percent Enrolled
1968-69	86
1969-70	78
1970-71	53
1971-72	51
1972-73	26
1973-74	23

Milltown and North Brunswick attribute this decline in enrollment to overcrowding at New Brunswick High School and to the consequent disturbances and unrest at the high school during the last few years. They point to a series of school closings due to confrontations, including incidents of violence. It is alleged that some disturbances have had racial aspects. They allege that there exists an atmosphere of hostility and fear; in any event, one that is not conducive to maximum educational benefits. The two sending districts charge that New Brunswick is not providing suitable educational facilities for their respective pupils.

The rapid withdrawal rate shown above may well be the so-called "white flight" referred to throughout the testimony, that has been seen to occur when a school district, particularly an urban school district, becomes increasingly nonwhite in pupil enrollment. The "tipping point" phenomenon was described as the ratio of nonwhite to white pupils, at which a trend occurs causing a school system to become increasingly comprised of nonwhite pupils. It was said that, once the "tipping point" is reached, the trend is accelerated and irreversible. All

of the expert witnesses were familiar with the concept. Some insisted that, once the threshold was passed, the trend could not be reversed. Others testified to their belief that under appropriate circumstances, including for example, strong community cooperation and leadership and "magnet" schools, the trend could be reversed. These witnesses were hard pressed, however, to cite examples when asked to pinpoint situations where the trend had, in fact, halted or reversed itself.

Various figures were put forward as the "tipping point" percentage. Although there was no agreement among the witnesses, the "tipping point" phenomenon is said to occur somewhere within the range of 30 and 40 percent nonwhite.

Since New Brunswick High School is 40 percent nonwhite, according to enrollment figures as of September 1973, it may well be that the recent precipitous withdrawal of the North Brunswick and Milltown pupils is indicative of the occurrence, to some extent, of the "tipping point" phenomenon.

A large number of New Brunswick's children do not attend the public high school, but no precise numbers of these children were produced for the record. It is logical to conclude, from the fact that the City's 75 percent white population produces only 25 percent of the public school pupils, that New Brunswick white pupils are attending the area's abundant private and parochial schools. This is the fact that has led to the assertion by the North Brunswick and Milltown Boards that New Brunswick has the pupil resources within its own borders to achieve racial balance within its school district. Alleging that New Brunswick should have made efforts to retain its own white pupils, Milltown and North Brunswick maintain that they should not be required to ignore their own needs to help resolve New Brunswick's internal problem.

As was previously stated, enrollment figures as of September 1973, were 1,131 white and 748 nonwhite, or 60 percent white and 40 percent nonwhite. Although the addition of North Brunswick's ninth grade would tend to reduce the 40 percent figure somewhat, it is apparent that if there is any legitimacy to the "tipping point" concept, and there seems to be, the solution to the question of racial balance cannot ultimately be found within the confines of the three districts that are party to this proceeding.

The New Brunswick Board produced evidence to demonstrate that it was providing an adequate high school program. It pointed, *inter alia*, to the large number of courses offered. The New Brunswick Board alleges that, if withdrawal of the North Brunswick pupils or North Brunswick and Milltown pupils were permitted, the same number and depth of courses of study could not be offered. There was contradictory testimony, however, and the hearing officer finds that sufficient numbers of pupils would remain in the New Brunswick High School to maintain a comprehensive high school program.

As noted above, the problem of overcrowding at the New Brunswick High School is a most serious one. The withdrawal of North Brunswick pupils alone or with Milltown pupils would suffice to enable New Brunswick High School to

return to single sessions. From the viewpoint of numbers alone, it is educationally imperative that the high school facilities of both the City and the Township be utilized and appropriate numbers of pupils be assigned to permit operation within the respective capacities of each. (See Decision on Motion, November 30, 1973)

The views presented by lay witnesses regarding the desirability of the sought merger were mixed. Some witnesses, including black, Puerto Rican, and white, thought that all pupils should be educated together and that pupils would learn from exposure to one another. Others expressed fear of the possible consequences if the present conditions continue to exist. Still others believed that each community should be able to provide for its own pupils. This latter group included both black and white parents and spokesmen for groups. The thrust of the North Brunswick Board's position is that they desire permission to provide their own high school facilities and educational program for their own pupils. Some black witnesses who reside in New Brunswick testified that that is exactly what they want to do for their own children. While all of these views expressed by citizens are informative, they do not determine the ultimate legal questions involved in this litigation.

The views of the expert witnesses were also mixed. Dr. Joseph F. Pettigrew and Dr. Daniel Dodson testified regarding the desirability of racial integration among the three districts. They testified to their belief that to allow absolute withdrawal of predominately white, middle-class suburban pupils from increasingly nonwhite, lower socioeconomic urban pupils could be an irresponsible disengagement from a necessary encounter and a step in the creation of two Americas, one black and one white. (Transcripts: July 6, 1972, July 14, 1972, October 12, 1972, October 13, 1972, December 4, 1972, January 12, 1973, January 13, 1973, January 17, 1973)

Dr. David J. Armor, on the other hand, presented an analysis of several longitudinal studies and measured them against a model that he posited as the basis for past integration decisions. He found that significant elements of the model were not supported by the research. He further concluded that it was not advisable to mandate busing to achieve racial balance when research did not substantiate that any measurable gains were to be realized thereby. (Transcripts: January 9, 1973, January 10, 1973)

Dr. Armor testified in effect that, to the extent social policy is based on assumptions that are shown to be in error, then to that extent, the policy should be seriously questioned. He saw potential harm in mandating that black and white pupils remain together in a hostile environment.

Dr. Armor's analysis itself was seriously questioned by Dr. Pettigrew's testimony. See A Critique of "The Evidence on Busing" by Pettigrew, Normand, Useem and Smith (Exhibit P-40) and see Dr. Armour's reply to the Critique, "The Double Double Standard: A reply" (Exhibit PM-3).

There is apparent disagreement among social scientists as to the validity and import of research findings to date and as to the policy implications of those



findings. It is difficult to determine the exact extent to which the ultimate fashioners of social policy have taken the results of social science research into account. It is apparent, however, that a number of widely-held views have been contradicted by research starting with the report on *Equality of Educational Opportunity* prepared by the U.S. Office of Education pursuant to the Civil Rights Act of 1964 and transmitted to the President and Congress in 1966 (commonly referred to as the Coleman Report). See, e.g., *On Equality of Educational Opportunity*, Mosteller and Moynihan, Eds., Random House, New York (1972), which is a reanalysis of the Coleman data and which was specifically referred to at the hearings in this matter; *Rethinking Educational Equality*, Koyan and Walberg, Eds., McCutchan, Berkeley, California (1974); and *Inequality: A Reassessment of the Effect of Family and Schooling in America*, Jencks, Harper and Row, New York (1972). Surely more research is needed, and surely the implications of this research should influence public policy making.

The hearing officer is not persuaded by the conflicting expert testimony that the existing State policy regarding racial balance should be either diminished or extended.

#### LEGAL DETERMINATIONS

##### A. Estoppel

The North Brunswick Board urges that the relief sought by the New Brunswick Board and the City be denied on the grounds of estoppel and laches. Citing authority for the availability of estoppel against public bodies where “\*\*\*the interests of justice, morality and common fairness dictate\*\*\*”(North Brunswick Board’s Memorandum of Law, at p. 78), it refers to the failure on the part of the New Brunswick Board and the City to take action or even indicate serious objection to the building by North Brunswick of its own high school. It alleges that the City and the New Brunswick and Milltown Boards had full knowledge of its plans. The North Brunswick Board points out that it presented questions regarding the New Brunswick Board’s intentions at a joint meeting with the New Brunswick Board. The North Brunswick Board further claims to have expended large sums of money (approximately \$500,000) for the development of plans for its high school, while relying upon the silence and apparent acquiescence of the New Brunswick Board.

Although the estoppel and laches arguments are not without foundation in fact and, on the surface, not without logic, nevertheless, they should not preclude consideration of the merits of the instant matter. This conclusion is reached because the basic concern of the Commissioner is the welfare of the children involved and not the technical failure of any board to take appropriate action to preserve legal rights. The Supreme Court has repeatedly emphasized the broad and overriding responsibilities of the Commissioner. *Jenkins, supra*; *Booker, supra*; *Board of Education of Elizabeth v. City Council of Elizabeth*, 55 N.J. 501 (1970); *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 N.J. 94 (1966)

The hearing officer observes that at least until *Jenkins, supra*, was decided by the Supreme Court in June 1971, the New Brunswick Board and the City

would have had no tangible support for their position wherein they seek to prevent the construction of a high school in North Brunswick, and the subsequent withdrawal of North Brunswick pupils. In the Commissioner's determination in *Jenkins*, dated November 30, 1970, he held that he did not have authority to order a merger of the Morristown and Morris Township School Districts. It was the Supreme Court that proclaimed the merger authority of the Commissioner, at least under certain circumstances. The Court's decision in *Jenkins* pointed out the necessity for local boards of education to receive the Commissioner's approval for a change of designation of receiving district or a termination of a sending-receiving relationship even where the sending district decides to provide its own school facilities. The instant litigation was instituted after the Commissioner made his determination of *Jenkins*, but just prior to the Supreme Court's decision.

The fact that New Brunswick High School has operated on double sessions since September 1970, shows that the New Brunswick Board has failed to provide adequate school facilities. However, the New Brunswick Board's failure to object earlier by way of protest or the institution of legal proceedings should not preclude an examination of the actual school situation and a consideration of New Brunswick's full arguments.

#### B. Federal Law

Although the New Brunswick Board and the City initially alleged that a withdrawal of North Brunswick pupils would be violative of the Fourteenth Amendment of the United States Constitution, they have recognized in their Brief that racial imbalance which exists through no discriminatory action by State authorities is beyond the ambit of the Fourteenth Amendment. Given the previously stated finding that no racial imbalances in the instant situation result from official actions on the part of the parties, the question of a federal constitutional imperative would not seem to be in dispute. The hearing officer finds no evidence that actions on the part of the North Brunswick Board to provide its own high school, as many other school districts have done when the need is justified by growth in school enrollments, rise to the level of proscribed "State action."

The hearing officer agrees that, at this point in time, there is no compelling decisional authority to support a finding that a Fourteenth Amendment violation exists in this case. Plaintiffs in *Spencer v. Kugler*, 326 F.Supp. 1235 (D.N.J. 1971) aff'd without opinion 404 U.S. 1027, 92 S.Ct. 707, 30 L.Ed.2d 723 (1972), asserted that New Jersey's statutory provision for local school districts to be coterminous with municipalities was a federal constitutional violation, because the result was racial imbalance among many school districts. A three-judge federal panel rejected this contention. The Court found that the New Jersey statutes designating school district boundaries were based on geographic limitations of the various municipalities throughout the State, and that nowhere in the drawing of school district lines were there any considerations of race, creed, color or national origins. In *Spencer, supra*, the Court specifically found no basis for federal court intervention in the *de facto* context:

\*\*\*\* A continuing trend toward racial imbalance caused by housing

patterns within the various school districts is not susceptible to federal judicial intervention. The New Jersey Legislature has by intent maintained a unitary system of public education, albeit that system has degenerated to extreme racial imbalance in some school districts; nevertheless the statutes in question as they are presently constituted are constitutional.\*\*\*” (326 *F. Supp.*, at p. 1243)

The dismissal of the complaint for failure to state a claim upon which relief could be granted was affirmed by the United States Supreme Court, without opinion, *Spencer v. Kugler*, 404 U.S. 1027, 92 S.Ct. 707, 30 L.Ed.2d 723 (1972).

The case of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d (1971), was decided after the initial draft of *Spencer*, *supra*, and was cited in *Spencer* as fully supportive of its disposition. *Swann* did indeed contain language which lends strong support to the *Spencer* holding. After describing the deliberate gerrymandering of attendance zones as a permissible interim corrective measure, and as within the broad remedial powers of the Court where there had been a history of discriminatory state practices, the Court specifically noted in *Swann*, *supra*, that “\*\*\*[a]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis.\*\*\*” Stressing the need to undo the results of acts of intentional segregation, the Court continued:

“\*\*\* All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation\*\*\*.” (420 U.S., at p. 28)

The Supreme Court in *Swann*, *supra*, supplied a further indication that there is no federal duty to desegregate in *de facto* circumstances. After indicating that there is no requirement to make year-to-year adjustments in racial compositions of pupil bodies, once the duty to desegregate has been accomplished, and racial discrimination through official action is eliminated in the system, the Court said in *Swann*, *supra*, that it did not mean that the federal courts would be without power to deal with future problems.

“\*\*\* [B]ut in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.\*\*\*” (402 U.S., at p. 32)

See also *Bradley v. School Board of the City of Richmond, Virginia*, 338 F.Supp. 67 (E.D. Va. 1971); reversed on other grounds, 462 F.2d 1058 (4th Cir. 1972); affirmed by the United States Supreme Court without opinion by a divided Court, 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771 (1973).

Further doubt was dispelled in *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686 (1973). That case involved deliberate actions that had the

effect of fostering racial imbalance in part of Denver, and questions were raised with respect to the obligation of the Denver school authorities to take steps to correct racial imbalance in "core" schools of the city. No showing had been made by the plaintiffs that deliberate segregative action on the part of the school district had caused the imbalance in the core schools. In remanding the case for a more specific determination of the causes of the imbalance in the core schools, the Court reinforced its position that the federal constitutional obligation to take affirmative steps to desegregate does not arise unless segregative action caused the imbalance:

\*\*\* We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown*\*\*\*the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system'\*\*\* that is, to eliminate from the public schools within their school system all vestiges of state-imposed segregation. *Swann*\*\*\*

\*\*\* This is not a case, however, where a statutory dual system has existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.\*\*\*" (93 S.Ct., at p. 2693)

In circumstances where the segregative actions affect the entire system, the Court indicated that the application of the neighborhood school concept would not be a defense. Despite the otherwise clear implication of the *Keyes* case, however, the Court took the trouble to state that it had no occasion to consider, in the case before it, whether a "neighborhood school policy" of itself would justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting *de jure* segregation.

For the present purposes, however, it seems safe to conclude that no federal imperative exists in the absence of a showing of segregative action resulting in *de jure* segregation. There has been no such showing in the instant matter. Accordingly, there is no federal constitutional mandate to take corrective measures.

There have been cases directly supporting the concept of crossing of school district lines and the consolidation of school districts in order to accomplish racial balance. See *Newburg Area Council, Inc. v. Board of Education of Jefferson County, Kentucky*, 489 F.2d 925 (6th Cir. 1973), petition for cert. filed March 25, 1974; *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973), cert. granted 42 L.W. 5249 (1974); *United States v. Board of School Commissioners of Indianapolis, Indiana*, 474 F.2d 81 (7th Cir. 1973), cert.

denied 93 S.Ct. 3066; *Hart v. Community School Board of Brooklyn*, 487 F.2d 223 (E.D.N.Y. 1974), 42 L.W. 2428. A decision in *Bradley v. Milliken* is expected shortly from the United States Supreme Court. It should be noted, however, that each of these cases was bottomed on a specific finding of *de jure* segregation.

### C. State Law

The New Brunswick Board and the City rely on State law and State policy in support of their claims for relief. They cite the New Jersey Constitution prohibiting discrimination based on race and directing the provision by the Legislature of a "thorough and efficient" system of free public schools, the statutory sections that clothe the Commissioner of Education with broad powers in the areas of education and racial balance, the landmark New Jersey decisions in *Booker* and *Jenkins*, *supra*, and the strong policy statements of the State Board of Education favoring integrated education.

The New Jersey Constitution provides:

"The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." (Art. VIII, Sec. IV, Par. 1)

and:

"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." (Art. 1, Par. 5)

The New Jersey education statutes provide, *inter alia*, as follows:

"Each school district shall provide \*\*\* suitable educational facilities including proper school buildings and 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 20 years\*\*\*." N.J.S.A. 18A:33-1

The Commissioner, in 1963, citing some of these provisions, concluded that New Jersey school districts have an affirmative obligation to reduce or eliminate *de facto* segregation. *Fisher v. Board of Education of the City of Orange*, 1963 S.L.D. 123

Decisions of the State Board of Education were immediately supportive of the Commissioner's posture with regard to the duty to eliminate racial imbalance within school districts. *Alston v. Board of Education of the Township of Union*, 1964 S.L.D. 60; *Booker v. Board of Education of the City of Plainfield*, 1964 S.L.D. 167; *Volpe v. Board of Education of the City of Englewood*, 1963 S.L.D. 147

The New Jersey Supreme Court noted the State policy against racial discrimination in the public schools and emphatically declared the obligation to deal with *de facto* racial imbalances within school districts. *Booker, supra* The Court held that the Commissioner had taken too narrow a view when he limited his review function to a determination of whether local board actions in this area were “arbitrary or capricious or whether it was the result of bias or prejudice” and when he confined himself to correction of racial imbalance that resulted in schools within a system that were “all or nearly all Negro.”

The obligation to correct racial imbalances *within school districts* of the State, then, no matter how those imbalances were caused, was firmly established in *Booker*. See also *Morean v. Board of Education of Montclair*, 42 N.J. 237 (1964).

The important issue of the obligation to eliminate racial balance across school district lines was directly dealt with in *Jenkins, supra*. The Court held under the facts of that case that the Commissioner had the power to order a continued sending-receiving relationship at the high school level between Morristown and Morris Township, or to order merger of the two school districts, K-12. The Court was rather explicit, however, in limiting its holding to the particular case before it, and it is necessary to look rather closely to derive guidelines for the instant situation.

*Jenkins, supra*, involved the school districts of Morristown and Morris Township. A petition was brought by citizens seeking to prevent the withdrawal of Morris Township’s pupils from Morristown High School which had served as a receiving school for 100 years. A further parallel to the instant matter was the allegation (joined in by the Morristown Board of Education) that to permit withdrawal of the predominantly white Township pupils would result in a predominantly white suburb and an increasingly black central Town. It was also alleged that the admittedly excellent high school program would suffer.

The Court, however, relied on specific factual findings. Primarily it was convinced that the Town and the Township, although separate political entities, in reality comprised one overall community. It found extensive inter-relationships between the two.

“\*\*\* Despite their official separation, the Town and Township have remained so interrelated that they may realistically be viewed as a single community, probably a unique one in our State. The Town is a compact urban municipality of 2.9 square miles and is completely encircled by the Township of 15.7 square miles. The boundary lines between the Town and the Township do not adhere to any natural or physical features but cut indiscriminately across streets and neighborhoods. All of the main roads radiate into the Township from the Green located in the center of the Town and it is impracticable to go from most Township areas to other Township areas without going through the Town itself.

“The Town is the social and commercial center of the community whereas the Township is primarily residential with considerable undeveloped area



for further residential development. The Town has many retail stores and other commercial establishments surrounding its Green while the Township has only a few retail outlets located on its main roads. The Township has no business center or so-called 'downtown' area but the Town's substantial shopping center serves in that aspect for both the Township and the Town. Most of the associations, clubs, social services and welfare organizations serving the residents of both the Town and the Township are located within the Town and, as members of the aforementioned organizations, the Town and Township residents are routinely together at both work and play. The Morristown Green is a common meeting place for young people from both the Town and the Township; day care centers and park and playground facilities in the Town are used by the residents of both the Town and the Township; and little leagues and the like generally involve Town and Township teammates who play on both Town and Township fields.

"There is also considerable interdependency in municipal public services. Thus the Town's Water Department supplies water to most of the Township residents; sewer service is rendered by the Town to some parts of the Township; Town and Township Fire and Police Departments regularly assist each other; and the Town and Township jointly operate the Public Library located within the Town. There are socio-economic and population differences between the Town and the Township but despite these differences the record before us clearly establishes that, as set forth in the Candeub report, the Town and Township 'are integrally and uniquely related to one another' and 'constitute a single community.' The Candeub report was prepared for the Town by an established consulting community planning firm. The hearing examiner, whose findings were adopted and incorporated by the Commissioner of Education in his decision, found that the Morristown-Morris community was essentially as described in the Candeub report; he noted further that the Township did 'not dispute the interrelatedness between itself and the Town' though it contended that statutorily and technically the Town and the Township are 'separate entities for school purposes.'\*\*\*" (58 N.J., at pp. 485-487)

The Court also found that there would be educational disadvantages to the existing excellent high school program if withdrawal were permitted, and advantages if the school districts were kept together. Implicit in the decision was the idea that racial balance would be beneficially accomplished within the overall community by a merger. More explicitly, the Court felt that separation within the community, albeit composed of two separate school entities, would result in the same harm that the Commissioner had worked to eliminate within individual school districts.

It was in the context of these findings of fact that the New Jersey Supreme Court held that the Commissioner had power to continue the sending-receiving relationship and, if necessary, to order merger of the school districts. The Court was not deterred by the absence of any specific statutory authority granting the Commissioner such power or by the specific and otherwise exclusive provision for the formation of regional school districts,



which included as a prerequisite an affirmative vote of the electorate of the involved school districts. Instead, the Court reviewed in detail the statutory responsibilities of the Commissioner, included his general supervisory powers to see that a thorough and efficient system of education is provided. In *Jenkins, supra*, the Court cited various cases wherein broad powers were held to derive from the statutes and chided the Commissioner for taking a narrow view of his powers to cross district lines and for his following statement:

“\*\*\* it may well be that, given the racial disparity between the school populations in Morristown and Morris Township and given the disparity in socio-economic makeup of the two communities and the resultant difference in capacity to provide quality education programs, the Legislature has not fulfilled its constitutional obligation to provide for a thorough and efficient system of public schools.\*\*\*” (58 *N.J.*, at p. 506)

*Cf. Robinson v. Cahill*, 62 *N.J.* 473 (1973) In any event, placed against the strong State policy in favor of integrated education, the Court found in these broad statutory provisions the power necessary for the Commissioner to deal with the specific case before it.

There is a traditional judicial concept which limits the conclusions of law in a decision to the factual circumstances of the case being decided. The principles enunciated have continued viability to be sure, but their strength and applicability to subsequent disputes depends upon the existence of parallel facts or, at least, logically related extensions of rationale. In *Jenkins, supra*, the Court took the trouble to make specific reference to the traditional limitation described:

“\*\*\* For present purposes we need not pursue the issue [the scope of powers of the Commissioner flowing to him through the grant of broad supervisory powers by the Legislature] in its broader aspects for the situation here is indeed a specially compelling one and in traditional judicial fashion our holding may be confined to it.\*\*\*” (58 *N.J.*, at p. 505)

Articulating to some extent the limitation intended, the Court continued:

“\*\*\* As has already been pointed out, here we are realistically confronted not with multiple communities but with a single community having no visible or factually significant internal boundary separations, and with a record which overwhelmingly points educationally towards a single regional district rather than separate local districts.\*\*\*”  
(58 *N.J.*, at p. 505)

Limiting and defining language is repeated elsewhere in the *Jenkins* decision as follows:

“\*\*\* Surely if those policies [the educational and racial policies embodied in our State Constitution and in its implementing legislation] and the views firmly expressed by this Court in *Booker* (45 *N.J.* 161) and now reaffirmed are to be at all meaningful, the State Commissioner must have

power to cross district lines to avoid 'segregation in fact' (*Booker* 45 N.J. at 168), at least where, as here, there are no impracticalities and the concern is not with multiple communities but with a single community without visible or factually significant internal boundary separations.\*\*\*" (58 N.J., at p. 501)

"Unlike other areas in the State, the split [the urban-suburban split between black and white students] can readily be avoided without any practical upheavals; indeed, the record indicates not only that merger would be entirely 'reasonable, feasible and workable' \*\*\*[citing *Swann*]\*\*\* but also that it would not significantly involve increased bussing or increased expenditures since most of the schools within the Town and the Township are located near their boundary line.\*\*\*" (58 N.J., at p. 505)

As noted above, the Court stated that the Town and Township were so interrelated that they may realistically be viewed as a single community, and added the comment, "probably a unique one in our State."

It seems fair to conclude that the Court was cautioning against an interpretation that the Commissioner has the power to merge school districts under any circumstances. It may reasonably be concluded, also, that the Court was making no determination regarding the scope of the Commissioner's power beyond the factual situation presented in *Jenkins*.

Measuring the facts of the instant case against the specific holding in *Jenkins*, the hearing officer finds that *Jenkins* does not provide authority for the merger relief sought by a New Brunswick Board and the City. It is not believed that the *Jenkins* Court intended to confer power upon the Commissioner to merge school districts under the present circumstances either directly or by any reasonable extension of its rationale.

This determination is based upon the previously stated specific findings that, in the instant matter the record does not support the conclusion that New Brunswick, North Brunswick, and Milltown constitute a single community but are instead three separate and distinct communities.

Another finding bears repeating here. Given the racial makeup of the three school districts and the "tipping point" phenomenon, the situation is not one in which racial balance can be achieved within the three school districts. Ultimately the school populations of surrounding districts would have to be taken into account if the percentage of nonwhite pupils is to be stabilized. The result is a multiple-district situation referred to by the Supreme Court in its limiting language. It is not suggested here that nothing be done about a multiple-district racial balance situation; it is only being said that the solution to these problems is not within the province of the Commissioner and his current panoply of powers.

Despite the Commissioner's lack of authority to order a merger under these circumstances and despite the expiration of the sending-receiving

contracts, the Commissioner's approval must be sought and obtained in the instant matter in order to terminate the existing sending-receiving relationships. This requirement was made clear in *Jenkins* where the Court specifically disapproved of

“\*\*\* the administrative holding that the unilateral determination by Morris Township to build its own high school\*\*\* has the legal affect of nullifying the precise statutory requirement (*N.J.S.A.* 18A:38-13) under which ultimate withdrawal of its high school students from Morristown High School may not be accomplished without a prior showing to the Commissioner of good and sufficient reason and express approval on his part.\*\*\*” (58 *N.J.*, at p. 503)

The full statutory sections read as follows:

“The board of education of every school district which lacks high school facilities within the district has not designated a high school or high schools outside of the district for its high school pupils to attend shall designate a high school or high schools of this state for the attendance of such pupils.” *N.J.S.A.* 18A:38-11

“No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to 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 except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications.” *N.J.S.A.* 18A:38-13

*N.J.S.A.* 18A:38-20 permits local boards of education to enter into sending-receiving contracts, and 18A:38-21 provides for termination of such agreements as follows:

“Any board of education which shall have entered into such an agreement may apply to the commissioner for consent to terminate the same, and to cease providing education to the pupils of the other contracting district on the ground that it is no longer able to provide facilities for the pupils of the other district, or to withdraw its pupils from the schools of the other contracting district and provide educational facilities for them in its own or another district on the ground that the board of education on the receiving district is not providing school facilities and an educational program suitable to the needs of the pupils of the sending district or that the board of education of the receiving district will not be seriously affected educationally or financially by their withdrawal.” *N.J.S.A.* 18A:38-21

Some of the criteria for termination of sending-receiving relationships were delineated in the recent decision of the Commissioner in *Morris School District v. Board of Education of the Township of Harding et al.*, 1974 *S.L.D.* 457

(decided April 29, 1974). In *Morris, supra*, the Commissioner quoted previous decisions indicating that the burden of proof rests upon the petitioning board to establish "good and sufficient reason" for the change (*Board of Education of the Borough of Haworth v. Board of Education of the Borough of Dumont*, 1950-51 S.L.D. 42), and that termination is permissible where receiving districts are unable to provide suitable facilities and to maintain a thorough and efficient system of education. In *the Matter of the Termination of the Sending-Receiving Relationship Between the Board of Education of the Township of Lakewood and the Township of Manchester, Ocean County*, 1966 S.L.D. 12. In another case, the Commissioner granted a termination request where he found that the:

\*\*\*\* High School is overcrowded, that to continue to increase this overcrowding would impair the educational program of the district and that the pupils from Montville could receive an adequate educational program in any one of four high schools within a reasonable distance from Montville." In *the Matter of the Application of the Board of Education of Caldwell-West Caldwell to Terminate Sending-Receiving Relationship with the Board of Education of the Township of Montville*, 1957-58 S.L.D. 43, 45

*Jenkins, supra*, had a good deal to say about racial balance and about sending-receiving relationships. Although there may be some question as to the exact relationship between the sending-receiving statutes and racial balances between school districts, it is fair to say that racial balance is a factor the Commissioner can and must consider when he hears an application for a change of designation or for termination of a sending-receiving relationship, even apart from the questions of adequate school facilities and program, and whether the school districts comprise a single community.

In the case of *Morris School District v. Board of Education of the Township of Harding, supra*, the Commissioner considered the factor of racial balance, even though withdrawal was permitted. He did so also In *the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, Middlesex County*, 1972 S.L.D. 286.

In his decision on motion to dismiss in the *Board of Education of the City of Plainfield v. Board of Education of the Borough of Dunellen et al.*, May 12, 1972, the Commissioner analyzed *Jenkins, supra*, as follows:

\*\*\*\* In the Commissioner's judgment, the Court's opinion in *Jenkins* clearly directs him to consider the elimination of *de facto* segregation as a major responsibility of his office. He recognizes that in *Jenkins* the Court clearly dealt with a specific situation and as such did not direct the Commissioner to fundamentally alter the legislative scheme for the management of education in the State. In the Commissioner's judgment, however, the Court clearly enunciated a doctrine that school district lines are not *in themselves* an unassailable impediment to the elimination of racial imbalance. The Commissioner finds that he is required to analyze any controversy alleging racial imbalance to determine if the facts warrant

the granting of relief in the form of ordering measures to prevent or ameliorate racial imbalance.\*\*\*\*

From a review of the record, the hearing officer finds that good and sufficient reason has been demonstrated for permitting the withdrawal of North Brunswick's tenth, eleventh and twelfth grade pupils from the New Brunswick High School. The record supports the finding that the New Brunswick Board is not furnishing adequate high school facilities to house and satisfactorily educate the pupils of all three school districts. This conclusion is previously stated in detail in the findings of fact. It is not disputed that New Brunswick High School is overcrowded and presently operating on a double-session school program.

To continue New Brunswick as a receiving district for the North Brunswick pupils would deliberately insure that no satisfactory education could take place for any of the high school pupils of the three municipalities. Given these basic facts, the additional fact that the racial composition of New Brunswick High School will be altered, as described above, cannot serve as a reason or justification to continue the sending-receiving relationship in the form in which it currently exists.

Any attempts to ameliorate the effect on pupil racial composition in the New Brunswick High School, caused by a termination of the present sending-receiving relationship with North Brunswick, would require the utilization of the new high school facility in North Brunswick. Preservation of the existing racial composition would necessitate the transportation of New Brunswick pupils to North Brunswick and North Brunswick pupils to New Brunswick. As has been previously stated, no amount of busing among the three municipalities would be likely to stabilize the racial composition of New Brunswick High School.

The question then becomes one of determining the proper scope of the Commissioner's authority to order the creation or establishment of North Brunswick as a receiving district for some number of New Brunswick pupils and to order the reestablishment of New Brunswick as a receiving district for some number of North Brunswick pupils. While there is no question of the ample power of the Commissioner of Education to deal with the issue of racial balance within individual school districts, or among school districts in the context of the fact pattern of *Jenkins, supra*, the New Jersey courts have yet to establish the Commissioner's authority to deal with racial patterns in the circumstances presented by this case: that is, among municipalities where there is no unique connection apart from the existence of the sending-receiving relationship itself. As noted above, even the sending-receiving relationship is not historically unique to the three districts.

The Commissioner may interpret judicial statements regarding the scope of his authority broadly and, expanding upon expressed rationale, may extend its scope to cover current circumstances. On the other hand, he may determine to issue orders within the framework of clearly established authority. Primarily because this case does not fall within the ambit of the Court's holding in *Jenkins*, the hearing officer recommends caution in the degree to which the law is here extended.

To say that present State law and policy do not mandate the continuation of the sending-receiving relationship between the New Brunswick and North Brunswick Boards is not to ignore the possible benefits of truly integrated (as opposed to desegregated) education or to foreclose all opportunity for meaningful exposure of the races to each other in the educational context. Where it can take place with reasonable expectations of benefit, such exposure is to be encouraged. Expert witnesses for all parties either asserted or acknowledged that voluntary programs hold the best hope for successful integration. The hearing officer believes that the State policy of integrated education would be satisfied in this instance by some form of voluntary program.

It should be noted that some form of use of the North Brunswick facility by New Brunswick pupils was contemplated by the parties as early as July 1971, when the North Brunswick Board passed a resolution agreeing to

“\*\*\* work actively with the New Brunswick and Milltown Boards of Education toward an equitable solution thereof [to the racial balance problems at New Brunswick High School] in the utilization of the proposed North Brunswick Township High School facility.\*\*\*”

Along with the State policy favoring integrated education, there is a basic belief, restated at these hearings by expert witnesses, that is fundamentally important to American society that all races learn to respect their similarities and differences and learn ultimately to live together in harmony. The optimum conditions for the benefits of the “social contact” theory discussed by the experts may yet appear. Attitudes may change, and long-range exposure may lead to awareness, understanding, acceptance and respect. If the races are increasingly separated, the opportunities for the hoped-for learning and success would seem to be diminished. These factors indicate the desirability of providing an opportunity for a continuation of interracial exposure among the three school districts here involved. Hopefully, a means of broader interaction among more communities can be developed. In the meantime, continuation of some form of relationship, rather than stepping away from any hope of beneficial racial exposure, would seem the preferred course.

At the same time, due consideration must be given to the traditional concepts of local identification and home rule. The Supreme Court in *Jenkins, supra*, did not envision an abandonment of home rule principles, when it indicated that governmental subdivisions should not be a bar to the fulfillment of state constitutional rights and policies:

“\*\*\* It seems clear to us that, similarly, governmental subdivisions of the state may readily be bridged when necessary to vindicate state constitutional rights and policies. *This does not entail any general departure from the historic home rule principles and practices in our State in the field of education or elsewhere*; but it does entail suitable measures of power in our State authorities for fulfillment of the educational and racial policies embodied in our State Constitution and in its implementing legislation.\*\*\*” (*Emphasis supplied.*) (58 N.J., at p. 500)

The "neighborhood school" policy itself, although having to yield at times to overriding constitutional issues and state policies, nevertheless maintains a significant area of independent viability. The United States Supreme Court recognized this, at least where everything else was equal. To repeat part of a quotation cited above in another context:

\*\*\*\* All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes.\*\*\*\*  
(420 U.S., at p. 28)

And, see *Keyes v. School District No. 1, supra*.

The recommendations that follow attempt to keep in reasonable perspective the racial balance and home rule concepts, and to take due account of the legitimate desire of communities to provide for the education of their own children, while at the same time honoring the State policy of fostering integrated education.

### RECOMMENDATIONS

For all the above reasons, the hearing officer recommends that the Commissioner issue an Order in this matter as follows:

1. Denying the merger relief sought by the New Brunswick Board and the City;
2. Permitting the permanent withdrawal of North Brunswick's tenth, eleventh and twelfth grade pupils from New Brunswick High School for purposes of their attending the new high school facility in North Brunswick;
3. Directing the North Brunswick Board to provide space at the North Brunswick High School to accommodate up to 200 volunteering nonwhite high school pupils from New Brunswick (ninth, tenth, eleventh and twelfth grades);
4. Directing the New Brunswick Board to send up to 200 volunteering nonwhite New Brunswick pupils proportionately from ninth, tenth, eleventh and twelfth grades to the North Brunswick high school facility. Selection of these pupils should be made by the New Brunswick Board, among volunteers only, in accordance with the following criteria:
  - (a) pupils who have particular educational needs who would benefit from participation in programs offered at North Brunswick High School, and
  - (b) convenience of access;
5. Denying the relief sought by the Milltown Board to permit a choice by Milltown pupils to attend either New Brunswick or North Brunswick High School;
6. Directing that any North Brunswick pupil currently enrolled in New



Brunswick High School be permitted to remain at New Brunswick High School on a voluntary basis for the duration of his or her high school education.

This recommended solution will permit New Brunswick and North Brunswick to operate their own school systems for grades kindergarten through twelve, and at the same time maintain a relationship that will permit a continuation of integrated education for all high school pupils of the three school districts. If fully implemented, this solution will result in a racial composition of New Brunswick High School of approximately 52 percent white and 48 percent nonwhite, a difference of 8 percent from the present ratio of 60 percent white and 40 percent nonwhite. In any event, the New Brunswick High School will return to a single-session program and will be able to operate well within its optimum capacity. The disadvantage that flowed from its prior state of overcrowdedness would now be removed, thereby enhancing the opportunity for the successful education of the remaining New Brunswick and Milltown pupils. The continued presence of Milltown pupils in New Brunswick High School will help preserve the school's above-stated racial percentages.

With respect to the North Brunswick High School, the racial composition resulting from implementation of the recommended plan, 80 percent white and 20 percent nonwhite, will preserve the values of integrated education within the space limitations of the new high school. These statistics are for ninth, tenth, eleventh and twelfth grades and reflect approximately a 16 percent change from the present ratio of white to nonwhite North Brunswick pupils.

Given the complexities of scheduling, and the time required for proper program development, it is apparent that the recommended plan cannot be successfully implemented for the 1974-75 academic year. It is accordingly urged that the above recommendations be ordered implemented for the 1975-76 school year. It should be noted that projected racial percentages are approximate. It is impossible to determine in advance the exact pattern of school enrollment which would result from the full implementation of the above-stated recommendations.

This concludes the report of the hearing examiner.<sup>1</sup>

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<sup>1</sup>Since the above report was drafted, the United States Supreme Court decided *Bradley v. Milliken, supra*, which dealt squarely with the issue of racial balance across school district lines from a federal constitutional standpoint.

The Commissioner provided each party the opportunity to submit Memoranda of Law on the questions of the applicability of that decision to the current controversy.

Upon preliminary consideration, the hearing officer determines that the interpretation of federal law contained in the report as submitted, which cited the pendency of the *Bradley v. Milliken* decision, remains consistent with the United States Supreme Court decision in that case. The hearing officer also believes that the *Bradley v. Milliken* decision does not impinge upon New Jersey's own efforts to deal with questions of racial balance. Accordingly, the report and recommendations may stand as submitted and should be issued forthwith.

The ultimate decision regarding the effect of *Bradley v. Milliken* is, of course, reserved for the Commissioner of Education.

The Commissioner has reviewed the instant matter and the report of the hearing examiner, and has carefully considered the exceptions thereto as filed by counsel pursuant to *N.J.A.C.* 6:24-1.16, and, when warranted, has modified the findings and recommendations contained therein. In addition, the Commissioner has studied the August 19, 1974 transcript of oral argument on a North Brunswick Board Motion to Dismiss. He also reviewed the Memoranda of Law submitted by parties respondent pursuant to a request by Fred H. Combs, Jr., Assistant Commissioner of Education in charge of Controversies and Disputes, soliciting views of the parties respondent regarding the impact of the decision of the United States Supreme Court in *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) upon the instant matter.

The Commissioner observes that these proceedings began in June 1971 and have followed a tortuous process culminating in the report of the hearing examiner on August 13, 1974. During this three-year period the hearing examiner admitted evidence considered relevant by any of the parties. The North Brunswick Township Committee was permitted to join in an *amicus* capacity. Various Petitions and applications were heard, adjudicated, and appealed. There were periods during which parties respondent indicated the desire for a mutually determined solution to the problems; such agreement, however, was never finalized. The hearing in this matter was concluded on January 30, 1974, and Briefs on the merits were finally filed by May 20, 1974. On July 25, 1974, *Milliken v. Bradley*, *supra*, was decided and the North Brunswick Board and the Milltown Board filed a Motion to Dismiss based on this decision. In the interest of correcting a deteriorating educational situation for New Brunswick and North Brunswick pupils, the Commissioner issued an interim order on August 17, 1974, making pupil assignments for the 1974-75 school year.

The report of the hearing examiner, supplemented by consideration of the impact of *Milliken v. Bradley*, *supra*, is now before the Commissioner for final determination. In the Commissioner's judgment *Milliken v. Bradley* is not, in itself, dispositive of this matter. Reading of *Milliken* and *San Antonio Independent School District et al. v. Demetrio P. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), convinces the Commissioner that the United States Supreme Court intends to rely on the States for the administration of public education. The language in *Rodriguez* is clear on this point:

“\*\*\* The consideration and initiation of *fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States*, and we do no violence to the values of federalism and separation of powers by staying our hand.\*\*\*”  
(*Emphasis supplied.*) 93 S. Ct. at 1309

and,

“\*\*\* [T]his is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.\*\*\* We are asked to condemn the State's judgment in conferring on

political subdivisions the power to tax local property to supply revenues for local interests. *In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures.\*\*\**" (Emphasis supplied.) 93 S. Ct. at 1300

The strong language contained in the New Jersey Constitution against racial segregation, plus the clearly different factual situation existing in the instant matter from that in *Milliken v. Bradley, supra*, compels the Commissioner to determine this matter in accordance with the New Jersey Constitution and statutory and judicial law pursuant thereto.

It should be noted that the Commissioner is not here gratuitously considering reaching beyond district lines. What is at issue is the determination of a contractual relationship—in the case of North Brunswick, one that has existed for over one hundred years. The Commissioner believes that unless he has a clear basis for taking affirmative action in terminating this relationship, he may be violating the *Milliken* rationale by taking official action which might result in racial segregation. For that reason, it is imperative that the principles articulated in *Booker v. Board of Education of the City of Plainfield*, 45 N.J. 161 (1965) and *Jenkins, supra*, be carefully applied in determining whether the instant sending-receiving relationship should be terminated.

The Commissioner accepts and adopts as his own the following findings of the hearing examiner:

1. *Jenkins v. Morris Township, supra*, does not provide authority for the merger relief sought by the New Brunswick Board and the City. In *Jenkins*, the Court did not intend to confer power upon the Commissioner to merge school districts under the situation described in the hearing examiner's report either directly or by any reasonable extension of its rationale. This determination is based upon the hearing examiner's finding that the record in the instant matter does not support the conclusion that New Brunswick, North Brunswick, and Milltown constitute a single community but are, in fact, three separate and distinct communities.

2. Stabilized racial balance cannot be achieved solely by regionalizing the three school districts. School populations of surrounding districts would have to be included if the percentage of nonwhite students is to be stabilized.

3. The New Brunswick Board is not furnishing adequate high school facilities to house and satisfactorily educate the pupils of all three school districts. New Brunswick High School is overcrowded and in 1973-74 operated on a double-session school program. The Commissioner finds that the record clearly supports the need for two high school facilities to meet the needs of the pupils from New Brunswick, North Brunswick, and Milltown who attended the New Brunswick High School during the 1973-74 academic year. The Commissioner holds that to include the high school facility in North Brunswick in the existing sending-receiving relationship would be an extension of statutory authority not warranted without merger power. Since the Commissioner can find no authority in *Jenkins, supra*, to merge the districts, he cannot use the

provisions of *N.J.S.A.* 18A:38-21 to order the use of the North Brunswick facility for purposes other than those intended by the voters of that school district. Accordingly, the Commissioner determines that good and sufficient reason has been demonstrated for permitting the withdrawal of North Brunswick tenth, eleventh, and twelfth grade pupils from the New Brunswick High School.

The Commissioner is constrained to comment that he abhors the existence of a segregated society and firmly believes that all elements of government have a fundamental responsibility to support programs which will lead to a successful integration. He further observes that the North Brunswick Board of Education has formally recognized this problem in a resolution passed in July 1971, *ante*. The Commissioner regrets that the Boards of Education in the instant matter were unable to arrive at a mutually agreeable solution in accordance with that resolution, but continues to hope that the importance of the principle will be of such overriding value so as to endure beyond the strife of the moment. In the judgment of the Commissioner, his authority is limited, under the circumstances of this case, in regard to the achievement of the goal of successful integration. The Commissioner can only provide some mechanism by which this hope for a mutually agreeable solution may be kept alive. Accordingly, the Commissioner believes that some voluntary pupil exchange between the two high schools is highly desirable and not beyond the reasonable expectation of persons of good will.

The Commissioner accepts the following recommendations of the hearing examiner and orders:

1. That the merger relief sought by the New Brunswick Board and City be denied.
2. That the sending-receiving relationship between North Brunswick and New Brunswick be and is terminated forthwith, with the exception that any North Brunswick pupil currently enrolled in New Brunswick High School be permitted to remain on a voluntary basis for the duration of his/her high school education.
3. That the North Brunswick Board of Education provide space at the North Brunswick High School to accommodate up to 200 volunteering pupils from New Brunswick yearly, for a ten-year period. The New Brunswick Board of Education may select, from those volunteering, pupils whose educational interests, in its judgment, would be best served by attendance at North Brunswick. New Brunswick and North Brunswick Boards are urged to use this pupil assignment to build linkages between the two school communities in order to ameliorate the negative effects of racial segregation. Both New Brunswick and North Brunswick are specifically charged with the educational responsibility of working to make a reality of their mutually espoused concern for racial harmony.
4. That the Milltown Board of Education comply with the Commissioner's interim order of August 15, 1974, and continue its sending-receiving relationship with New Brunswick pending determination of Milltown's

September 4, 1974 appeal to the State Board of Education of the interim order. The Commissioner determines that the Milltown Board's application for termination of its sending-receiving relationship with New Brunswick, previously held in abeyance (Decision on Motion, dated March 27, 1973), may now proceed to plenary hearing before the Commissioner.

COMMISSIONER OF EDUCATION

October 25, 1974

Pending before State Board of Education

**South Plainfield Education Association,  
a non-profit corporation to the State of New Jersey, and Marilyn Winston,**  
*Petitioners—Appellants,*

*v.*

**Board of Education of the Borough of South Plainfield,  
in the County of Middlesex,**

*Respondent.*

**STIPULATION OF DISMISSAL WITH PREJUDICE**

For the Petitioners—Appellants, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Robert J. Cirafesi, Esq.

The matters in dispute in connection with the above matter having been amicably resolved by and between the parties, it is hereby stipulated that the Petition in the above matter be and the same is hereby dismissed, with prejudice.

[Pursuant to instructions of New Jersey Superior Court (125 *N.J.Super.* 131 (*App. Div.* 1973) ) on remand to Commissioner of Education]

November 1, 1974

**Frank P. Hegyi,**

*Petitioner,*

*v.*

**Lorraine Tyler and the Board of Education of the Borough of  
Fieldsboro, Burlington County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Frank P. Hegyi, *Pro Se*

For the Respondent, Sever & Hardt (Ernest N. Sever, Esq., of Counsel)

Petitioner, a resident of the Borough of Fieldsboro, alleges that Lorraine Tyler is not a qualified member of the Board of Education of the Borough of Fieldsboro. He asks the Commissioner of Education to determine affirmatively her lack of qualification and to remove her from her seat on the Board.

A hearing in this matter was conducted on June 24, 1974 in the Extension Services Building, Mount Holly, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

Respondent was elected to a seat on the Board for a three-year term at the annual school election held in February 1974. Petitioner avers that respondent lacks standing as a resident pursuant to *N.J.S.A. 18A:12-1* which reads in pertinent part as follows:

"Each member of any board of education shall be a citizen and resident of the district \*\*\* and shall have been such *for at least two years immediately preceding his \*\*\* election \*\*\*.*" (*Emphasis supplied.*)

Specifically, petitioner's charge is that:

"\*\*\* Respondent, Mrs. Lorraine Tyler, in May 1973, moved from a home located at 17 Second St., Fieldsboro, which she and her husband had been renting, to an apartment owned by her father and mother, Mr. and Mrs. Frank Simon, located at 1028 Route 206, Bordentown Township. She remained at the above stated address in said Bordentown Township until late October 1973, when she moved into premises owned by her and her husband at 15 Second St., Fieldsboro. The latter residence had been damaged by fire in February 1970, and the Tyler family is currently residing there under a temporary certificate of occupancy. \*\*\*" (Petition of Appeal, at p. 1)

Testimony adduced at the hearing reveals that respondent's home at 15 Second Street, Fieldsboro, was seriously damaged by fire near the end of February 1970. After the fire the family accepted shelter that was offered them

for two days; then they moved to their parents' home in Bordentown Township for two and one-half or three weeks. During the "middle of March" 1970 (Tr. 26), respondent moved back to Fieldsboro, and rented an apartment at 17 Second Street, until May 1973, when the family returned to live with their parents until October 1973. (Tr. 25-29) Respondent testified that they had no fire insurance on their home when it burned and they lost everything. She testified, also that, after the fire in February 1970, they began reconstructing and remodeling their home at 15 Second Street whenever money and time would permit. This work on their home was sufficiently completed in October 1973, when they again regained occupancy at their former address (15 Second Street). (Tr. 25, 28, 33, 35, 43, 45, 55)

Respondent testified further that her family moved from Fieldsboro to Bordentown Township in May 1973, because the house in which she rented an apartment at 17 Second Street was sold. The new owners gave them a thirty-day notice to move out of their apartment, and they could not find another place in which to live in Fieldsboro. (Tr. 27) Therefore, respondent does not deny that she and her family lived with their parents in Bordentown Township for a period of time between May and October 1973, when they returned to Fieldsboro.

The record reveals that respondent, her husband, and her four children, ages 10, 7, 6, and 4, now reside at 15 Second Street, Fieldsboro, and respondent's family has resided there since April 1968, except for approximately three weeks after the fire in February 1970, and for the period May through October 1973, during which time they resided with their parents in Bordentown Township.

At the hearing, petitioner implied that respondent and her family took an inordinate period of time in which to repair their home. (Tr. 35-38) Petitioner also implied that respondent's home may not qualify as a residence because they do not have a "Certificate of Occupancy." (Tr. 38) The hearing examiner stated on the record that permission for the occupancy of a building is a function of local government and not that of the Commissioner of Education. (Tr. 38-39)

The period of time required to repair a damaged home may or may not be governed by local ordinances; however, the hearing examiner finds no need to pursue that argument because it is not germane to the real issue in contention. That issue is whether or not those periods of time respondent and her family resided with her parents disqualify her as a Board of Education member pursuant to *N.J.S.A. 18A:12-1*.

Petitioner states that a similar matter was decided by the Commissioner in *Beceiro v. Anderson and Board of Education of the Township of Holmdel, Monmouth County*, 1967 S.L.D. 198, and Anderson was removed from his seat on the Board of Education. He argues that the matter herein is exactly the same, and therefore, Lorraine Tyler should be removed from her seat on the Board. (Tr. 62-63)

Respondent argues that the facts in this matter are altogether different from *Beceiro, supra*.



In *Beceiro*, the Commissioner said:

“\*\*\* Respondent took title to a home in Holmdel Township on October 13, 1959, and was subsequently elected to a seat in the Board of Education of that district. In 1965 he sold his home, purchased another building lot in the Township, and contracted for the construction of a residence on the acquired lot. On or about September 3, 1965, and during the erection of his new residence, respondent removed himself, his wife, and their three children to a furnished three-room bungalow owned by a relative and located in the municipality of Long Beach Township in Ocean County, for which they paid no rent or other occupancy charge. Respondent’s household goods were placed in storage with the understanding that they were to be delivered at the proper time to the new residence in Holmdel. Respondent’s three children were enrolled in the Long Beach Island school system where the school records indicate that their registration and attendance was of a temporary nature. Construction of respondent’s new residence in Holmdel proceeded during the period from September 1965 to September 1966. In September 1966, respondent and his family took possession of their new residence in Holmdel and have resided there since that time.

“During this construction period, in February 1966, the Commissioner of Registration for the County of Monmouth determined that within the purview of R.S. 19:4-1, respondent did not actually reside in any election district of the Township of Holmdel. This determination was confirmed by Order of the Monmouth County Court directing the Commissioner of Registration to remove the registration records of respondent from the voting records of the Township of Holmdel.”\*\*\*” (at pp. 198-199)

The Commissioner concluded that that matter was *res judicata*, having been decided by the Court, and since Anderson was not qualified to vote he could not qualify for an elective seat on the Board of Education. Therefore Anderson’s seat on the Board was vacated.

Respondent argues further that the indicia of domicile or residency, and respondent’s intent, establish the fact that she at all times since 1968 has been a resident of Fieldsboro.

Respondent and her husband offered uncontradicted testimony to support their indicia of residency or domicile as follows:

1. They never intended to change their legal domicile or residence. (Tr. 30)
2. Their drivers’ licenses and car registrations always revealed a Fieldsboro address. (Tr. 30)
3. All income tax returns were filed giving a Fieldsboro address. (Tr. 31)

4. A Fieldsboro address was used also on the following records: (Tr. 31, 45-47)
  - a. Checking and saving accounts,
  - b. Places of employment,
  - c. Trade Union membership,
  - d. Voter registration,
  - e. Insurance policies,
  - f. All financial transactions. (Tr. 46-47)
5. Their mail was always delivered to the 15 Second Street address and was picked up daily. (Tr. 32)
6. Their children have at all times attended Fieldsboro schools and were transported to school daily by their parents. (Tr. 6-10)
7. Their dog was kept at the 15 Second Street address and was cared for daily. (Tr. 30, 42)
8. They received a mortgage in July 1973, which enabled them to do more repairs on their home. (Tr. 41-42)

The hearing examiner finds that the instant matter is distinguishable from *Beceiro, supra*, because it is not *res judicata* as a result of Court action. Further, it is distinguishable because respondent in the *Beceiro* matter voluntarily sold his home in Holmdel and moved out of that community pending completion of construction on his new home: whereas Lorraine Tyler was involuntarily forced to seek other living arrangements after her home burned and after she was forced to move from the apartment she rented in Fieldsboro.

*Black's Law Dictionary* (rev. 4th ed. 1968) defines residence as follows:

"A factual place of abode. Living in a particular locality. *Reese v. Reese*, 179 Misc. 665, 40 N.Y.S. 2d 468, 472; *Zimmerman v. Zimmerman*, 175 Ord. 585, 155 P. 2d 293, 295. It requires only bodily presence as an inhabitant of a place. In *re Campbell's Guardianship*, 216 Minn. 113, 11 N.W. 2d 786, 789.

"As 'domicile' and 'residence' are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place *and also an intention to make it one's domicile*. In *re Riley's Will*, 266 N.Y.S. 209, 148 Misc. 588. 'Residence' demands less intimate

local ties than 'domicile', but '*domicile*' allows absence for indefinite period if intent to return remains. Immigration Act 1917, § 3, 8 U.S.C.A. § 136 (e,p). *Transatlantica Italiana v. Elting*, C.C.A.N.Y., 74 F. 2d, 732, 733. But see, *Ward v. Ward*, 115 W. Va. 429, 176 S.E. 708, 709; *Southwestern Greyhound Lines v. Craig*, 182 Okl. 610, 80 P.2d 221, 224; holding that residence and domicile are synonymous terms. 'Residence' has a meaning dependent on context and purpose of statute. In re Jones, 341 Pa. 329, 19 A.2d 280, 282. Words 'residence' and 'domicile' may have an identical or variable meaning depending on subject matter and context of statute. *Kemp v. Kemp*, 16 N.Y.S. 2d 26, 34, 172 Misc. 738." (*Emphasis supplied.*) (at p. 1473)

Domicile is defined as:

"That place where a man has his *true, fixed, and permanent home* and principal establishment, *and to which whenever he is absent he has the intention of returning*. *Kurilla v. Roth*, 132 N.J.L. 213, 38 A.2d 862, 864; In re *Stabile*, 348 Pa. 587, 36 A.2d 451, 458; *Shreveport Long Leaf Lumber Co. v. Wilson*, D.C. La., 38 F.Supp. 629, 631, 632. *Not for a mere special or temporary purpose*, but with the *present intention* of making a permanent home, for an unlimited or indefinite period. In re *Garneau*, 127 F. 677, 62 C.C.A. 403; In re *Gilbert's Estate*, 15 A.2d 111, 117, 118, 18 N.J. Misc. 540; In re *Schultz' Estate*, 316 Ill. App. 540, 45 N.E. 2d 577, 582; *Davis v. Davis*, Ohio App., 57 N.E.2d 703, 704. \*\*\*\*"

And,

"The word 'domicile' is derived from latin 'domus' meaning *home or dwelling house*, and domicile is legal conception of 'home'. In re *Schultz' Estate*, 316 Ill. App. 540.

"The established, fixed, permanent, or ordinary dwelling place or place of residence of a person, *as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode*; or his home, as distinguished from a place to which business or pleasure may temporarily call him. *Towson v. Towson*, 126 Va. 640, 102 S.E. 48, 52. \*\*\*\*"

Also,

"'Domicile' and 'residence', however, are frequently distinguished, in that domicile is the home, the fixed place of habitation; while residence is a transient place of dwellings. *Fisher v. Jordan*, C.C.A. Tex., 116 F.2d 183, 186; *Minich v. Minich*, 111 Fla. 469, 149 So. 483, 488; *Hartzler v. Radeka*, 265 Mich. 451, 251 N.W. 554. \*\*\*\*" (*Emphasis supplied.*) (at p. 572)

Based upon the above-stated facts concerning Mrs. Lorraine Tyler's circumstances, and in view of the definitions of the terms domicile and residence, the hearing examiner recommends that the Commissioner determine Mrs. Tyler to have been domiciled within the Borough and School District of

Fieldsboro at all times since 1968, and further, that she is a *bona fide* member of the Board of Education of the Borough of Fieldsboro.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner, and he concurs with the conclusion and recommendations expressed therein. This concurrence is grounded in the fact that, by all indicia, respondent's move from the Borough of Fieldsboro for a five-month period in 1973 was a move for a special or temporary purpose. She clearly intended to return to Fieldsboro during all of the period and did so return in October 1973. In such circumstances, respondent's original domicile continued in law. The Commissioner so holds.

This determination is grounded in a series of decisions by the Commissioner and the courts which hold, in essence, that a physical change of a person's abode must be accompanied by an intention of making the new abode his/her permanent home to justify a conclusion that his/her legal domicile has been changed.

In previous instances, the Commissioner has been called upon to determine the domicile of parties in order to ascertain the appropriate school district to be attended. *Laufer et al. v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County*, 1970 *S.L.D.* 424; *Rutgers, the State University et al. v. Board of Education of the Township of Piscataway, Middlesex County*, 1963 *S.L.D.* 163; *Board of Education of Borough of Franklin, Sussex County v. Board of Education of the Township of Hardyston et al.*, 1954-55 *S.L.D.* 80

The courts of this State have determined that every person is deemed to have a domicile somewhere under all circumstances and conditions, and that a person may have several residences or places of abode, but can have only one domicile at a time. In *State v. Benny*, 20 *N.J.* 238 (1955), then Chief Justice Vanderbilt, writing for the Court, stated the following at p. 215:

“\*\*\* It is everywhere conceded that a person can have only one true domicile, which is synonymous with the common understanding of the word ‘home.’ *Stout v. Leonard*, 37 *N.J.L.* 492 (*E. & A.* 1874); *Cromwell v. Neeld*, 15 *N.J. Super.* 296 (*App. Div.* 1951).

“\*\*\* Residence, on the other hand, though parallel in many respects to domicile, is something quite different in that the elements of permanency, continuity and kinship with the physical, cultural, social and political attributes which inhere in a ‘home’ according to our accepted understanding, are missing. Intention adequately manifested is the catalyst which converts a residence from a mere place in which a person lives to a domicile.\*\*\*”

The Court cited Mr. Justice Heher, in *State v. Garford Trucking, Inc.*, 4 *N.J.* 346 (1950), where he said at p. 353:

“\*\*\* ‘Domicile’ and ‘residence’ are not convertible terms, although they are sometimes used interchangeably in legislative expressions. The polestar in each case is the intention of the lawmaking authority. *E.g.*, *Brown v. Brown*, 112 *N.J. Eq.* 600 (*Ch.* 1933). See 28 *C.J.S.* 7, 14.\*\*\*”

Accordingly, the Commissioner finds no merit in the instant Petition, and it is hereby dismissed.

COMMISSIONER OF EDUCATION

November 6, 1974

“D.I.” and “E.I.,” guardians *ad litem* for “A.I.,”

v.

*Petitioners,*

Arthur R. Neumann, Principal, Oakcrest High School;  
C. Joseph Martin, Superintendent, and Board of Education,  
Greater Egg Harbor Regional High School District, Atlantic County,

*Respondents.*

COMMISSIONER OF EDUCATION

#### DECISION

For the Petitioners, Cape-Atlantic Legal Services (Charles Middlesworth, Jr., Esq., of Counsel)

For the Respondents, Champion & Champion (Edward W. Champion, Esq., of Counsel)

Petitioners, parents of a daughter who formerly attended Oakcrest High School, allege that their daughter, hereinafter “A.I.,” has been improperly excluded from high school by its administrators and, therefore, denied her constitutional and statutory right to a free public school education.

Petitioners allege also that the school’s administrators have been supported in their action by the Board of Education of the Greater Egg Harbor Regional High School District, hereinafter “Board,” and pray that the Commissioner of Education direct the Board to reinstate A.I. as a pupil in the high school and mitigate to the greatest extent possible the lost education caused by her exclusion.

The Board admits that A.I. was excluded from school; however, it asserts that her exclusion is proper and based on a series of incidents of emotional behavior displayed by A.I., which prompted the Board to require her examination by its Child Study Team prior to her reassignment in its schools.

An oral argument in this matter was held at the State Department of Education, Trenton, on June 21, 1974 before a hearing examiner appointed by the Commissioner. Thereafter, counsel filed Briefs and numerous supporting documents and letters which reveal, in detail, the history of the instant matter. The report of the hearing examiner is as follows:

The record reveals a series of disciplinary infractions by A.I., beginning in September 1972, her ninth grade year in high school, and continuing for the ensuing four and one-half months until her administrative exclusion from school on or about January 10, 1973. A.I.'s discipline record includes problems of frequent lateness to class, fighting, disrespect to her teachers, leaving class without permission, non-participation in class, cutting class, walking out of detention class, and calling a teacher disrespectful names and striking that teacher. A.I. has been suspended from school for short periods of time because of her poor behavior as reported, *ante*, and was excluded from school on January 10, 1973 after the striking incident and referred to the Child Study Team for a complete evaluation. (Exhibit J)

The vice-principal of the high school notified A.I.'s mother by telephone on the day that A.I. was excluded from school pending her evaluation by the Child Study Team. A school social worker called A.I.'s mother on the same afternoon and scheduled a meeting with her on January 18, 1973 to discuss the situation with school authorities.

The record shows that A.I. has been evaluated by members of the Child Study Team as follows:

1. January 11, 1973 – Adolescent Study Team Staffing (Exhibit A)
2. January 18, 1973 – Learning Disabilities Evaluation (Exhibit B)
3. January 18, 1973 – Psychological Evaluation (Exhibit C)
4. January 28, 1973 – Social History (family) (Exhibit D)
5. January 31, 1973 – Adolescent Study Team Staffing (Exhibit E)

The Child Study Team reports reveal, *inter alia*, that A.I. had behavior problems during most of her years in elementary school, and that these problems became more acute during and after grade six. They also attest to certain other facts; namely, that she was doing poorly in her academic work, and that she deliberately reacted poorly to the psychological test because she wanted to make the psychologist angry, although it appears she worked conscientiously for the learning disabilities specialist. (Learning Disabilities Evaluation) The recommendations by the Child Study Team included the following:

“\*\*\* After considering all other evaluations, the Adolescent Study Team feels that it is necessary to have a psychiatric evaluation in order to assess her present emotional status. Until such time as this is accomplished, the Team can make no further recommendations.” (Exhibit E)

This recommendation by the Child Study Team on January 31, 1973, supports the same recommendation for a psychiatric examination made on January 11, 1973 (Exhibit A), the day after A.I.'s exclusion and prior to any

evaluations by the team.

The Board contends that petitioners initially agreed to a psychiatric examination for A.I., although they later modified their position and agreed only to an examination conducted by a psychiatrist of their own choosing. Petitioners thereafter refused to have any psychiatric evaluation. (Petition of Appeal, Exhibit D) A.I., therefore, was not readmitted to school.

On March 8, 1973, petitioners were summoned to Court before Hon. Milton Schusler, Municipal Magistrate of Hamilton Township, Atlantic County, for failure to have A.I. in school pursuant to *N.J.S.A. 18A:38-25* which reads as follows:

“Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.”

The Court directed petitioners to have A.I. examined in accordance with the recommendations of the Child Study Team (Exhibits A,E) so that a proper educational program could be established by the school for A.I. (Board's Answer) (Note: Petitioners did have A.I. examined by a psychologist (Exhibit K) who, they assert, is a relative. (Exhibit G) The Board has refused to accept this evaluation.)

Counsel informed the hearing examiner that A.I. was transferred by her parents to an out-of-State school for the remainder of the 1972-73 school year. She did not attend any school for the 1973-74 school year.

The positions of the parties herein are succinctly summarized as follows:

1. The Board insists that A.I. have a psychiatric examination as a prerequisite for readmittance to a proper school program. The Board asserts that petitioners may select their own psychiatrist if they choose to do so. (Brief of Respondents, at p. 7)
2. Petitioners refuse to have A.I. examined by a psychiatrist.

The result of this impasse is that A.I. is receiving no public school education whatsoever.

Petitioners argue that A.I. has been guaranteed a free public school education by the New Jersey Constitution, the education statutes, and applicable administrative regulations. Petitioners aver that this request for a psychiatric examination is a guise for disciplinary action by the Board, and it is not a true administrative exclusion designed to help A.I. They assert further that A.I. “\*\*\*has been, *de facto*, expelled; [and] \*\*\*left to themselves, respondents will permit [A.I.] to remain out of school permanently.\*\*\*” (Petitioner's Brief, at p. 3)



The Board avers that it intends to continue A.I.'s education, but can do so only after she has been properly evaluated, as previously set forth. The Board avers finally that it is unable to plan a proper educational program for A.I. until that evaluation is completed; specifically, until A.I. submits to a psychiatric evaluation.

The authority for a local board of education to classify pupils is provided by *N.J.S.A. 18A:46-1 et seq.* Specifically, *N.J.S.A. 18A:46-16* reads as follows:

"A pupil may be refused admission to, or be excluded temporarily from, the schools of any district for a reasonable time pending his examination and classification pursuant to this chapter."

In accordance with the applicable statutes, the Administrative Code, specifically *N.J.A.C. 6:28-1.1*, provides in part that:

"\*\*\* (c) The legislation specifically requires each local public school district to identify and classify all handicapped children between the ages of five and 20 and to provide an appropriate educational program for them. Beyond this, the local public school district may identify and classify handicapped children below the age of five and beyond the age of 20 who do not hold a diploma from an approved secondary school and may provide appropriate educational programs.\*\*\*"

*N.J.A.C. 6:28-1.3(b)* also provides that:

"\*\*\* (b) A child study team may also include a *psychiatrist* experienced in work with children, a school administrator, a classroom teacher, a school nurse, a guidance counselor, a speech correctionist, a remedial reading teacher, and other members of the school professional staff as may be recommended by the basic child study team with the approval of the chief school administrator.\*\*\*" (*Emphasis supplied.*)

Additionally, *N.J.A.C. 6:28-2.1* provides in part that:

"\*\*\* 2. Classification of emotionally disturbed children and recommendations of educational programs shall be made by the basic child study team augmented by the evaluation of a psychiatrist trained or experienced in working with children.\*\*\*"

Thus, the statutory and administrative authority to require a psychiatric examination for a pupil is clearly set forth. The hearing examiner has reviewed such authority, listened to the oral arguments of counsel, and examined the briefs and exhibits. As a result of such examination he finds no evidence that the Board has acted in an arbitrary or discriminatory manner, and to the contrary, finds that the Board stands willing to place A.I. in a suitable educational program as soon as she is evaluated by a psychiatrist.

Petitioners contend that A.I. was not given a full hearing prior to her exclusion. This argument cannot be supported because there is no statutory or

administrative requirement for a hearing as a prerequisite for a temporary exclusion pursuant to *N.J.S.A. 18A:46-6*. However, the record shows not only that petitioners knew the reasons for her exclusion, but consented to the requirements for an evaluation by the Child Study team. A.I.'s mother also met with school authorities to discuss her problems.

The authority of a Board to require a psychiatric evaluation of a pupil when it deems it necessary cannot be lightly challenged. The Commissioner has previous upheld the action of boards who have placed pupils in educational programs *after* Child Study Team evaluations, including evaluations by psychiatrists. *In the Matter of "D" v. Board of Education of Scotch Plains-Fanwood and Fred Laberge, Superintendent of Schools, Union County*, 1971 *S.L.D.* 509

The Commissioner has recognized the important need, under certain circumstances, for a psychiatric examination of emotional behavior by a pupil, as a prerequisite for an expulsion action by a board. *"R.K." v. Board of Education of the Township of Lakewood, Ocean County*, 1973 *S.L.D.* 343 In *"R.K."* the Commissioner stated in part:

\*\*\*\* that the Board expelled R.K. without securing a prior evaluation by its Child Study Team and an examination by its school psychiatrist.

\*\*\*\* *the Board is directed to have R.K. evaluated by its Child Study Team, including examination by its school psychiatrist.* The Commissioner directs that the Board be guided by these examinations and recommendations in taking further action regarding R.K.\*\*\*\* (Emphasis supplied.) (at p. 347)

In *"M.O." v. Board of Education of the Township of Deptford, Gloucester County*, 1972 *S.L.D.* 641, the Commissioner quoted from his earlier decision *In the Matter of "D"*, *supra*, as follows:

\*\*\*\* Personnel of such child study teams are specifically empowered to make just such judgments as that made herein. Admittedly, it is a difficult task, but as the Commissioner observed in *The Parents of K.K. v. Board of Education of the Town of Westfield, Union County*, decided by the Commissioner June 1, 1971:

\*\*\*\* the State Board of Education has required each district to employ highly-qualified personnel representing many disciplines. The certification standards for these team members are high. When, as in this instance, such a team makes a judgment it is qualified and mandated to make\*\*\*\* *that judgment will not be determined to be faulty* or incorrect by the Commissioner; *absent* a clear showing of procedural fault or an arbitrary exercise of discretion without proper diagnostic information.\*\*\*\* ” (Emphasis in text.) (at pp. 644-645)

He, therefore, upheld the placement of *"M.O."* by the Board.

The hearing examiner finds in the instant matter no procedural defect in A.I.'s exclusion or the requirement by the Board that she submit to a psychiatric evaluation. However, the Board now knows that A.I. did not continue her education out-of-state as she did for the balance of her ninth grade year in high school; therefore, the hearing examiner recommends that the Commissioner direct the Board to require that:

1. A.I. submit to a psychiatric evaluation.
2. Petitioners be directed to enroll A.I., after the psychiatric examination, in an educational program prescribed for her by the Board or in an equivalent program at their own expense.
3. If petitioners do not comply as directed, all further appropriate measures should be taken to insure compliance with the statutes of the State of New Jersey which compel school attendance by all children between the ages of six and sixteen.

The hearing examiner recommends further, that petitioners' prayer for interim relief and immediate reinstatement pending a Commissioner's decision in this matter be denied.

This concludes the report, findings, and recommendations of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record of the instant matter, including the report of the hearing examiner, and the exceptions filed thereto pursuant to *N.J.A.C. 6:24-1.16*. He finds no evidence that the Board, or the Child Study Team, given the events and circumstances leading to the directive that A.I. be examined by a psychiatrist, acted in an arbitrary, discriminatory, or otherwise improper manner. Rather, it is clear that A.I. was excluded from school pursuant to *N.J.S.A. 18A:46-16* and was properly required to submit to a psychiatric examination pursuant to *N.J.A.C. 6:28-1.1 et seq.*

Parents of A.I. contest the authority of the Board to require a psychiatric examination. The Commissioner finds no merit in this position. *N.J.A.C. 6:28-2.1* makes specific provision that a Child Study Team in arriving at a determination regarding social maladjustment shall be guided by the following:

“ ‘Socially Maladjusted’

- “1. A child shall be considered to be socially maladjusted when his pattern of social interaction is characterized by conflicts which he cannot resolve adequately without the assistance of authority figures, or when his behavior is such as to interfere seriously with the well-being or the property of those which whom he associates.
- “2. The socially maladjusted child exhibits his maladjustment chiefly in his persistent inability to abide by the rules and regulations of social structure.

- “3. Classification of socially maladjusted children and recommended educational programs shall be made by the basic child study team *augmented by the evaluation of a psychiatrist trained or experienced in working with children.*” (Emphasis supplied.)

Similar provision is made in *N.J.A.C. 6:28-2.1* for an evaluation by a psychiatrist when the Child Study Team suspects that emotional disturbance may be present.

Parents of A.I. have sought to unilaterally modify the Board's requirement by presenting in lieu thereof a report by a psychologist. In no sense is the report of a psychologist considered to be equivalent to the evaluation by a medical doctor with a degree in psychiatry. Petitioners' refusal to have A.I. submit to a psychiatric evaluation is in contravention of the constituted authority of the Board. The Commissioner so holds.

The Commissioner denies petitioners' plea for immediate reinstatement in the absence of compliance with the Board's reasonable requirements. He directs that A.I. submit to a psychiatric evaluation and that, upon receipt of the psychiatrist's report, the Child Study Team prescribe for her an appropriate program. He further directs that A.I. then be enrolled by her parents in the Board's school or at their discretion in an equivalent program at their own expense. Finally, he directs that, in the event petitioners refuse to comply with the above directives or with the provisions of *N.J.S.A. 18A:38-25*, the Board take appropriate and prompt action to insure compliance with the statutes and regulations of the State of New Jersey herein set forth.

COMMISSIONER OF EDUCATION

November 6, 1974

**Board of Education of the Southern Regional High School District,**

*Petitioner,*

*v.*

**Boards of Education of the Township of Bass River, Burlington County;  
the Township of Eagleswood, the Township of Little Egg Harbor,  
and the Borough of Tuckerton, Ocean County,**

*Respondents.*

COMMISSIONER OF EDUCATION

### DECISION

For the Petitioner, Berry, Summerill, Rinck & Berry (Jane Rinck,  
Attorney at Law)

For the Respondents, Hiering, Grasso, Gelzer & Kelahe (Milton H. Gelzer,  
Esq., of Counsel)

Petitioner, the Southern Regional Board of Education, hereinafter "Southern Regional Board," has forwarded a resolution to the Commissioner of Education requesting a termination of the sending-receiving relationships which exist between it and the four Boards of Education of the Township of Bass River, Burlington County; the Townships of Eagleswood and Little Egg Harbor, and the Borough of Tuckerton, Ocean County. The respective Boards of Education of these four sending districts oppose the application for termination of the respective sending-receiving relationships and move for dismissal of the Petition of Appeal at this juncture.

A hearing in this matter was conducted on May 20, 1974 at the office of the Ocean County Superintendent of Schools, Toms River, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

The instant controversy is between the Southern Regional Board which is responsible for the government of the Southern Regional High School District, and the boards of education of four of its six sending districts. The Southern Regional Board operates schools for grades seven through twelve. This controversy must be reviewed in the context of the Southern Regional District as an organized whole, in order that it may be viewed objectively in its proper perspective.

The Southern Regional High School first became operational for the 1957-58 school year. At that time, there was one high school building which accommodated approximately 800 pupils enrolled in grades seven through twelve. (P-1; Tr. 46) From that year forward to the present day, the Southern Regional District has been comprised of all school districts within the geographical area known as Long Beach Island and the school district of the Township of Stratford, which is located on the mainland. (Tr. 46) Additionally, Southern Regional High School also receives pupils from six sending districts: the four previously named respondents, plus the school districts of Union and Ocean Townships, Ocean County. (Tr. 46)

Growth in pupil enrollment within the Southern Regional District was modest during the years 1957-70 (Tr. 46-47); but, nevertheless, a building addition was required in 1966 to provide for an additional 500 pupils. (Tr. 47) During the 1970-71 school year, a middle school was added to house grades seven and eight. (Tr. 47) However, according to testimony of the Superintendent of Schools, during the years subsequent to the 1969-70 school year, there has been a rapid increase in pupil enrollment. The Superintendent testified that the Southern Regional District has once again outgrown its available school facilities. (Tr. 74) As evidence of this increased enrollment, he cites the necessity to initiate a so-called "wave" scheduling program for the 1974-75 school year which includes a nine-period school day instead of seven periods, and a delayed starting time for one group of pupils. The Superintendent also testified regarding certain other limitations with respect to curricular offerings. (Tr. 56-58)

These conditions caused the Southern Regional Board to pass the following resolution on December 20, 1971:

“Whereas, population growth in Southern Ocean County, both present and projected for the immediate future, require the Board of Education of Southern Regional High School to make practical plans now for future educational facilities; recognizing that overcrowded schools destroy quality education; further, that school buildings take time to locate, design, finance and staff and that sending districts will need adequate time to make arrangements to accommodate their children in an orderly fashion in convenient, high quality school systems;

“NOW, THEREFORE, BE IT RESOLVED that the Board Secretary be authorized to notify Eagleswood, Little Egg Harbor and Tuckerton of the intention of Southern Regional High School to terminate the sending-receiving relationship at the close of school ending June 1975;

“BE IT FURTHER RESOLVED that Bass River be informed by the Board Secretary, that its present contract will continue to be honored, but that in June 1978, its sending-receiving relationship will be terminated.”

This resolution was held in abeyance for a two-year period while other possible solutions were explored. The sending-receiving agreements between the Southern Regional Board and the Boards of Education of Eagleswood, Little Egg Harbor and Tuckerton will terminate in June 1975, and the agreement between the Southern Regional Board and the Bass River Board will expire in June 1978. The Petition of Appeal states that the underlying reason for the Petition is “projected population growth.” (Petition of Appeal, at p. 3)

In recognition of the aforementioned pupil population problem, and in conformity with the spirit of the resolution, *ante*, the four respondent Boards of Education have, in fact, attempted to make other arrangements for the education of their high school age pupils. The County Superintendent of Schools testified that one regional study including one of the named respondent Boards was completed in September 1972, but failed to receive approval by the voters (Tr. 23-24), and a similar regionalization proposal was defeated in 1973. (Tr. 24) He further testified that, subsequent to this second defeat, the Little Egg Harbor Board decided to withdraw from further regionalization studies and develop its own study. The County Superintendent also testified that a committee of representatives from the school districts of Tuckerton, Eagleswood and Bass River has completed a third regionalization study involving these three school districts. The County Superintendent testified that the proposed three-district regionalization plan has not, to date, been found feasible by the committee, and therefore it has not been approved by the respective Boards for submission to the Commissioner of Education. (Tr. 25)

In any event, this proposal is now held in abeyance, and at the present juncture, the three school districts of Tuckerton, Eagleswood, and Bass River are considering an affiliation with Little Egg Harbor (Tr. 25-26), either in a sending-receiving relationship or in a regionalization. The County Superintendent also testified that these four school districts do comprise a natural geographic grouping. (Tr. 28)

The pupil population projections which are the causative factors for the

Petition of Appeal, *sub judice*, were submitted in evidence by the Southern Regional Board. (See also testimony of the Superintendent of Schools, Tr. 43 *et seq.*) Such projections may be viewed in the context of testimony given at the hearing by the Director of the Building Services Division, State Department of Education, that the functional operating capacity of the Southern Regional High School is 1,517 pupils, and the uncontradicted testimony of the Superintendent of the Southern Regional District that the functional operating capacity of the middle school is approximately 1,050 pupils. (Tr. 55)

The pupil population projections for a five-year period are summarized as follows:

**Projected Enrollment (P-3, Exhibit "D") \*\*\***  
**1974-75**

<b>Sending Districts</b>	<b>Middle School</b>	<b>High School</b>	<b>Total</b>
Bass River	63	69	132
Eagleswood	31	68	99
Little Egg Harbor	191	309	500
Tuckerton	79	145	224
Ocean	113	169	282
Union	101	171	272
Totals	578	931	1,509
<b>Constituent Districts</b>	<b>Middle School</b>	<b>High School</b>	<b>Total</b>
Beach Haven	57	93	150
Long Beach Island	270	506	776
Stafford	195	352	547
	522	951	1,473
<b>Totals:</b>			
Sending Districts	578	931	1,509
Constituent Districts	522	951	1,473
Totals	1,100*	1,882**	2,982

\*Functional Capacity Rated 1,050

\*\*Functional Capacity Rated 1,517

\*\*\*Incorporates an average growth rate grounded in actual experience during the years 1970-73 (See P-3, Exhibits "C" and "D".)

**1978-79 \*\*\***

<b>Sending Districts</b>	<b>Middle School</b>	<b>High School</b>	<b>Total</b>
Bass River	99	61	160
Eagleswood	23	88	111
Little Egg Harbor	291	453	744
Tuckerton	87	173	260



Ocean	157	216	373
Union	<u>153</u>	<u>251</u>	<u>404</u>
Totals	810	1,242	2,052

#### Constituent Districts

Beach Haven	61	101	162
Long Beach Island	370	686	1,056
Stafford	<u>259</u>	<u>468</u>	<u>727</u>
Totals	690	1,255	1,945

#### Totals:

Sending Districts	810	1,242	2,052
Constituent Districts	<u>690</u>	<u>1,255</u>	<u>1,945</u>
Total	1,500*	2,497**	3,997

\* Functional Capacity Rated 1,050

\*\*Functional Capacity Rated 1,517

\*\*\* Incorporates an average growth rate grounded in actual experience during the years 1970-73 (See P-3, Exhibits "C" and "D").

A straight-line projection as developed by Southern Regional Board, which the hearing examiner regards as unrealistic in the circumstances of this fast-growing area, shows a slower rate of growth through the 1978-79 school year and an actual decrease in pupil population thereafter. (See P-3, Exhibit "B".) A summary of this straight-line projection, parallel to the projection which incorporates an average growth rate (P-3, Exhibit "D"), may be set forth as follows for the five-year period 1974-79:

Middle School from 1,012 to 964  
 High School from 1,807 to 1,997  
 Regional District from 2,819 to 2,961

Thus, in summary, petitioner projects the following growth in pupil enrollment for the five-year period 1974-75 through 1978-79 by the use of two statistical methods, one employing an experimental growth factor and the other projecting enrollment totals of only those pupils who are *presently* enrolled in constituent schools or in schools of the sending districts (straight-line):

	1974	1978 Straight- Line	1978 Experiential	Bldg. Capacity
Middle School	1,012 to	964	—	(1,050)
Middle School	1,100 to		1,500	(1,050)
High School	1,807 to	1,997	—	(1,517)
High School	1,882 to		2,497	(1,517)
District	2,819 to	2,961	—	(2,567)
District	2,982 to		3,997	(2,567)

It must be noted, that by use of either method, the present high school

enrollment problem is expected to become more severe during the five-year period 1974-79. (See also R-1, Pupil Population Projection as developed by the Ocean County Superintendent of Schools.) Such projections are disputed only in minor respects by respondents. However, respondents state, with the exception of Egg Harbor, that they are not responsible for the projected increases. Egg Harbor avers that it recognizes the problem and is trying to find a cure, and, therefore, the Petition, *sub judice*, is premature. (Tr. 70-72) All respondents assert that there is no available alternative placement for their pupils in the immediate future.

The Ocean County Superintendent of Schools testified that Tuckerton, Eagleswood, and Bass River are the slowest growing districts in the general area. (Tr. 30; P-3) He also testified that both Union and Ocean Townships believe that they will be large enough by the 1978-79 school year to regionalize and form a high school district of their own. (Tr. 29) However, from his examination of the enrollment projections, he foresees no alleviation of the basically overcrowded conditions in Southern Regional High School by the removal of the four named respondents alone. (Tr. 31) He further testified that if all six sending districts were removed “\*\*\*Southern Regional would be in a very good position\*\*\*.” (Tr. 31) The County Superintendent does not believe that such a withdrawal is feasible at this juncture, because he knows of no available placement to provide for the education of the high school pupils from the respondent schools. (Tr. 22-23)

The Superintendent of the Southern Regional School District, while acknowledging that the problem of overcrowding is not directly caused by growth in the sending districts of Eagleswood, Tuckerton and Bass River, testified as follows:

“\*\*\* every time we build, we must build because of sending districts; and our people feel that the sending districts have reached reasonable size as a composite group to form their own district, their own high school; and we feel and our school district feels they do not want to assume the burden of future expansions.\*\*\*” (Tr. 63)

He also testified that any future building program by the Southern Regional District must include planning for a second high school since “\*\*\*we feel that educationally we would not want to expand our existing high school as many as another thousand students\*\*\*.” (Tr. 64) He testified:

“This would give us a high school of 2,500 or 2,700, and our people feel that’s too large a school.\*\*\*” (Tr. 64)

The Little Egg Harbor Board introduced in evidence a proposed educational plan for the construction and operation of its own high school. (R-2) It was represented at the hearing, however, that the plan had just been received and had not been reviewed or acted upon in a formal manner by the Board. The Little Egg Harbor Board avers that, on the basis of this proposed plan, the instant matter is premature and that no date should be set for the termination of the sending-receiving relationship between it and the Southern

Regional Board at this time. The Little Egg Harbor Board desires to hold the question of termination in abeyance so that it may have sufficient time to properly review the plan.

On the basis of all the available evidence summarized above, the hearing examiner finds and concludes that:

1. As alleged by the Southern Regional Board, the two schools within its districts are operating at or above maximum rated functional capacity and the high school may be presently classified as overcrowded.
2. Overcrowding at the high school is likely to be of increasing severity in the five-year period 1974-75 through 1978-79 and will require emergency measures for its alleviation.
3. The middle school will become overcrowded during the 1974-75 school year and the overcrowding will thereafter increase.
4. The respondent sending districts, with the exception of Little Egg Harbor, have not significantly contributed to past pupil enrollment increases in the regional schools, but, nevertheless, have recognized the common problem and moved with expedition to solve it.
5. Respondent sending district Little Egg Harbor is also exploring a proposed solution.
6. Pending such definitive solutions at this time, there is no available alternative placement for the pupils of the four respondent sending districts other than in the Southern Regional District.

The proceedings, herein, have not been truly adversary in nature; but, to the contrary, almost conciliatory and cooperative in the essential respects. The Boards of Education of the respondent sending districts and the Southern Regional Board have moved expeditiously to an exploration of a variety of solutions to their joint, and ever more pressing, problems. They have been ably assisted by the Ocean County Superintendent of Schools and officials of the State Department of Education.

In such circumstances, the fact of overcrowding in the Southern Regional District poses a simple issue which may be concisely set forth: does the fact of overcrowding, both present and projected in the Southern Regional District, constitute the "good and sufficient reason" required by statutory prescription (*N.J.S.A. 18A:38-13*) for a judgment by the Commissioner of Education that the sending-receiving relationships between the Southern Regional Board and each of the named respondents be severed? This issue must be considered in the context of the applicable statutes and prior decisions of the Commissioner.

The statute most applicable to the instant controversy is *N.J.S.A. 18A:38-13* which sets forth the quantum of proof required whenever the

designation of a high school or high schools is proposed to be changed or terminated. The statute provides in its entirety:

*N.J.S.A. 18A:38-13*

“No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to 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 except for *good and sufficient reason* upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications.”

*(Emphasis supplied.)*

Thus, the reasons advanced for such a change of designation, or the severance of a sending-receiving relationship, must be “good” ones and they must be judged “sufficient” as the result of an “equitable determination” by the Commissioner of Education. In examining such reasons, and in making such determination in prior controversies, the Commissioner has employed multiple criteria, and delineated the parameters of such criteria *In the Matter of the Application of the Upper Freehold Regional Board of Education for the Termination of the Sending-Receiving Relationship with the Board of Education of the Township of Washington, Mercer County*, 1972 *S.L.D.* 627 wherein he said:

“\*\*\* In interpreting the words of these statutes, and similar statutes which have preceded them, the Commissioner has often been required to elucidate the specifics which underlie such judgments.

“Thus, *In the Matter of the Application of the Board of Education of the Township of Green Brook, Somerset County, to Terminate the Sending-Receiving Contract with the Board of Education of the Borough of Dunellen*, 1967 *S.L.D.* 329, the Commissioner refused an application to terminate a sending-receiving relationship initiated by Green Brook, the sending district, on the principal grounds that the:

\*\*\* termination of the sending-receiving contract in 1968 will seriously affect Dunellen both financially and educationally, and he so holds.\*\*\*  
(at p. 334)

“As another case example, the Commissioner found that a sending-receiving relationship should be severed because a receiving district was unable to meet the demands upon it. He stated in this case, *In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of the Township of Lakewood and the Township of Manchester, Ocean County*, 1966 *S.L.D.* 12, that:

\*\*\* continuation of the present sending-receiving relationship can be expected to impose such serious demands upon the high school facilities in Lakewood Board of Education will be unable to provide suitable school facilities for its pupils and to maintain a thorough and efficient system of secondary education.\*\*\*  
(at p. 14)

"A similar request *In the Matter of the Application of the Board of Education of Caldwell-West Caldwell to Terminate Sending-Receiving Relationship With the Board of Education of the Township of Montville Beginning With the Ninth Grade for the School Year 1958-59, 1957-58 S.L.D. 43* was also approved by the Commissioner and he stated that the:

\*\*\* High School is overcrowded, that to continue to increase this overcrowding would impair the educational program of the district and that the pupils from Montville could receive an adequate educational program in any one of four high schools within a reasonable distance from Montville.\*\*\*' (P-45)

"Perhaps the most complete rationale for decision-making involving sending-receiving relationships is found in *Board of Education of the Borough of Haworth v. Board of Education of the Borough of Dumont, 1950-51 S.L.D. 42* wherein the Commissioner stated the following:

\*\*\* In considering an application for a change of designation or reallocation of pupils, the Commissioner must be mindful of the purpose of the high school designation law. In this State there are 165 school districts which maintain high schools for pupils of all high school grades. This means that 387 school districts must depend upon the 165 for the education of their high school pupils. This arrangement is mutually advantageous. The sending districts obtain high school facilities cheaper than such facilities can be provided by themselves and the additional pupils enable the receiving districts to expand their educational offerings and reduce their overhead.

'The success of the so-called 'receiving-sending set-up' has given New Jersey an enviable position in the nation in secondary education. New Jersey has fewer small high schools than any other State in the United States. It was to give stability to the receiving-sending set-up that the first high school designation law was enacted. Before the enactment of this law, receiving districts hesitated to bond themselves to erect buildings and to expand their facilities to provide for tuition pupils for the fear that the tuition pupils might be withdrawn after the facilities have been provided. The high school designation law protects such districts from the withdrawal of tuition pupils without a good cause. This statute benefits the sending district as well as the receiving district. If the law were not in effect, many sending districts, whether individually or by uniting with other districts, would be burdened with the erection and maintenance of high schools.

'In order to provide for cases where good and sufficient reasons exist for the transfer of pupils to another high school, the Legislature charged the Commissioner with the duty of determining when there is good and sufficient reason for a change of designation.

'The Commissioner feels constrained to exercise his discretion under the statute with great caution. Otherwise, the law will not accomplish the salutary purposes intended by the Legislature. Accordingly, the Commissioner will grant an application for change of designation or reallocation of pupils only when he is satisfied that positive benefits will accrue thereby to the high school pupils sufficient to overcome the claims of the receiving district to these pupils.

'The burden of proof rests upon the petitioning board to establish the good and sufficient reason for change required by R.S. 18:14-7. It is the opinion of the Commissioner that the petitioner has not sustained this burden of proof.\*\*\*' (at pp. 42-43)

"For other decisions in this regard see *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park*, 1959-60 S.L.D. 163; *Board of Education of the Borough of Allenhurst, Monmouth County v. Board of Education of the City of Asbury Park, Monmouth County*, 1963 S.L.D. 168; *In the Matter of the Application of the Board of Education of the City of Vineland, Cumberland County, for the Termination of the Sending-Receiving Relationship with the School Districts of Newfield, Pittsgrove, Weymouth, and Buena Regional*, decided by the Commissioner April 15, 1971.\*\*\*" (at pp. 634-636)

(See also *Morris School District v. Board of Education of the Township of Harding and Board of Education of the Borough of Madison, Morris County*, 1974 S.L.D. 457.)

Thereafter, in *Upper Freehold*, *supra*, the Commissioner found that while there was evidence of overcrowding, as in the matter, *sub judice*, such evidence was not sufficient to warrant a judgment that the sending-receiving relationship with Washington Township should be terminated, since there was no viable alternative placement for pupils of Washington Township and, thus, a judgment to this effect would have been an exercise in futility.

The hearing examiner finds that the facts of the instant matter justify a similar conclusion. Overcrowding in the Southern Regional School District is of great concern; but, a decision to sever the four sending-receiving relationships considered herein poses no possibility of relief since there is no available alternative placement for pupils of the four sending districts.

The overcrowding in the schools of the Southern Regional High School District will increase during succeeding school years. However, the hearing examiner does not recommend approval of petitioner's prayer for termination of the four sending-receiving relationships considered herein. Instead, he recommends that there be an intensification of efforts already begun by the four respondents so that separation may be effected at an early date to benefit all pupils of the area.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the entire record of the instant matter, the report of the hearing examiner, and the exceptions thereto filed pursuant to *N.J.A.C. 6:24-1.16*. He accepts the findings of fact set forth by the hearing examiner and holds them for his own.

The Southern Regional Board seeks a determination that good and sufficient reason exists by reason of present overcrowded conditions to terminate the existing sending-receiving relationship with the four respondent Boards of Education. The Commissioner determines that such good and sufficient reason does now exist in the form of present overcrowding in the high school. Additionally, an experiential projection of pupil population for a mere five years leads to a conclusion that present facilities would be totally inadequate in 1978-79 to accommodate either the middle school or the high school enrollment. Were the present relationships to continue in these limited facilities, the present inconveniences necessitated by "wave scheduling" would multiply in geometric proportions. Such innovative scheduling techniques as have to date been employed to meet pupil needs are not without limitation.

Were alternative placement presently available for pupils of respondent districts at this time, the Commissioner would approve petitioner's prayer to sever the sending-receiving relationship as requested. However, by reason of respondents' geographic isolation from nearby population centers, it is apparent that no such alternate assignment is now available. Therefore, the Commissioner reluctantly declines at this time to approve or order the termination of the present arrangement. This decision is grounded in the realization that a viable alternative must exist for those pupils of respondent districts to receive a thorough and efficient education. *Upper Freehold Regional, supra* No reasonable alternative place does presently exist. However, the Commissioner will brook no delay in the development of an alternative.

It is observed that certain regionalization studies have proven unfeasible. All four respondent districts are now engaged in a regionalization study. The Commissioner commends respondents for assuming this initiative and directs that they proceed, expand, and intensify their efforts in conjunction with the Ocean County Superintendent of Schools to develop a viable alternative to the present sending-receiving relationship. In this regard, the Commissioner directs respondents to forward to him an interim progress report on or before April 30, 1975.

The Commissioner retains jurisdiction.

COMMISSIONER OF EDUCATION

November 11, 1974



**In the Matter of the Application of the Boonton Board of Education  
for the Termination of the Sending-Receiving Relationship with the  
Board of Education of Lincoln Park, Morris County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondent, Joseph A. Hallock

The Board of Education of the Town of Boonton, hereinafter "Boonton," has, by resolution adopted July 17, 1972, petitioned the Commissioner of Education to sever the sending-receiving relationship which has heretofore existed between it and the Board of Education of the Borough of Lincoln Park, hereinafter "Lincoln Park." Boonton avers that, pursuant to statutory prescription, there is good and sufficient reason for such severance. Lincoln Park opposes the resolution of Boonton and denies that the proofs advanced by Boonton are sufficient to warrant such severance of the sending-receiving relationship.

A hearing in this matter was conducted on February 2, 1973, and was continued on May 1 and 2, and October 31, 1973 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. The submission of post-hearing memoranda was completed on August 5, 1974. The report of the hearing examiner is as follows:

The existing sending-receiving relationship between Boonton and Lincoln Park has been of long duration at the high school level (grades nine through twelve). During the years 1958-1968 such relationship was contractual in nature. In that latter year, however, the contractual relationship ended although Lincoln Park has continued as a sending district to Boonton to the present day.

At this juncture Boonton requests the Commissioner to sever such relationship. It grounds the request on one principal avowal; namely, that the Boonton schools are overcrowded and such overcrowding may be relieved if Lincoln Park is terminated as a sending district to Boonton, and the Boonton school district is then restructured. In Boonton's view a restructuring of its school system will obviate the need for a capital expenditure program which will otherwise be improperly required of the taxpayers of Boonton. The proofs presented at the hearing, *ante*, were primarily concerned with this issue.

Lincoln Park, while not disputing certain factual statistics which attest to a degree of overcrowding in Boonton High School, does dispute the contention that the overcrowding is excessive. It maintains that Boonton High School has accommodated more pupils in the past than are enrolled there today and that the enrollment of pupils from Lincoln Park is expected to decrease and/or reach a lower plateau in future years.

These contentions of the parties will be set forth in more detail at a later point in this report and will then be examined in the context of law. However, it is first necessary to detail certain factual data which was elicited at the hearing.

The Town of Boonton is small in its geographical area and is almost completely developed. In fact, the total available land that remains for possible housing development in future years appears to approximate a total of only 100-150 acres. (Tr. I-51-52)

The public schools of Boonton total three in number and of this total one is used as a high school housing grades nine through twelve. This facility was enlarged in 1961 (Tr. I-64) and at the time of the hearing the high school enrollment was approximately 1,368 pupils. (Tr. I-65; P-14)

A second school of the three which comprise the Boonton school system was built in 1922 and according to the Superintendent of Schools of Boonton is overcrowded. (Tr. I-73) This school has an enrollment of approximately 600 pupils of whom, it is estimated, 250 are enrolled in grades seven and eight. (Tr. I-74) The alleged inadequate facilities of this schoolhouse, particularly for pupils of grade levels seven and eight, provide the root causes of the dispute, *sub judice*, since Boonton proposes by a severance of its relationship with Lincoln Park to provide space for these grade levels in its high school. (Tr. I-74-75) The principal reason for the application for severance, however, is an alleged overcrowding of the Boonton High School. (Tr. I-76)

The present functional capacity of Boonton High School is approximately 1,037 pupils. (PR-1-B) This capacity evaluation was prepared for the hearing, *ante*, by the Facilities Services Division of the State Department of Education. The director of this Division testified at the hearing of October 1, 1973, and his evaluation of the impact of this capacity evaluation will be summarized at a later point in this report. For comparison purposes, however, it is noted that the present enrollment of Boonton High School (1,368 pupils) exceeds the functional capacity by approximately 330 pupils. It is further noted that, although at one time as many as 1,700 pupils were enrolled in Boonton High School (Tr. I-76), double sessions or other drastic expedients have not been employed.

Lincoln Park is presently organized as a school district for the education of its own pupils in grades kindergarten through eight, and it sends all of its pupils enrolled in grades nine through twelve to Boonton High School. At the present time and during the immediate past the enrollment of these pupils has approximated 600-625. (P-9, P-14) Thus it may be stated that Lincoln Park pupils have comprised or comprise approximately 44 percent of all pupils enrolled in Boonton High School. Stated in a different manner, and using current figures, if all pupils from Lincoln Park who are presently enrolled in Boonton High School were summarily removed at this time, the enrollment of the high school would be decreased from 1,368 pupils to approximately 745. (Of this latter total of 745, approximately 235 pupils are enrolled in Boonton High School from Boonton Township.) (P-14)

Other factual data of some significance herein is concisely summarized as

follows:

The actual number of pupils from Lincoln Park enrolled in Boonton High School during the 10 year period 1962-1972 had increased from a total of 379 in the year 1962 to 580 in 1972. (P-2) This enrollment has continued to increase to the present time, as noted *ante*, to 625. (R-1, R-11)

Lincoln Park has contacted three other neighboring school districts to ascertain the possibility of effecting an alternate sending-receiving relationship or to explore the possibility of regionalization. (R-7) Such contacts have proved fruitless, and the responses received were negative. On the basis of this fact and the testimony at the hearing, there is no presently viable alternative for the placement of all of the high school pupils from Lincoln Park, although it appears that the nearby Mountain Lakes High School could accommodate approximately 300 more pupils. (Tr. I-115)

The enrollment in Boonton High School has been considerably reduced in recent years by the withdrawal of pupils from the adjacent community of Montville. (Tr. I-173) Such withdrawal has alleviated the former severely overcrowded situation (1,700 pupils) and was in part, at least, attributable to an evaluation of Boonton High School conducted by the State Department of Education in 1965. (P-10)

Several enrollment projections were offered into evidence by the parties in the instant matter. Included are a study done by the firm of Engelhardt and Engelhardt, Inc., for Lincoln Park (R-10), a Newsletter (P-13) published by the Morris County Planning Board containing "Population Projections," and data of pupils presently enrolled. (P-8) The enrollment projections grounded on such data differ in degree but not, in the judgment of the hearing examiner, in their essential import which is that Boonton High School is, and will continue to be, overcrowded in the sense that its pupil enrollment will exceed its functional capacity (1,037) in the years of the immediate future.

For the record, however, the following projections of high school enrollment are set forth:

Year	By Boonton* (P-8)	By Lincoln Park (R-3)
1974-75	1,512	1,424
1975-76	1,527	1,434
1976-77	1,499	1,408
1977-78	1,538	1,417
1978-79	1,548	1,402
1979-80	1,508	1,340
1980-81	1,548	
1981-82	1,508	

\*Includes an estimate of parochial school pupils expected to enter Boonton High School.

The projections by the firm of Engelhardt and Engelhardt, Inc., indicate that the enrollment of Lincoln Park pupils of high school age will decline in the ten-year period 1973-74 through 1982-83 as follows:\* (R-10, at p. 18)

1973-74	625
1974-75	644
1975-76	626
1976-77	599
1977-78	590
1978-79	579
1979-80	548
1980-81	558
1981-82	564
1982-83	570

\*Includes Special Education Pupils (Tr. III-84)

(See also graphs R-5, R-11.) Such projections are a revision of other estimates by the same firm in recent years and according to testimony are updated to reflect declining birth rates and other conditions extant in Lincoln Park. (Tr. III-67 *et seq.*)

The County Superintendent estimates that the maximum enrollment which may be expected in Boonton High School during the next ten-year period will approximate 1,596 pupils in the year 1978-79 if present district composition is maintained. (Tr. I-153)

It was the testimony of an educational consultant of the firm of Engelhardt and Engelhardt, Dr. Kenneth Humphries, that all predictions with respect to future pupil enrollments of Lincoln Park must be tempered by certain changes which have occurred in recent years within the nation generally, and in Lincoln Park in particular. (Tr. III-79 *et seq.*) In summary, he said:

“\*\*\* We’re finding that many of the communities in north Jersey, metropolitan New York, we’re finding that school enrollments, particularly at the elementary level are leveling off and, in fact, decreasing. Surprisingly, for some school districts which now find themselves with empty classrooms and even, in fact, empty schools. So this is a trend due to various things. Certainly the birth rate has dropped off in the country as a whole in this particular area and this has had its impact on the elementary grades and essentially will have its impact on the secondary grades.\*\*\*” (Tr. III-82)

He further stated that his own estimates of the future enrollment of pupils from Lincoln Park took such changes into account. (Tr. III-82)

Boonton avers that the factual situation detailed, *ante*, with respect to overcrowding, and the testimony, *post*, concerning problems in its John Hill School comprise a body of evidence sufficient to justify the severance of its sending-receiving relationship with Lincoln Park. Further, Boonton maintains that one of the viable alternatives for Lincoln Park, namely the erection of a

junior-senior high school building, will prove possible, in terms of borrowing power, in the 1975 school year. Thus, Boonton argues that it has produced the good and sufficient reason required for the proposed severance, and there is no practical bar to granting it. Accordingly, Boonton maintains the severance should be granted pursuant to the Commissioner's decision in *Board of Education of Haworth v. Board of Education of the Borough of Dumont*, 1950-51 S.L.D. 42.

Lincoln Park relies on the testimony of its own Superintendent of Schools, the County Superintendent of Schools, and of its educational consultant to support its argument that a severance of the sending-receiving relationship, at this juncture, would impair the ability of both districts to offer a thorough and efficient educational program.

If the relationship is maintained, however, Lincoln Park avers that such a relationship "\*\*\*\* will not impose such serious demands upon the high school facilities of Boonton that the Boonton Board of Education will be unable to provide suitable school facilities for its pupils and maintain a thorough and efficient system of secondary education. \*\*\*\*" (Brief of Lincoln Park, at p. 36) Further, Lincoln Park argues that there is no viable present alternative for the placement of high school pupils of Lincoln Park and that on this ground alone, the present Petition should be dismissed. In support of this view, Lincoln Park cites *In the Matter of the Application of the Upper Freehold Regional Board of Education for the Termination of the Sending-Receiving Relationship with the Board of Education of the Township of Washington, Mercer County*, 1972 S.L.D. 627.

The Superintendent of Boonton Schools, Dr. John T. Greed, was the principal witness called by Boonton at the hearing. His detailed account of the nature and extent of Boonton's school housing problems embraces both the high school building and the John Hill Elementary School (Tr. II-63 *et seq.*), and he recited a list of alternative solutions to the problems which have been considered by Boonton. (Tr. II-69 *et seq.*) Included among these alternatives were consideration of:

1. the construction of additional facilities at Boonton High School (Tr. II-69);
2. a twelve-month school year (Tr. II-69);
3. split-sessions (Tr. II-69);
4. conversion of the John Hill Elementary School to provide ninth grade facilities (Tr. II-70); and
5. a staggered schedule (Tr. II-70).

The Superintendent testified that Boonton's final decision directed at solving its school housing problems was the one controverted, *sub judice*; namely, the decision to "\*\*\*\*petition the commissioner to gradually remove the Lincoln Park children,\*\*\* giving the town of Lincoln Park adequate time to construct its own facilities or to find other educational opportunity.\*\*\*\*" (Tr. I-75)

The Superintendent also testified that he had no reason to believe that the pupil population from either Boonton Township or Lincoln Park would decline (Tr. II-106) as predicted by Lincoln Park's educational consultant. (R-10)

Dr. Irving Peterson of the State Department of Education's Division of Building Services stated that the Department's formula for measuring the capacity of school buildings changes from time to time in order "\*\*\*to keep up with what is happening in education\*\*\*." (Tr. IV-8) He also indicated that the formula is a "guideline" (Tr. IV-8) as an "\*\*\*approximation of what number of pupils can be adequately housed for educational purposes.\*\*\*" (Tr. IV-9) In his opinion Boonton High School in the context of this formula employed by the State Department of Education is "overcrowded" (Tr. IV-35, 40, 53), and Boonton probably needs to take some action to alleviate the situation. (Tr. IV-53)

The Morris County Superintendent of Schools, Mr. Leslie Rear, testified that at the present time there is "\*\*\*no viable alternative\*\*\*" for the current placement of Lincoln Park pupils in the Boonton High School. (Tr. I-117) However, he also testified that "\*\*\*there are other alternatives that should be studied.\*\*\*" (Tr. I-117)

In this regard the County Superintendent then listed a series of possible alternatives. These are concisely summarized in the following manner.

Alternative 1 – Establish a new sending-receiving relationship between Boonton Township and Mountain Lakes while leaving the present Lincoln Park relationship intact. (Tr. I-118) While the County Superintendent believes such an arrangement would be beneficial to Mountain Lakes (Tr. I-163) and to Boonton Township, he also opines that it might be detrimental to the educational program of Boonton High School. His words in this regard were:

“\*\*\* the Boonton High School might have difficulty in offering the diversity of programs it now does, and on the other hand, while Mountain Lakes would have the capacity currently, to take most of the Boonton Township pupils for this ten year period, any growth that might be experienced in Boonton Township could force further expansion of Mountain Lakes either within, or near the end of that ten year period.\*\*\*” (Tr. I-119)

Alternative 2 – Explore the possibility of a four-district regionalization to involve Boonton, Boonton Township, Lincoln Park and Mountain Lakes. (Tr. I-120) Such a regionalization has been discussed informally among school administrators but has never reached the formal discussion stage. (Tr. I-121) According to the County Superintendent, such a regionalization would be responsible over a ten-year period for a maximum of approximately 2,200 pupils. (Tr. I-120) As an advantage to such a plan there is the fact that Mountain Lakes High School has some unused capacity (for about 315 pupils). (Tr. I-115) This could be utilized through the creation of such a four-district regionalization.

Alternative 3 — Consider a regionalization of the districts of Boonton, Boonton Township, and Lincoln Park. (Tr. I-121) The County Superintendent sees little value in this kind of proposal since it “\*\*\*doesn’t change the problems that are facing them right now, involving the same districts, the same numbers.\*\*\*” (Tr. I-121)

Alternative 4 — Consider a regionalization of Boonton, Boonton Township, and Mountain Lakes with the provision that Lincoln Park continue as a sending district. (Tr. I-121) Cost factors for such a regionalization come within “\*\*\*a reasonable range of being equitable\*\*\*” according to the County Superintendent. (Tr. I-123) Furthermore, he avers, it provides a possible option for Lincoln Park to sever its school district from the regional at some future date and, in the interim, the three-district regional might make it feasible to solve a “middle school” problem as well as the problem with respect to high school education. (Tr. I-121)

Alternative 5 — Sever both Lincoln Park and Boonton Township from Boonton to create junior-senior high schools in each of the districts of Boonton and Lincoln Park and establish a new sending-receiving relationship between Boonton Township and Mountain Lakes. The County Superintendent agrees that such an alternative should be considered and that it avoids the problems contingent to regionalization. (Tr. I-129) However, it is noted that Lincoln Park’s proposal to build its own high school was before the Commissioner of Education in the year 1969-70, and the Commissioner requested that such application be withdrawn. His request was grounded in the opinion that a separate high school in Lincoln Park was not economically feasible. (Tr. I-166, 173)

In summation of his judgment with respect to possible viable alternatives to the present placement of Lincoln Park pupils in Boonton High School, the County Superintendent testified as follows in response to the question:

\*\*\*

Q. “I have just one question. In your opinion, looking ahead for the next ten years, are there alternatives to the education of the high school students in the three municipalities involved in Boonton High School that you think ought to be explored before the sending-receiving relationship between Boonton and Lincoln Park is severed?

A. “I think we have boiled it down to two, at least in my opinion: One, the possibility and educational feasibility of the establishment of the junior-senior, middle high school facilities by both Boonton and Lincoln Park. The other one, which I consider as a viable and desirable alternative, would be the regionalization of either the three or four districts. I think it needs to be studied in terms of both of them, to see what kind of impact it brings.\*\*\*” (Tr. I-180-181)

The testimony of the County Superintendent with respect to this matter was almost entirely concerned with alternatives to the present placement of



Lincoln Park's high school pupils. However, he did agree that some practical alternative should be found to the existing situation. (Tr. I-171)

The Superintendent of Lincoln Park Schools testified that pupil enrollment in grades kindergarten through eight had "dropped off considerably" in recent years. (Tr. II-113) He attributed such decline to certain problems of sewerage disposal existent in Lincoln Park and to the fact that much of Lincoln Park's remaining undeveloped land is in a flood plain. (Tr. II-112)

The Superintendent also testified concerning Lincoln Park's school building needs and the efforts which the district has exerted in recent years to solve them. (Tr. II-122 *et seq.*) Such efforts have proved fruitless, including a tentative plan to build a new junior-senior high school (Tr. II-127) and an attempt to find another sending-receiving relationship. (Tr. II-131)

The law with respect to the termination of sending-receiving relationships, such as that herein controverted, is contained both in statutory prescription and in decisions of the Commissioner of Education. The applicable statute is *N.J.S.A.* 18A:38-13 since a written contract is not in effect between Boonton and Lincoln Park. In this regard, Boonton argues that the applicable statute is *N.J.S.A.* 18A:38-21 since, at one time, a contractual relationship had existed between the two districts. (Tr. I-31 *et seq.*)

The statute *N.J.S.A.* 18A:38-13 provides:

"No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to 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 except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications."

Thus the test herein is "good and sufficient" reason upon which the Commissioner shall make "equitable determination."

Such determinations have been made by the Commissioner on many occasions in prior years and are summarized *In the Matter of the Application of the Upper Freehold Board of Education for the Termination of the Sending-Receiving Relationship of the Township of Washington, Mercer County, 1972 S.L.D. 627*, as follows:

"\*\*\* The judgment required of the Commissioner is whether 'good and sufficient' reason exists to warrant the termination of an existing sending-receiving relationship and if so, whether or not there are 'good grounds' for such termination.

"In interpreting the words of these statutes, and similar statutes which have preceded them, the Commissioner has often been required to elucidate the specifics which underlie such judgments.

“Thus, *In the Matter of the Application of the Board of Education of the Township of Green Brook, Somerset County, to Terminate the Sending-Receiving Contract with the Board of Education of the Borough of Dunellen*, 1967 S.L.D. 329, the Commissioner refused an application to terminate a sending-receiving relationship initiated by Green Brook, the sending district, on the principal grounds that the:

\*\*\* termination of the sending-receiving contract in 1968 will seriously affect Dunellen both financially and educationally, and he so holds.\*\*\*’ (at p. 334)

“As another case example, the Commissioner found that a sending-receiving relationship should be severed because a receiving district was unable to meet the demands upon it. He stated in this case, *In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of the Township of Lakewood and the Township of Manchester, Ocean County*, 1966 S.L.D. 12, that:

\*\*\* continuation of the present sending-receiving relationship can be expected to impose such serious demands upon the high school facilities in Lakewood that the Lakewood Board of Education will be unable to provide suitable school facilities for its pupils and to maintain a thorough and efficient system of secondary education.\*\*\*’ (at p. 14)

“A similar request *In the Matter of the Application of the Board of Education of Caldwell-West Caldwell to Terminate Sending-Receiving Relationship with the Board of Education of the Township of Montville Beginning with the Ninth Grade for the School Year 1958-59, 1957-58* S.L.D. 43 was also approved by the Commissioner and he stated that the:

\*\*\* High School is overcrowded, that to continue to increase this overcrowding would impair the educational program of the district and that the pupils from Montville could receive an adequate educational program in any one of four high schools within a reasonable distance from Montville.\*\*\*’ (P-45)

“Perhaps the most complete rationale for decision-making involving sending-receiving relationships is found in *Board of Education of the Borough of Haworth v. Board of Education of the Borough of Dumont*, 1950-51 S.L.D. 42 wherein the Commissioner stated the following:

\*\*\* In considering an application for a change of designation or reallocation of pupils, the Commissioner must be mindful of the purpose of the high school designation law. In this State there are 165 school districts which maintain high schools for pupils of all high school grades. This means that 387 school districts must depend upon the 165 for the education of their high school pupils. This arrangement is mutually advantageous. The sending districts obtain high school facilities cheaper than such facilities can be provided by

themselves and the additional pupils enable the receiving districts to expand their educational offerings and reduce their overhead.

‘The success of the so-called ‘receiving-sending set-up’ has given New Jersey an enviable position in the nation in secondary education. New Jersey has fewer small high schools than any other State in the United States. It was to give stability to the receiving-sending set-up that the first high school designation law was enacted. Before the enactment of this law, receiving districts hesitated to bond themselves to erect buildings and to expand their facilities to provide for tuition pupils for the fear that the tuition pupils might be withdrawn after the facilities have been provided. The high school designation law protects such districts from the withdrawal of tuition pupils without good cause. This statute benefits the sending district as well as the receiving district. If the law were not in effect, many sending districts, either individually or by uniting with other districts, would be burdened with the erection and maintenance of high schools.

‘In order to provide for cases where good and sufficient reasons exist for the transfer of pupils to another high school, the Legislature charged the Commissioner with the duty of determining when there is good and sufficient reason for a change of designation. The Commissioner feels constrained to exercise his discretion under the statute with great caution. Otherwise, the law will not accomplish the salutary purposes intended by the Legislature. Accordingly, the Commissioner will grant an application for change of designation or reallocation of pupils only when he is satisfied that positive benefits will accrue thereby to the high school pupils sufficient to overcome the claims of the receiving district to these pupils.

‘The burden of proof rests upon the petitioning board to establish the good and sufficient reason for change required by R.S. 18:14-7. It is the opinion of the Commissioner that the petitioner has not sustained this burden of proof\*\*\*. (at pp. 42-43)

“For other decisions in this regard see *Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park*, 1959-60 S.L.D. 163; *Board of Education of the Borough of Allenhurst, Monmouth County v. Board of Education of the City of Asbury Park, Monmouth County*, 1963 S.L.D. 168; *In the Matter of the Application of the Board of Education of the City of Vineland, Cumberland County, for the Termination of the Sending-Receiving Relationship with the School Districts of Newfield, Pittsgrove, Weymouth and Buena Regional*, decided by the Commissioner April 15, 1971.\*\*\*” (at pp. 634-636)

It is in the context of such statutory prescription and decisions of the Commissioner embracing his equitable determinations that the present matter rests for decision.

The hearing examiner has reviewed the factual situation as it has been recited, and has considered the contentions of the parties and the testimony of witnesses at the hearing. At this juncture he sets forth the following findings and recommendations.

It is observed that the resolution of Boonton, if granted and given effect, would:

1. probably solve a middle school crowding problem for Boonton;
2. reduce the enrollment of Boonton High School, grades nine through twelve, by approximately 623 pupils to a total enrollment of approximately 745 pupils (below the total of 1,000 pupils previously found as a desirable size by the Commissioner in *Haworth, supra*); and
3. create a problem for Lincoln Park for which there is no presently known viable solution (contrary to the situation in *Caldwell-West Caldwell, supra*).

Thus, the hearing examiner finds that while the present overcrowding in Boonton High School presents some *prima facie* good reason to sever the relationship which exists between Lincoln Park and Boonton, a decision to this effect would be an exercise in futility since, as the County Superintendent stated, there is no "viable alternative." The "good and sufficient" reason, then, fails on practicable grounds alone. However, even if this were not so, the hearing examiner finds there is "good and sufficient" reason of greater import in the factual situation herein which stands as a strong argument for the proposition that, at least for the present, these two school districts should remain together.

Of principal importance in this regard is the expressed conclusion of the County Superintendent that such a severance as proposed here would reduce the enrollment of Boonton High School to a "barely functional" level and make it very difficult to sustain the diversity of program which that high school offers now. (Tr. I-118-119) This view is consistent with previously expressed case law cited *ante* which, in general, holds that a fragmentation of sending-receiving relationships is not desirable when, as here, such fragmentation would almost certainly require a contraction of educational offerings, an increase in overhead costs, and resultant detriment to Boonton as well as to Lincoln Park. Indeed, the hearing examiner concludes that the instant application by Boonton which is controverted herein is founded on a flimsy assumption; namely, that a restructuring of the Boonton school system will be of financial benefit to Boonton since the need for capital expenditures will be obviated. There is no concrete evidence that this is so in the context of a proposed current expense tuition loss to Boonton of hundreds of thousands of dollars.

Further, it appears there are excellent alternatives which need to be explored expeditiously and concertedly for the benefit of each of the school districts.

Principally, there is the need, which the hearing examiner characterizes as

pressing, to explore regionalization in depth, either on a three or four-district basis as described by the County Superintendent of Schools. The apparent advantages of such exploration to all school districts involved herein appear to present a convincing educational argument for the study of this alternative as a prerequisite to any alteration of the present pattern of relationships. There are no arguments found by the hearing examiner that negate such a view. The paramount conclusion is that regionalization offers the possibility of:

1. maintaining and/or enhancing the high school educational opportunity presently available in each of two high schools;
2. solving middle school enrollment problems on a mutually advantageous basis; and
3. the requisite flexibility as respects Lincoln Park in the event of a three-district regionalization adoption.

Accordingly, the hearing examiner recommends that the present request of Boonton be temporarily set aside until such time as other apparently more feasible and desirable alternatives are explored in depth. He further recommends that Boonton and Lincoln Park initiate such exploration in an expeditious manner forthwith and that at the conclusion of these efforts, but not later than January 1, 1976, a report be submitted to the Commissioner detailing the ramifications of the various proposals which have been considered.

Finally, the hearing examiner recommends that all districts which are now or may be concerned in the study herein take full advantage of the resources available to them through the State Department of Education and the office of the Morris County Superintendent of Schools.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions pertinent thereto which have been filed by counsel. Such exceptions are concerned primarily with whether or not there are viable alternatives for the placement of Lincoln Park High School pupils and with the need for prompt action to alleviate crowded conditions in Boonton High School.

The Commissioner has considered the report and exceptions and concludes that there is a compelling and pressing need, as found by the hearing examiner, for an exploration in depth of a new alignment of school districts in the Boonton area. This exploration, in the Commissioner's judgment, should be one which is thorough and incisive, and it should proceed to an expeditious conclusion.

Accordingly, the Commissioner directs that the Boonton and Lincoln Park Boards of Education proceed forthwith to an examination of all possible options for the provision of a thorough and efficient program of education in the Boonton area. The Commissioner also directs that a report of this examination,

or definite proposals, be submitted to the State Department of Education on or before June 30, 1975.

COMMISSIONER OF EDUCATION

November 15, 1974

**Janet Quiroli, Carleen Heiser, Allen Benedict, Beverly Galupo,  
Carley Kleckner, Frances Taylor, Kirby Knox, Nina Seiferth,  
Benedict Nutter, Gladys Kuhlmann, Betty Fox, Robert Loper,  
Margaret Schafer, Mildred Matteo, Roslyn Rabinowitz, Roslyn Oberson,  
Michael Platt, Barbara Gerkens, Gerrie McNellis, Eileen O'Keefe  
and Linwood Teachers' Association,**

*Petitioners,*

*v.*

**Board of Education of the City of Linwood and Francis Johnson,  
Atlantic County,**

*Respondents.*

COMMISSIONER OF EDUCATION

#### DECISION

For the Petitioners, Ruhlman and Butrym (Cassel R. Ruhlman, Jr., Esq., of Counsel)

For the Respondents, Joseph B. Kauffman, Esq.

Petitioners are teachers employed by the Board of Education of the City of Linwood, hereinafter "Board," who challenge a resolution adopted by the Board which regulates teacher attire.

This matter has been submitted to the Commissioner of Education for his determination on the Briefs of counsel.

The parties stipulate that since March 1971, the Board and its agents enforced a dress code requiring male teachers to wear neckties. In August 1973, the Board adopted the following resolution regulating teacher attire:

\*\*\*\* Teachers shall dress at all times in an acceptable manner. Extreme fashions or fads may not be acceptable attire for the classroom. It is expected that the teacher will use good judgment in selecting attire for wear in the classroom. Male faculty members may remove their coats but neckties are to be worn at all times.\*\*\*\* (Exhibit A)

Petitioners aver that the Board's adoption of the code as a policy violates their rights under the Fifth and Fourteenth Amendments to the United States

Constitution, and further, that the dress code and its enforcement constitute arbitrary, unreasonable, and capricious actions on the part of the Board.

The Board avers that its actions are clearly within its statutory rights, powers, and obligations (*N.J.S.A.* 18A:11-1) and within its discretionary authority pursuant to recent decisions by the Commissioner and the courts.

The issue succinctly stated in this: Does the Board have the authority to establish and enforce a dress code for teachers, particularly requiring male teachers to wear neckties in class?

The parties cite several decisions throughout the country and quote court language on the several subjects of student hair styles, teachers' beards, sideburns, moustaches, and students wearing freedom buttons. Petitioners cite also a court decision on the subject of students wearing various colored armbands signifying different factions within a school with respect to anti-war and pro-war sentiment; however, there are no decisions cited having specific reference to teacher dress, nor have there been any decisions by the Commissioner or the courts of this State on the subject. The Commissioner decided one matter regarding student dress in which he affirmed the board's authority to establish a dress code, but found that one facet of the regulations was unreasonable. *Singer v. Collingswood*, 1971 *S.L.D.* 594

The Board defends its resolution (Exhibit A) and relies in part on its statutory authority pursuant to *N.J.S.A.* 18A:11-1 which reads in pertinent part as follows:

"The board shall –

"a. Adopt an official seal;

"b. Enforce the rules of the state board;

"c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes<sup>1</sup>; and

"d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

<sup>1</sup>Section 11:1-1 *et seq.*

Further authority for a board to make rules is found in *N.J.S.A.* 18A:27-4 as follows:

"Each board of education may make rules, not inconsistent with the



provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.”

The Board asserts also that its rule has been promulgated under its “exclusive prerogatives” as set forth in recent decisions by the New Jersey Supreme Court. *Board of Education of Englewood v. Englewood Teachers’ Association*, 64 N.J. 1, (1973); *Dunellen Board of Education v. Dunellen Education Association*, 64 N.J. 17 (1973); *State v. Professional Association of New Jersey Department of Education*, 64 N.J. 234 (1974)

Regarding petitioners’ argument that the Board rule violates teachers’ constitutional rights, petitioners rely on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). However, an interpretation of that Supreme Court decision in *David Brownlee v. Bradley County, Tennessee Board of Education et al.*, 311 F.Supp. 1360, U.S.D.C. (E.D.Tenn. 1970) follows:

“\*\*\* The Court held that under the circumstances of the case of wearing of the black arm bands was so closely akin to ‘pure speech’ as to fall within the protection of the First Amendment and that this mode of expression accordingly could not be forbidden by public school authorities in the absence of a showing of actual or potentially disruptive conduct arising therefrom. In rendering its decision the Court expressly excluded from the ambit of the decision the matter of the adoption of dress and hair codes by school authorities doing so in the following language: ‘*The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment.*\*\*\*’ (Emphasis ours.) (at p. 1364)

This language, of course, was limited to the pupils in the school, and it must be pointed out that it dealt with First Amendment rights; nevertheless, the Commissioner cannot find in the Board’s regulation a denial of any right closely akin to “pure speech.” Therefore, the Commissioner rejects petitioners’ argument that the Board’s rule violates their rights guaranteed by the First Amendment of the United States Constitution.

The Commissioner takes notice of a decision from the State of Louisiana, in which a federal court upheld the right of a board to require its male teachers to wear neckties. *Edward Blanchet v. Vermilion Parish School Board*, 220 Southern Reporter, 2d Series 534 (1969) In that decision the Court held that: (1) the requirement to wear a necktie did not violate petitioner’s rights under the Fourteenth Amendment; (2) the language was not vague even though certain board members differed as to types of ties, such as cowboy string ties, bow ties, and trick ties; and, (3) the policy was not discriminatory because women did not have to comply with any arbitrary restriction.

In a New York State decision about proper attire for a female swimming teacher who was ordered by a board of education to refrain from wearing a two-piece bikini type bathing suit while giving swimming instructions to male high school pupils, it was determined that the board was unable to establish that the teacher's dress was disruptive of the educational process. *In the Matter of the appeal of Heather Martin from action of the Board of Education of Central School District No. 1 of the Towns of North Dansville and West Sparta*, 10 Ed. Dept. Rep. 7 (1971), the New York State Commissioner of Education stated:

“\*\*\* There is no question but that a board of education, like any employer, may establish reasonable standards with respect to the general mode of attire of its employees in connection with their various work assignments. However, respondent in this case has not sought to establish such standards but, rather, has based its action on the contention that petitioner's bathing suit was a ‘distracting and disruptive influence.’\*\*\*”

The Commissioner notes, also, that there are many acceptable variations of teacher dress in wide use throughout the country. Male physical education teachers usually wear some type of uniform as do female physical education teachers, whose typical uniform has a skirt which many people would not accept as modest for regular classroom wear. Chemistry, home economics, art and kindergarten teachers often wear smocks. A necktie could be dangerous to an industrial arts teacher. Swimming teachers wear bathing suits. Teachers going on field trips to streams, forests and outdoor education programs obviously dress in less standard attire than one would expect in a classroom.

Therefore, the real questions ripe for adjudication, more precisely stated, are:

1. Can the Board establish and enforce any dress code?
2. Is the current dress code reasonable?

The answer to the first question is affirmative. *N.J.S.A.* 18A:11-1, *N.J.S.A.* 18A:27-4 Certainly, there are degrees of dress or undress which can be subjectively described as immodest, or inappropriate in a particular classroom setting; therefore, a board may establish a reasonable dress code for its teachers.

To determine whether or not the dress code in the instant matter is proper, the Commissioner relies on his prior decisions, notwithstanding the federal court decision in *Blanchet, supra*. In *Angell v. Board of Education of Newark*, 1960 *S.L.D.* 141, the Commissioner stated that any rule of a board of education in order to be valid must meet three tests:

\*\*\*

- “1. It must be reasonable,
- “2. It must not be inconsistent with other provisions of Title 18[A] of the statutes 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.”\*\*\*” (at p. 143)

In *Angell* the petitioners challenged the resolution of the Newark Board of Education which required employee residence within the city limits as a condition of employment. The Commissioner commented further in *Angell* as follows:

“\*\*\* A rule, in order to be valid, must be reasonable. Boards of education cannot exercise the authority given to them in ways that are arbitrary, capricious or unreasonable, overworked and difficult of precise definition as these words may be. *N.J. Good Humor, Inc. vs. Bradley Beach*, 124 *N.J.L.* 162 at 164. Reasonable is defined as ‘comformable to reason; such as is rational, fitting or proper, sensible.’ It imports that which is appropriate or necessary under the circumstances. A reasonable rule implies that there is a rational and substantial relationship to some legitimate purpose.

“In the opinion of the Commissioner the rule in question fails to meet this test. The resolution itself contains no statement of purpose but in its brief respondent states there is no other motivation for its enactment than a belief that residence of the employees in question within the city ‘will serve the welfare of the Newark schools.’ In support of this, they refer to other rules of the Board which require teachers to be on duty before and after school hours, to make reports to the principal, and to comply with procedures for maternity leaves. That these rules serve a legitimate purpose in the operation of the school system is obvious. Not so apparent is the relationship between the residence rule and any improved functioning of the city’s schools.\*\*\*” (at p. 143)

The Board asserts in its Brief that its purpose in establishing the rule now in contention is as follows:

“\*\*\* The Linwood Board of Education conducts a school system for the education of students – male and female – from K through 8. These students are very young and impressionable and accordingly, the Board, in its sound discretion and bearing in mind such fact, carefully considered and determined that the adoption of a dress code with particular emphasis upon the requirement for the wearing of a necktie by male teachers is necessary to facilitate and carry out correctly and properly the school system’s educational functions and objectives. In the judgment of the Board – the training of these young students includes the example set by their male teachers to establish decency and decorum in the class-room required the adoption of the dress code including the need for the wearing of a necktie.\*\*\*” (Respondents’ Brief, at p. 2)

However, the Commissioner cannot find in the instant matter any rational or substantial relationship to any legitimate purpose, nor any valid principle which will be served by the Board’s rule requiring neckties. Having made this determination, the Commissioner finds it unnecessary to further raise the specific issue of wearing a necktie to the level of a deprivation of a right under the United States Constitution. The Commissioner summarizes as follows:

1. The Board has the statutory and discretionary authority to make

reasonable rules for its own government. *N.J.S.A.* 18A:11-1, *N.J.S.A.* 18A:27-4

2. The specific sentence in the Board's rule referring to the mandatory wearing of neckties by male teachers is unreasonable and will be set aside.

COMMISSIONER OF EDUCATION

November 15, 1974

**In the Matter of the Election Inquiry in the School District of  
The Borough of South River, Middlesex County.**

COMMISSIONER OF EDUCATION

**DECISION**

Pursuant to a letter complaint filed by Candidate Joan Peterson alleging irregularities in the conduct of the annual school election held on February 13, 1974 in the School District of the Borough of South River, an inquiry was conducted by a representative designated by the Commissioner of Education, at the office of the Middlesex County Superintendent of Schools on March 20 and 22, 1974. The report of the Commissioner's representative follows:

The announced results of the balloting for the election of school board members was not challenged; however, allegations of improper conduct were made with the assertion that such conduct could possibly have influenced the election of certain candidates. These charged irregularities are hereinafter considered *seriatim*.

**CHARGE NO. 1**

Complainant Peterson alleges that both she and a judge of the election were approached by two men in close proximity to a polling place, who were improperly electioneering for three candidates for the school election.

Complainant Peterson testified that she received a telephone call at approximately 6:00 p.m. on the day of the school election from another candidate, John Budzin, who informed her that two men were standing outside the gate of the Lincoln School, a polling place, and stopping voters to speak to them before they entered the polls. (Tr. I-19-20) At approximately 8:00 p.m. she went to the Lincoln School polling place, and as she crossed the street and walked toward the gate these two men walked toward her, blocking her access to the gate. Complainant Peterson testified that one of the two men told her they supported the school budget, and also told her that there were three very good candidates running, Mr. Wyluda, Mr. Hoskins and Mr. Servon. She testified that

this man stated the three candidates' numbers on the voting machine were one, three and six. She told the two men that she was number four on the voting machine, and one of the men said that she must be Mrs. Peterson. Complainant Peterson testified that she then told the two men that they had better leave or she would summon the police. She entered the polling place and informed that judge of the election of this incident. The election judge donned her coat and went outside the polling place with Mrs. Peterson, but the two men had left. (Tr. I-20-22)

The judge of the election testified that she had left for dinner at approximately 7:00 p.m. As she was leaving the Lincoln School with a friend, two men were standing outside the gate of the schoolhouse. When she returned to the Lincoln School polling place within the hour, these same two men were standing inside the gate and close to the door of the Lincoln School. She testified that one man was wearing a Knights of Columbus jacket with the nickname "Tanky" inscribed on it, and the second man had dark hair and was wearing a dark-colored jacket. She testified that the first man told her to: "Vote one, three, six, and vote down the budget." The second man said: "Vote 'No' on the budget." (Tr. I-43-44)

She further testified that she informed these men she was the judge of the election at this polling place and that electioneering was prohibited within 100 feet of the polls. She also added that she had already voted. She testified that the second man then told her: "Well, go in and vote under somebody else's name." She replied by telling the men to "get moving" because electioneering was prohibited. According to this witness, the two men then walked away.

The election judge testified that she entered the polling place and within ten minutes Mrs. Peterson entered and reported that she had just been approached by two men who were electioneering outside the polling place. (Tr. I-44-45) From the descriptions given by Complainant Peterson and the judge of the election, it is clear that the same two men had approached both of them.

At the close of the polls this election judge informed two Board of Education members and the Board Secretary regarding this incident, and gave the Board Secretary a brief written statement. (Exhibit P-3; Tr. I-46-47) According to the election judge, she was later asked by police officials, after she had filed a formal written statement (Exhibit P-4), to attempt to secure the names of the two men who were electioneering. From her description a friend informed her that the man with the nickname "Tanky" on his jacket was Anton Knoblock. (Tr. I-56)

The judge of the election provided a written statement to the South River Police Department regarding the electioneering incident. (Exhibit P-4) A copy of this statement was signed by this witness while she was testifying at the inquiry, and the court reporter notarized this exhibit. A copy of her notarized affidavit was sent to the Chief of Police subsequent to the close of the inquiry. From the testimony of both this witness and Complainant Peterson, it appears that police officials did identify the man who wore the jacket with the nickname "Tanky," and did question him about the incident. (Tr. I-57)

The testimony and evidence, which are uncontradicted, clearly establish the fact that the alleged electioneering did take place at the Lincoln School polling place.

#### CHARGE NO. 2

The election board members did not compare the signatures of voters on election authority slips with the signatures as they are written in the signature copy registers.

The judge of the election at the Lincoln School polling place testified that the election workers, including her, did not compare the signatures of voters written on the election authority slips, with the voters' signatures as written in the signature copy registers. She testified that she questioned the other election officials whether they were supposed to compare signatures of voters, and they informed her that they did not do this. (Tr. I-51-52) This witness testified that she did not receive any written instructions regarding the comparison of signatures. (Tr. I-53)

Election workers from the polling places located at the junior high school, Campbell School and Willett School testified that they did compare signatures of voters to the signature copy register. All of the election board workers who testified concurred that they received no verbal instructions regarding the conduct of the school election, and none of these election workers recalled receiving any written instructions.

#### CHARGE NO. 3

The election board members did not maintain a poll list for voters to sign at the annual school election.

Testimony of all seven election board members who testified at the inquiry established the fact that no poll list was provided for voters to sign. These witnesses had been election board workers for many previous school elections, and no one could recall that a poll list was ever used at a school election.

#### CHARGE NO. 4

A relative of a candidate entered various polling places at different times during the hours of the school election to inquire how many voters had cast ballots at the polls.

Complainant Peterson testified that she witnessed a man, who was identified to her by an election board member as an uncle of Candidate Wyluda, walking into various polling places at differing hours, and asking what number of votes had been cast. At one polling place, she testified, she observed an election board member write a number on a slip of paper and slide it across the table to this man.

One election board member testified that several persons periodically walked into the polls to ask how many voters had voted. This witness testified



that she believed that these people had been authorized by the candidates to secure this information. She testified that these persons were not challengers. According to this witness, the previous Board Secretary had in past elections given persons, other than candidates or challengers, a piece of paper authorizing them to enter any polling places for this purpose. She testified that in a previous school election she had received such an authorization. (Tr. II-22-23, 30-31) This witness was an election board member at the junior high school polling place.

An election board member assigned to the Willett School polling place testified that she saw various persons enter the polling place during the election to check the number of votes cast. This witness identified Mr. Wyluda, a relative of the candidate, as one of the persons who visited the polls for this purpose. (Tr. II-42-43, 46-47)

Another election board worker at the Willett School polling place testified that she saw two persons, whom she could not identify, enter the polling place approximately every two hours to check on how many voters had cast ballots. (Tr. II-51-52) This witness testified that one of the two persons fit the description given by Mrs. Peterson of a tall, heavyset man. She testified that she saw this man standing near Mrs. Peterson at several different times during the election and she thought this man and Mrs. Peterson were together. (Tr. II-53)

An election board member from the junior high polling place testified that several unidentified persons entered her polling place approximately a dozen times during the election hours of 1:00 p.m. to 9:00 p.m. for the purpose of checking the number of persons who had voted. She testified that this practice has been taking place in school elections for a number of years. (Tr. II-71-72)

#### CHARGE NO. 5

The husband of an election board member sat at the election workers' table at the junior high school polling place.

Testimony of Complainant Peterson disclosed that the husband of an election board member sat at the table used by the election workers for at least one-half hour. (Tr. I-9-10)

An election board member from the junior high school polling place testified that Mr. Caputo, whose wife was serving on the election board for this school election, sat at the end of the election board table from approximately 7:30 or 8:00 p.m. until the polls closed at 9:00 p.m. (Tr. II-16, 24, 26) This witness did not recall seeing Mr. Caputo sitting at the end of the table at approximately 2:30 p.m. when Complainant Peterson was at the polling place, although Complainant Peterson stated that he was present at that time. The election board member testified that Mr. Caputo was sitting in a chair talking to a member of the Board of Education, Mr. Pratola, who was neither a candidate nor a challenger. According to this witness, several men were seated or standing in the polling place at that time. (Tr. II-28-30) This witness testified that, during a general election, the election board workers would not permit anyone to sit or stand in the polling place. (Tr. II-28)



A second election board member who had been assigned to the junior high school polling place testified that she saw Mr. Caputo sitting at the end of the table at approximately 8:00 p.m. (Tr. II-58-59)

Candidate Budzin testified that he observed Mr. Caputo sitting at the table at approximately 5:30 p.m. and again at 7:00 p.m. (Tr. I-67-68)

The evidence and testimony regarding this charge prove that the charge is substantially true.

#### CHARGE NO. 6

Candidate Budzin alleged that the nominating petitions of candidates were not available for public inspection immediately following the deadline for filing such petitions.

Both Candidate Budzin and the Board Secretary provided essentially similar testimony regarding the events which precipitated this charge. Candidate Budzin visited the Board's office approximately ten minutes before the deadline time on the last day for filing nominating petitions. He waited until the hour was reached and then requested permission to examine the nominating petitions. The Board Secretary informed him that the petitions were in a locked filing cabinet and his secretary, who had the only key, had left the office for the day. As a result, Candidate Budzin had to return a week later in order to inspect the nominating petitions. (Tr. I-60-62; Tr. II-10-11)

The petitions were produced and marked in evidence at the inquiry. An examination of these seven petitions (Exhibits P-5 through P-11) discloses that three contain a similar irregularity. The petitions of Candidates Wyluda, Servon and Hoskins (Exhibits P-5, P-7, P-10) each contain the name of Ralph Berardo as the signatory who, being duly sworn or affirmed according to the law on his oath, deposes and says:

“\*\*\* That the above petition is signed by each of the signers thereof in his own proper handwriting; that the said signers are, to the deponent's best knowledge and belief, legally qualified to vote at the ensuing election, and that the said petition is prepared and filed in absolute good faith for the sole purpose of endorsing the candidate therein named in order to secure his election as a member of the Board of Education.” (Exhibits P-5 through P-11)

On these nominating petitions there appears, below the aforementioned passage, a line for the signature of the petitioner who is making the oath or declaration. Next to this line there is a space provided for the notary public before whom the affidavit is sworn and subscribed. On the line for the deponent's signature, the signature is that of Floyd L. Wyluda, instead of Ralph Berardo. Floyd L. Wyluda is not one of the signatories of the petitions for Candidates Wyluda, Servon and Hoskins. (Exhibits P-5, P-7, P-10)

Candidate Budzin testified that he pointed out this discrepancy to the

Board Secretary on the occasion when he examined the petitions, and he further testified that the Board Secretary printed the name Floyd L. Wyluda under the name of Ralph Berardo on Candidate Servon's petition. (Exhibit P-7; Tr. II-91-92)

The facts regarding this charge disclose that the charge is true.

In summary, the results of the inquiry establish the following facts: (1) two men were electioneering for Candidates Wyluda, Hoskins and Servon outside of the Lincoln School polling place during the annual school election; (2) the signatures of voters were not uniformly compared with their signatures contained in the signature copy registers by all election board members; (3) no poll lists were maintained at any polling place during the annual school election; (4) a relative of Candidate Wyluda, plus other persons, improperly entered polling places to check on the number of votes cast, throughout the course of the school election; (5) the husband of an election board member and a member of the Board of Education were loitering at the polling place during the annual school election; and (6) nominating petitions (P-5, P-7, P-10) were improperly deposited, were not available for inspection at the deadline for filing, and one nominating petition (P-7) was improperly altered by the Board Secretary.

\* \* \* \*

The Commissioner has reviewed the record and report of this inquiry and adopts as his own the findings as reported.

The Commissioner is constrained to state that the irregularities proven to have occurred at the annual school election in the South River School District disclose a degree of carelessness and disregard for statutory requirements which will not be condoned and may not continue in future school elections. The Commissioner has consistently taken the position that school elections are no less important than other elections, and they are to be conducted with careful regard for and in strict compliance with every requirement of law. *In re Annual School Election in Palisades Park*, 1963 S.L.D. 99

The Commissioner points out that electioneering is prohibited by *N.J.S.A.* 18A:14-72, which reads as follows:

"If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding \$500.00 or by imprisonment not exceeding one year, or both."

Also, *N.J.S.A.* 18A:14-81 is applicable and provides as follows:

"If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or

public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person.”

*N.J.S.A.* 18A:14-101 specifically provides that:

“No person shall by \*\*\* duress or any forcible or fraudulent device or contrivance whatever, impede, prevent or otherwise interfere with the free exercise of the elective franchise by any voter at any election; or compel, induce or prevail upon any voter either to \*\*\* vote or refrain from voting for any particular person or persons at any election.”

Any person violating *N.J.S.A.* 18A:14-101 or any other provision of Chapter 14 of Title 18A for which no specific penalty is provided shall be guilty of a misdemeanor. *N.J.S.A.* 18A:14-104

Election officials are clearly empowered by *N.J.S.A.* 18A:14-46 to maintain order at the polls and to control the conduct of the election. The statute reads in pertinent part as follows:

“\*\*\* the election officers shall have power to maintain order in the polling place, to require all persons other than challengers, candidates, and persons in the process of voting to leave the polling place, and to prohibit electioneering in the building in which the election is being conducted while the same is being conducted.”

In this election, the election officers were not clearly instructed regarding their powers and responsibilities. Certainly, the election officials should have summoned police to stop the electioneering at the Lincoln School polling place.

The election officials should be instructed to order all loiterers to leave the polls, and to secure the assistance of police officers if necessary, regardless of the identity of the loiterers.

The practice of permitting persons other than candidates, challengers and actual voters to enter polling places to ascertain the number of voters who have cast ballots must be stopped forthwith, and election board members are to be clearly instructed to order such persons to leave the polling places and, if necessary, to secure police assistance for this purpose.

The facts disclose that at this school election held February 13, 1974, and at previous school elections, the Board has violated the provisions of *N.J.S.A.* 18A:14-48 by not providing for the keeping of a poll list in which each voter is required to sign his name and state his address, together with the number of his official ballot.

This procedure is clearly described in the statute, *N.J.S.A.* 18A:14-50. After the voter has signed the poll list and listed his address, one of the election officers “\*\*\* shall compare the signature made in the poll list with the signature theretofore made by the voter in the signature copy register \*\*\*.” If the

signatures compare, the voter shall be eligible to receive a ballot. *N.J.S.A.* 18A:14-51 At the conclusion of the election, the Board secretary is required to forward the statement of the canvass of the votes, the tally sheets, and the poll lists to the County Superintendent. *N.J.S.A.* 18A:14-62 Any person who shall remove, destroy, or mutilate any poll list used at any school election shall be guilty of a misdemeanor and shall be punished by a fine of not more than \$1,000 or imprisonment for not more than two years. *N.J.S.A.* 18A:14-82

The incident regarding the nominating petitions exhibits carelessness in the handling of these important documents. Nominating petitions must be available for inspection by the public, and in this instance should not have been locked in a filing cabinet and the only key removed from the premises by a secretary in the Board's offices. Such actions raise in the minds of the public the question of whether something is being concealed from the scrutiny of the citizens. Three of the nominating petitions (Exhibits P-5, P-7, P-10) were incorrectly verified as shown by the evidence. The nominating petitions must be verified by the oath of one or more of the signers. *N.J.S.A.* 18A:14-11

When such a defect is found in a nominating petition, the provisions of *N.J.S.A.* 18A:14-12 apply as follows:

*"When a nominating petition is found to be defective excepting as to the number of signatures, the secretary of the board shall forthwith notify the candidate of the defect and the date when the ballots will be printed and the candidate indorsing the petition may amend the same in form or substance, but not to add signatures so as to remedy the defect at any time prior to said date."* (Emphasis ours.)

It is not proper for a secretary of a local board of education to alter in any way or manner the nominating petition which contains the defect. In this case the Board Secretary seriously erred when he printed the omitted name of the deponent on the nominating petition of Candidate Servon. (Exhibit P-7)

The required verification on a nominating petition is that of one or more of the signers. *N.J.S.A.* 18A:14-11 The three defective petitions were verified by Mr. Wyluda whose name does not appear as a signatory on any one of the three petitions which he attempted to verify. (Exhibits P-5, P-7, P-10) These defective nominating petitions should have been returned to the candidates for correction as required by *N.J.S.A.* 18A:14-12. The purpose of this statute is to eliminate technical imperfections which could otherwise invalidate a nominating petition to the detriment of a potential candidate and those citizens who support his candidacy.

The Commissioner deplores the lack of compliance with statutory requirements which is evidenced by the numerous irregularities which took place at this school election. He is constrained to order that a thorough review be made of all election requirements by the Board of Education of the South River School District, and that following such review the Secretary of the Board be directed to conduct a training session for all election board officers who will be engaged in the next school election. Such training shall include adequate written

instructions for the conduct of a school election, and opportunities for the discussion of questions which may arise from election board workers. Consideration should be given to having police officers at least visit polling places during the course of the election in order to render any assistance required by election board officers to uphold the election laws.

By means of thorough preparation, it is to be hoped that the election board workers will properly follow all the statutory requirements which govern school elections.

The evidences of irregularities brought to light by the inquiry, while not condoned in any way by the Commissioner, do not warrant the setting aside of the election results. It is the clear intent of the law that elections are to be given effect whenever possible. It has been held by the courts of this State that gross irregularities, when not amounting to fraud, do not vitiate an election. *Love v. Board of Chosen Freeholders*, 35 N.J.L. 269 (Sup. Ct. 1871); *Stone v. Wyckoff*, 102 N.J. Super. 26 (App. Div. 1968) It is clear that irregularities and deviations from election laws by election officials provide insufficient grounds for voiding an election if the will of the people has been fairly expressed and determined and has not been thwarted. *Petition of Clee*, 119 N.J.L. 310 (Sup. Ct. 1938); *In re Livingston*, 83 N.J. Super. 98 (App. Div. 1964) It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. *In re Wene*, 26 N.J. Super. 363 (Law Div. 1953) sets forth the rule as follows:

“The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.\*\*\*” (26 N.J. Super. at 383)

For the reasons stated, the Commissioner determines that the announced results of the annual school election held in the South River School District will stand. The Commissioner's order, as hereinbefore set forth, for reformation of election procedures in the School District, are to be effectuated for the next school election.

COMMISSIONER OF EDUCATION

November 15, 1974

**In the Matter of the Annual School Election Held in the  
School District of South Orange-Maplewood, Essex County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

A written complaint, first in the form of a telegram and subsequently in letter form, was filed with the Commissioner of Education by Edward A. Rehling, a candidate in the annual school election held in the South Orange-Maplewood School District, alleging certain irregularities in the conduct of the election.

A conference in this matter was held March 28, 1974 at the office of the Assistant Commissioner of Education in charge of Controversies and Disputes. At this conference, Complainant Rehling did not divulge the names of witnesses he would present at the inquiry in this matter, nor who would submit written affidavits.

An inquiry was conducted on June 6, 1974 by a representative of the Commissioner, at the office of the Essex County Superintendent of Schools, East Orange. Testimony was provided by Complainant Rehling, the Board of Education Secretary, and a mechanic employed by the Board of Education on election day to make emergency repairs to voting machines.

Complainant Rehling alleges that the breakdown of the voting machine at the polling place in the Marshall School, and the procedure followed as the result of the breakdown, prevented voters from casting a secret ballot. The events which transpired are these:

The Board provided five polling places for this annual school election, and polls were open from 7:00 to 9:00 a.m. and from 3:00 to 9:00 p.m. Complainant Rehling, who was a candidate, voted at the Marshall School polling place. He raised a slide in position number one to make a write-in vote for a candidate who was conducting a write-in campaign. The space had the candidate's name already written in. He tried lifting the slide over each of the remaining slots and found the candidate's name written in each one with the exception of the last slot. He wrote in the candidate's name and then found he could not depress the lever next to his own name to cast a vote for himself. He informed the judge of the election and the judge explained that Candidate Rehling could not depress the lever next to his own name because he had already raised the slides in three write-in positions, and thus the machine had locked. The judge also explained that all of the write-in spaces were filled because the paper roll within the voting machine was not turning as it should. This incident occurred shortly before 9:00 a.m. when the polls were to be closed until 3:00 p.m.

The Board Secretary was notified regarding the breakdown of the single voting machine at the Marshall School polling place by the judge of the election. Four persons were not able to vote because of the breakdown, and were

requested to return during the afternoon at which time the machine would be repaired. Twenty-six voters had cast ballots on this single voting machine prior to the breakdown.

The Board had employed a mechanic from the Essex County voting machine warehouse to be present during the school election in the event of an emergency. This mechanic went to the Marshall School polling place and, since he was unable to make the voting machine operate properly, ordered a replacement machine from the Essex County warehouse. The mechanic returned to the Marshall School polling place at 2:00 p.m. to prepare the replacement voting machine for the opening of the polls at 3:00 p.m. He found that the replacement machine would not operate, and when he was unable to repair this machine, he reported this fact to the assistant chief mechanic by telephone. The clerk of the County Board of Elections, who was called by the Board Secretary, and the chief mechanic from the County voting machine warehouse, both arrived shortly after 3:00 p.m. at the Marshall School polling place. In the judgment of the mechanic employed by the Board, the second voting machine had been dropped or had fallen over in transit to the polling place.

Because of the breakdown of the replacement voting machine, the judge of the election provided an emergency voting procedure. This procedure required the voter to use the upper portion of the voting authority form, by writing the names of three candidates on the reverse side of this form. These voting authority forms were then deposited in a cardboard box placed in front of all of the election officers.

The Board Secretary secured a ballot box from the Board office, which had been used for school elections prior to the use of voting machines, and returned with it to the Marshall School polls. The election officials transferred the improvised paper ballots to the locked ballot box, and the judge of the election retained the single key to the ballot box. This procedure continued until the end of the election at 9:00 p.m.

The Board Secretary had summoned the clerk of the County Election Board to inspect the emergency voting procedure at the Marshall School and render an independent opinion as to the adequacy of that procedure. The Board Secretary testified that this county official instructed the judge of election to place the second half of the voting authority forms in a sealed envelope at the closing of the polls, and to have this sealed envelope delivered to the Board Secretary at the Board's offices, prior to the counting of any votes at the Marshall School polling place. The purpose of this procedure was to prevent the comparison of the portion of the voting authority form signed by the voter and numbered, with the other portion of the voting authority form which contained the same number, and which contained the names of the candidates written on the reverse side by the voter. The Board Secretary received the sealed envelope containing these forms and wrote the time of receipt and his signature across the sealed flap. He then deposited this sealed envelope in the box of materials which was delivered to the County Superintendent on the day following the election. The portions of the voting authority forms which were used as ballots were sent to the County Election Board clerk when the voting machines were returned to



the warehouse. The Board Secretary determined, subsequent to the inquiry, that the clerk of the County Board of Elections destroyed these paper ballots.

Complainant Rehling's contention is that since each voter signed one half of the voting authority form, which was numbered, and used the reverse of the other half of this form, also numbered, as a ballot, the two halves could be compared after the election and the comparison would disclose the name of the voter and the candidates for whom he voted. He testified that his wife only voted for him on this improvised ballot because she feared such a comparison would take place.

The evidence in the record of this inquiry establishes a finding that the emergency voting procedure, instituted because of the failure of two voting machines and the inability to secure a third machine, did provide an adequate secret ballot for all voters.

Complainant Rehling presented seven letters or statements signed by citizens. (Exhibits P-1 through P-7) These letters contain allegations that individuals were not properly instructed in the procedure for a write-in vote by officers of the election boards at the five polling places. Since none of these seven individuals were present to testify, the only one statement was notarized, little weight can be given to these statements.

The Board Secretary testified that he was aware, prior to the election, of an impending write-in vote campaign. Accordingly, he visited each of the five polling places, beginning at 6:45 a.m., and explained to each judge of the election how to instruct voters to cast write-in ballots.

The Board's mechanic testified that he visited the Maplewood Junior High School polling place as the result of a complaint by a voter who had cast a write-in vote and claimed he could not depress the lever next to the name of the candidate immediately below the write-in slot. The mechanic tested this voting machine and found that the complaint was unfounded. According to the mechanic, the voter must have raised three write-in slot covers, and thus locked the machine, since only three candidates could be selected by each voter. (Tr. 43-44)

Written instructions which had been prepared by the Board Secretary and distributed to each judge of the election (Exhibit R-2), inspector of the election (Exhibit R-3), secretary of the election (Exhibit R-4), and clerk of the election (Exhibit R-5) were marked in evidence. These written instructions are reasonably comprehensive to enable an election board officer to perform his duties. The instructions are all basically similar, but do describe the basic duties to be performed by each election board officer. Each judge of the election is directed by these instructions to call a designated telephone number and request the services of the mechanic on duty in the event of a malfunction of a voting machine. It is the recommendation of the Commissioner's representative that these written instructions be revised to include instructions for instituting emergency voting procedures in the event of necessity to resort to paper ballots, as occurred in the instant matter, and also include written instructions for

explaining to voters the correct procedures for casting a write-in vote.

Complainant Rehling also questioned the use of only five polling places for a school election instead of seventeen which are used for general elections. He alleged that the Board should use ten polling places, one in each school, in order not to disenfranchise voters by making voting extremely difficult.

The requirement for polling places at an annual school election is prescribed by *N.J.S.A. 18A:14-5*. This statute reads as follows:

“Whenever at two consecutive annual school elections more than 500 ballots shall be cast in a polling district, the board shall establish a polling district and polling place for each 500 ballots or part thereof cast at the last annual school election, and prescribe the boundaries thereof, which shall coincide with the boundaries of one or more of the election districts of the municipality or municipalities composing the school district, so that as nearly as practicable an equal number of voters shall be eligible to vote in each polling district, but, if at any two subsequent annual school elections held in the entire school district, the number of votes cast in any polling district shall be less than 500, the number of polling places may be reduced by the board to such numbers as may be necessary to conform with the provisions of this section unless and until the vote so cast in a future school election in any polling district shall exceed said number.”

The intent of the statute is to evenly distribute the polling places so that approximately 500 voters will vote at each polling place.

The distribution of voters at polling places in this school district for 1972, 1973, and 1974 is shown in the chart below.

Poll	1972	1973	1974
Maplewood School	1229	1596	1030
South Orange School	1628	1169	857
Marshall School	—	420	249
Clinton School	—	321	212
Seth Boyden School	183	205	112
TOTALS	3040	3711	2460

(Exhibits R-1, R-8 through R-11)

These results disclose that the Board's total number of five polling places for the 2,460 who voted meets the requirement of an average of approximately 500 voters per poll. The distribution is uneven, however, and the Board should attempt to provide a polling place which would accommodate approximately one half of the voters who voted at the Maplewood Junior High School polls. Such a change would bring the Board's polling places into a closer compliance with the statute. *N.J.S.A. 18A:14-5*

This concludes the report of the Commissioner's representative.

\* \* \* \*

The Commissioner has reviewed the record and the results of the inquiry in this matter.

In the judgment of the Commissioner, the facts in this case fail to support complainant's allegation that the breakdown of the voting machine and the use of the previously described emergency voting procedure deprived voters of the right to a secret ballot.

In regard to the instructions given to election officials concerning the proper directions for voters who desired to cast a write-in vote, the Commissioner determines that the record does not support a conclusion that such instructions to election board officers were lacking or improper. In view of the fact that the casting of write-in votes is oftentimes confusing and difficult for voters who vote on voting machines, the Commissioner directs this Board and strongly recommends that all local boards of education in this State, provide written instructions for election board officers regarding the write-in voting procedure. These written instructions, as well as the written instructions for the general performance of duties by election board officers, should be discussed and explained with them prior to the annual school election.

The Commissioner also recommends that the Board and all other local boards which use voting machines have written instructions for the use of emergency paper ballots in the event of a breakdown of a voting machine, as occurred in this case. The necessary paraphernalia should be provided and kept in a state of readiness in the eventuality that it be required in an emergency.

The Commissioner also instructs the Board to review its distribution of available polling places in order to assure, wherever possible, that an average of 500 voters will be served by a polling place. *N.J.S.A.* 18A:14-5

In conclusion, the Commissioner finds no showing of fraud, collusion or misconduct which would vitiate the election. It is purely speculative to presume that, if conditions had been different, the results would have been different. The Commissioner has consistently declined to set aside contested elections unless there is clear proof that the irregularities affected the result of the election. The Commissioner has consistently and vigorously condemned any procedural faults and irregularities found in a school election, but even gross irregularities not amounting to fraud do not vitiate an election. The Commissioner cannot find that the conduct of this school election was such that the will of the people was thwarted or could not be fairly determined. *Love v. Board of Chosen Freeholders*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Application of Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953), *aff'd* 13 *N.J.* 185 (1953); *Sharrock v. Borough of Keansburg*, 15 *N.J. Super.* 11, 19 (1951); *In re Moore*, 57 *N.J. Super.* 224, 251-52 (1959); *Petition of Clee*, 119 *N.J.L.* 310 (*Sup. Ct.* 1938)

For the reasons stated, the results of the election shall stand as announced.

COMMISSIONER OF EDUCATION

November 15, 1974

**Board of Education of the City of Trenton,**

*Petitioner,*

*v.*

**City Council of the City of Trenton, Mercer County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Merlino and Andrew (Michael A. Andrew, Jr., Esq., of Counsel)

For the Respondent, Robert Gladstone, Esq.

For the Commissioner, William F. Hyland, Esq., Attorney General (Jane Sommer, Attorney at Law)

Petitioner, the Board of Education of the City of Trenton, hereinafter "Board," filed a Petition of Appeal with the Commissioner of Education on April 10, 1974. This Petition requested the Commissioner to restore certain sums of money which had been deleted from the Board's budget for the school year 1974-75 by prior actions of the Commissioner, and of the City Council of the City of Trenton, hereinafter "Council." Subsequently, however, the Board reached an amicable settlement with Council with respect to Council's action, and the Board has withdrawn that portion of the instant appeal. At this juncture, then, the Petition remains viable with respect to the previous action of the Commissioner.

A Deputy Attorney General of the State of New Jersey has now filed a Motion to Dismiss this remaining portion of the Petition. Such Motion was advanced on behalf of the State Department of Education. A Brief in support of the Motion was filed by the Deputy Attorney General and the Board has filed an answering Brief. Oral argument has been waived and the matter is presented directly to the Commissioner for a determination. The factual circumstances and contentions of the parties are as follows:

The sole issue in this case is concerned with a decision by the Commissioner on January 31, 1974 with respect to the Board's proposed budget for the operation of its schools during the 1974-75 school year. Such decision by the Commissioner was occasioned by the fact that the statute *N.J.S.A. 18A:58-5* requires review by the Commissioner of all school budget proposals prior to submission to the electorate at the annual school election if the "\*\*\*incentive equalization aid plus the minimum support [both provided by State funds] shall be greater than the local tax requirement\*\*\*." Specifically the Commissioner determined, after review in this instance, that the amount of money required by the Board for school purposes in the 1974-75 school year should be \$930,000 less than the amount proposed by the Board. The Board requests restoration of this sum at this juncture.

Certain facts, in chronological order, are prerequisite to a recital of the arguments of the parties. These facts are succinctly recited as follows:

1. In October 1973, the Board submitted an estimate of its total budget allocations for the 1974-75 school year to the State Department of Education. The total of such estimated proposed expenditures was \$22,500,000.

2. In December 1973, the Board was notified by officials of the State Department of Education that, on the basis of the Board's previously estimated expenditures, it was eligible for the following amounts of State aid in school year 1974-75:

CURRENT EXPENSE AID

Incentive Equalization Aid	\$10,240,455
Minimum Aid	3,458,308
Transportation Aid	337,500
Atypical Pupil Aid	1,048,120
Building Aid	866,433

3. In January 1974, the Board submitted to the State Department of Education its revised estimate of the total amount of money it required for the current expense operation of its schools for the 1974-75 school year. This estimate was considerably higher than the preliminary estimate, *ante*, and totaled \$25,164,146, of which sum \$9,784,163 was proposed to be raised in local taxes.

4. At that juncture, a review by the State Department of Education was required since the sum of \$9,784,163 proposed to be raised in local taxes was less than the amount to be apportioned to the Board in State funds for Incentive Equalization Aid (\$10,240,455) and Minimum Aid (\$3,458,308). Such review was conducted by the Division of Administration and Finance, and subsequent thereto, two conferences with respect to the Board's budget were held between State Department of Education officials and representatives of the Board.

5. Thereafter, the Commissioner informed the Board on January 31, 1974 of his recommendation that the Board's budget proposals to the electorate be reduced by a net sum of \$930,000.

6. This recommended net reduction was incorporated by the Board in its proposal to the electorate at the annual school election which was held in Trenton on the postponed date of March 5, 1974. The ballot on that occasion contained the following resolution:

"That there be raised for Current Expenses for the ensuing school year (1974-75) . . . \$8,854,163.00"

(It is observed here again that the original January proposal by the Board was for a sum of \$9,784,163.)

7. The proposition was defeated by the voters and the budget was submitted to Council for its review pursuant to law. *N.J.S.A.* 18A:22-37

8. Thereafter, Council certified to the Mercer County Board of Taxation a sum to be raised by local taxation which was \$946,015 less than the Board's proposal, *ante*, which was rejected by the voters.

9. On April 9, 1974, the Board resolved to appeal both the reduction by Council and the prior reduction deemed appropriate by the Commissioner (\$930,000), even though such reduction by the Commissioner had been incorporated by the Board in the resolution which was rejected by the voters at the annual school election.

The arguments herein are set in this factual context. The principal question for determination is whether or not the Commissioner has the authority at a time subsequent to the annual school election to order the restoration of funds originally deleted by the Commissioner when such deletion was incorporated by the Board in the proposal it submitted to the voters. The Motion to Dismiss the instant appeal is grounded principally in an argument that there is no such authority. Council advances a contrary view. These arguments will now be summarized.

Counsel for the Department of Education advances two principal arguments in support of the Motion that the Petition should be dismissed. These arguments are first, that the Board is estopped from seeking a review of the Commissioner's reduction at this juncture since such reduction was incorporated, without timely protest, in the Board's proposal to the voters at the annual school election; and secondly, that petitioner has failed to state a claim upon which relief may be granted.

The argument with respect to estoppel is founded on the fact that between the date of January 31, 1974, when the Commissioner recommended that \$930,000 be excised from the Board's budget, and the date of March 5, 1974, when the Board's revised budget, incorporating such reduction, was submitted to the voters, the Board did not seek review of the reduction or of any of its component items. Therefore, counsel for the State Department of Education argues, the Board "\*\*\*\*accepted the Commissioner's recommended reduction of \$930,000 without reservation and presented a budget reduced by this figure to the voters, thus clearly and decisively waiving any right to a review of the Commissioner's recommendation.\*\*\*" (Brief of Department of Education, at pp. 8-9)

Counsel for the State Department of Education cites a number of cases in support of the argument that the Board has waived its right to bring an appeal of the Commissioner's action at this juncture, and that the Board's failure to take timely action constitutes not only a waiver of the right but also laches. *Montclair Trust Company v. The Star Company*, 139 *N.J. Eq.* 211, 216 (*Ch.* 1947), remanded on other grounds, 114 *N.J. Eq.* 263 (*E. & A.* 1948); *Somers Construction Company v. Board of Education*, 198 *F. Supp.* 732, 737 (*D.N.J.*



1961); *DeStefano v. Civil Service Commission*, 126 N.J.L. 121, 124-25 (Sup. Ct. 1941)

Counsel for the State Department of Education also avers that there is no authority for the Commissioner to fix a budget on his own which exceeds, in its local tax requirement, the amount proposed by a local board of education and submitted to the electorate at the annual school election. In support of this argument, counsel cites *Board of Education of the Township of East Brunswick Township v. Township Council of the Township of East Brunswick*, 48 N.J. 94, 102-103 (1966) and particularly that part of the Court's opinion which detailed the Commissioner's budget reviewing authority and which said that if the Commissioner finds that:

“\*\*\* the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimal educational standards for the mandated ‘thorough and efficient’ \*\*\* school system, he will direct appropriate corrective action by the governing body or fix the budget on his own *within the limits originally proposed by the board of education.*\*\*\*” (Emphasis added.) (at p. 107)

The Board denies it ever waived its rights to appeal the Commissioner's reduction of \$930,000 from its budget or that its delay to April 9, 1974 in filing a Petition of Appeal of such reduction constitutes laches or acts as an estoppel against the instant claim. It states:

“\*\*\* there are no statutory or decisional law time requirements relative to the filing of a request for review after reductions by the Commissioner of Education of a school budget. \*\*\* In the absence of such law, regulation or guideline, and considering the circumstances of the within matter it is submitted that the petitioner was not guilty of laches.\*\*\*”  
(Board's Brief, at p. 16)

The Board further argues that:

- (a) the Commissioner does have authority to increase the amount of money to be raised from local taxes for current expenses to a sum higher than that presented to the voters;
- (b) the Commissioner has an obligation to seek additional State aid from the Legislature if he determines that errors were made with respect to budget reductions;
- (c) the Commissioner also has an obligation to seek additional State aid if he finds that the Board was penalized by its original submission of an estimated budgetary request.

In essence, the Board's arguments with respect to (a) and (b) are that the



Commissioner is required to insure that a thorough and efficient educational program be provided in all of the schools of the State and that "\*\*\*\* the State's educational policies are being properly fulfilled \*\*\*." *East Brunswick, supra* It is the Board's contention with respect to (c) that its State aid appropriation was determined on the basis of its estimated preliminary budget but that, after a subsequent review, the Board found such budget a was inadequate and another estimate was required. Therefore, the Board argues that "\*\*\*\*it has been the subject of discrimination because of the 'freeze' in budgetary requests based on October, 1973, estimates. \*\*\*\*" (Board's Brief, at p. 24) This argument with respect to discriminatory treatment is founded on these assertions:

"\*\*\*\* The petitioner had attempted to keep its estimate in October, 1973, as low as possible based on the heretofore stated understanding that it could revise its estimate if circumstances warranted such revision. If the petitioner had submitted extremely high estimates, as it believes a number of other districts did, the amount of state aid received by the petitioner for 1974-75 would have been considerably higher.\*\*\*\*"

(Board's Brief, at p. 24)

The issue for determination by the Commissioner is whether or not, at this juncture, the Motion to Dismiss should be granted or, in the alternative, that a full plenary hearing should be set down for a new consideration of the Petition of Appeal on its merits.

The Commissioner has reviewed the facts of the instant matter and considered the contentions of the parties. He finds no reason to provide a plenary hearing at this juncture.

The Commissioner communicated his final recommendations regarding a budget reduction to the Board on January 31, 1974. Prior to that time the Board had had every opportunity to present its views to the Division of Administration and Finance, State Department of Education. Subsequently, the Board incorporated the Commissioner's reduction of \$930,000, without further appeal to the Commissioner or the courts, in its proposal to the voters at the annual school election. In fact, for a period of sixty-eight days from January 31, 1974 to April 9, 1974, until after the referendum had been held, the Board made no protest at all which is known to the Commissioner.

In such circumstances the Commissioner holds the Board has indeed waived its right of appeal and is barred by laches from advancing one. *Montclair Trust Company, supra*

Even assuming, *arguendo*, that this is not so, the Commissioner finds no reason or authority, absent clear and convincing *prima facie* proof of gross error or of extreme emergency, to justify a plenary hearing wherein the principal plea is for the Commissioner to require, in local funds from taxation, a sum greater than that deemed appropriate by a local board of education for submission to its voters. There is no such proof herein.

To the contrary, the Board's total current expense appropriations for

school year 1974-75, as approved by the Commissioner, are significantly higher than in school year 1973-74. Even with the recommended reduction by the Commissioner included, such expenditures are programmed to increase by approximately nineteen percent from an appropriation of \$20,423,706 for all current expense purposes in school year 1973-74 to an appropriation of \$24,223,146 in the 1974-75 school year. Based upon these facts, the Commissioner deems it unnecessary to conduct a formal plenary hearing in this matter.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

November 15, 1974

Pending before State Board of Education

**In the Matter of the Request of the Board of Education of the  
Central Regional High School District, Ocean County,  
to Utilize a School Site.**

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Wilbert J. Martin, Jr., Esq.

For the Respondent, William F. Hyland, Attorney General (Mary Ann Burgess, Deputy Attorney General)

Petitioner, the Board of Education of the Central Regional High School District, hereinafter "Board," appeals from a decision of the Commissioner of Education wherein the Commissioner refused to recommend approval of the construction of another school building on the same site whereon is located the existing Central Regional High School. A hearing in this matter was conducted on June 4, 1974 at the office of the Ocean County Superintendent of Schools, Toms River, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Central Regional High School District, which includes grades seven through twelve, is a large district encompassing an area of approximately 134 square miles situated in one of the most rapidly growing areas of the State. In fact, the total population of the district increased from 7,130 persons in 1950 to 12,856 in 1960 and to 20,333 in 1970. (P-4, at p. 4) According to the Ocean County Planning Board, it is expected that this population growth will continue to 44,500 persons in 1980 and 72,150 persons in 1990. (P-4, at p. 4)

In a parallel manner, the school pupil population of the district has increased dramatically in recent years, from 1,561 pupils in the 1968-69 school

year to 2,433 in 1972-73. (P-4, at p. 11) More than 2,600 pupils are expected to enroll at Central Regional High School in September 1974. (Tr. 39) This past and projected enrollment is the fundamental cause of the problem herein since the two school buildings of the district have a functional capacity of only 1,260 pupils, and double sessions have been required during the past four years. It is now further projected that the pupil enrollment will increase to approximately 3,388 pupils in 1976-77, 3,859 in 1978-79, 4,323 in 1980-81, and 4,741 in 1982-83. (P-4, at p. 18)

Thus, the Board's instant emergency provision of double sessions for the education of pupils of the district is clearly not a temporary expedient. However, it is equally clear that unless there is expeditious action to provide additional facilities, such double sessions must probably give way to triple sessions in the not distant future.

The concern of the Board, of the County Superintendent of Schools, and the State officials with respect to such present and projected overcrowding is of long duration, and in its most recent phase dates to January 12, 1971. On that date the President of the Board wrote to the Commissioner and asked for the assistance of the Commissioner's office in finding a solution to the problems of housing the growing pupil population. Thereafter, the County Superintendent and State officials were requested by the Commissioner to review and report on the situation. Such review was made and a report was submitted to the Board on April 14, 1971. (P-2) Additionally, the Board engaged a private consulting firm, Engelhardt and Engelhardt, Inc., to survey and report with respect to its building needs. The Board received this report in November 1972.

However, no subsequent immediate action was taken by the Board to alleviate overcrowded school conditions, and on July 2, 1973, the Commissioner directed the Board "\*\*\*\*to take immediate steps to provide suitable educational facilities.\*\*\*\*" Subsequently, on October 15, 1973, the Board did submit schematic plans to build a new school building on its present high school site, but such plans were not approved by the State Department of Education and an appeal was launched by the Board with the Commissioner and with the Division of Building Services, State Department of Education. This appeal was later denied by the Commissioner in a letter dated April 2, 1974 to the Superintendent of the Central Regional High School District. The letter reads as follows:

"We have carefully reviewed the documents and arguments in the appeal of the Central Regional High School District of Ocean County against the decision of our Department's Bureau of Facility Planning. In that decision, concerned with your proposal for construction of another school building on the same site in Bayville as occupied by the existing high school, the Bureau refused to recommend approval to the Commissioner and the State Board of Education.

"An examination of the pertinent data and testimony leads us to concur with the Bureau's statement . . . that the interests of the district and pupils will be served best by locating the proposed high school facilities on a tract

of land other than the site on which the existing high school is located.

“Your district appeal is therefore denied. It is recommended that you proceed immediately to confer with the Ocean County Superintendent of Schools, William F. White, to determine on an acceptable solution your facilities problem. The specialized services and personnel of our Department will be available to assist in any way possible.”

The Board then filed the instant Appeal, in effect the second one, and the matter was assigned to the Division of Controversies and Disputes, State Department of Education, for a formal hearing on the merits of the Board's complaint. Briefly stated, this complaint is concerned with that part of the Commissioner's letter *ante*, which states that the “interests of the district and pupils” (of the regional district) will be best served if new school facilities are located on a new school site rather than on the site of the present Central Regional High School. The Board maintains the site is adequate to sustain additional school facilities. The Commissioner of Education, other State officials, and the Board's own consultants have, to date, disagreed.

The site in question is, by almost any standard, a large one. It comprises approximately 96 acres (P-2) and at the present juncture contains two school buildings, a junior high school (grades seven and eight) with a functional capacity for the education of approximately 625 pupils, and a senior high school with a functional capacity of approximately 630 pupils. (P-4, at p. 23) (Note: State officials testified that the functional capacity of the two buildings is approximately 1,260 pupils.) (Tr. 63) The two buildings are adjacent and occupy the northeast quarter of the total site. Other parts of the site are developed as a baseball field and as a track, but approximately one-half of the available land area remains undeveloped. (P-1) It is this undeveloped area which is the primary source of dispute herein.

The Board avers that the undeveloped area is sufficiently large to support an additional high school building in the southwest corner and that the building should be placed there because the proposed site has a high elevation, and has good drainage factors. (P-7) The Board also avers the proposed site can be made easily accessible without increasing the traffic flow past present schools. (P-7)

It is represented by the Board that the proposed new building would accommodate approximately 1,800 pupils at its functional capacity, and that the educational facilities therein proposed to be contained would be integrated with school facilities already available on the total site. (Tr. 42) The Board also avers that previous referenda defeats in 1970 and 1971 lead to a conclusion that the voters want an “economical” program of school expansion and that the present Board proposal meets this criterion. (Tr. 15, 40) Further, the Board maintains it should be allowed to proceed since there is no firm criterion or standard which is universally applicable throughout the State, and that the State's insistence on compliance with its recommendations herein is, in effect, discriminatory. (Tr. 65)

The views of State officials, which have been cited in summary form by

the Commissioner in his letter *ante*, are concisely and specifically stated in a letter written by the Director, Bureau of Facility Planning, State Department of Education, to the Central Regional High School District's Superintendent of Schools on January 3, 1974. In that letter he said:

“\*\*\* There has been unanimous agreement that the interests of the district and pupils will be served best by locating the proposed high school facilities on a tract of land other than the site on which the existing high school is located.

“There were many considerations involved in the deliberations. Basically they are:

“1 – The department recommendation for the maximum enrollment of a secondary school is 1500. This is being emphasized by the Department of Education in its “thorough and efficient” study. It is also a basic criterion in the development of evaluative criteria for the educational adequacy of facilities in the proposed State-Wide Survey and district master-planning.

“Since the present Central Regional High School has a capacity of 1260, it is most desirable that it not be expanded.

“2 – In a school district comprising over 125 square miles (more than five times the size of Newark) it is evident that additional facilities will be needed to accommodate future population increases.

“Now, as part of a long-range master plan, a second high school site should be acquired and utilized.

“3 – Since Ocean County is one of the most rapidly growing areas of the State present planning should incorporate future needs. A recent demographic study for your district (November 1973) indicates a probable enrollment of 4741 by the school year of 1982-83. That would point to a need for approximately three high schools of 1500 each by that time. This would also emphasize the desirability of constructing the second plant now.

“4 – Because of the geographic expanse accessibility would be greater should a second, remote location be established now. Eventually this should reflect a decreased travel time for students.

“5 – In a Bureau study of the situation directed by M. Lee Pisauero and reported under date of April 14, 1971 a number of reasons were advanced for proposing the needed facilities at another location (see pages 4 and 5 of that analysis).

“6 – In a study made for your district by the educational consultants Engelhardt and Engelhardt under date of November 1972 the same recommendations were made.

“7 – In an analysis of the facilities situation made by a Department Task Force in 1973 these recommendations were again emphasized. Under date of May 30, 1973 it stated:

‘The need for a second school is now, and has been for a long time, very evident. Whether a new senior high or junior high building is planned it should be located at another site to avoid the numerous discipline, traffic congestion, and excessive wear on the site which would be inevitable if located at this site. A master plan for the District should suggest the most logical location for another building and site.’

“8 – With reference to the existing inadequacies of the plant, these could be corrected internally once the school population could be reduced to its functional capacity. The Department personnel and resources would be made available for your district, at that time, to assist in this upgrading.

“It is therefore suggested that your district move immediately toward the identification of a tract of land suitable for these purposes and incorporate the new site as part of your revised schematic submission. Every effort will be made in this Bureau to expedite the review.” (R-1)

The reasons enunciated in this letter were reiterated at the hearing, *ante*, although State officials did admit that the Department of Education has, on occasion, granted approval for sites that did not meet recommended criteria if no other alternative were available. In general, these State officials take the position today, as they have in the past, that large school populations on a given site are undesirable, because there is an increased potential for disorder and a decreased potential for a desirable personal interrelationship among pupils and teachers. (Tr. 58)

The hearing examiner has reviewed such arguments, and finds that the Board’s proposal herein, to add facilities for the education of approximately 1,800 pupils on a site where facilities are already available for 1,260 pupils, is at best a short term rather than a long term solution to the problem.

This is so since, if the Board’s plans are allowed to go forward, all school buildings would probably be filled to capacity on the day the new facility is programmed to open its doors. Such probability is derived from the statistics:

Projected building capacity - 3,060 pupils	
Projected enrollment (1976-77) – 3,388 pupils	(P-4, at p. 18)

However, the proposal of the Board, if implemented, would temporarily alleviate an increasingly difficult situation, and this fact must be balanced with the arguments against the proposal which have been advanced by State officials.

Having reviewed such arguments and equated the merits of each, the hearing examiner finds that the weight of the evidence suggests that the Central

Regional High School District would be better served, over the long term, by a proposal other than the one advanced by the Board which is herein controverted. The expert opinion of the Board's privately engaged consultant firm and of all State officials over a period of years attests to the correctness of this view and is perhaps best summarized in certain recommendations contained in the Engelhardt report of previous reference as follows: (P-4, at p. 42)

*"Site*

As soon as possible a new school site should be obtained." (Note: The arguments advanced herein are similar to those advanced by State officials and those of the State's Director of Facility Planning, *ante.*)

The report further recommends that this new site be located in an "\*\*\*area of population concentration\*\*\*" and should be comprised of a "\*\*\*minimum of 100 acres of useable land\*\*\*." (P-4, at p. 43)

Such recommendations, which buttress the argument of State officials, favor the adoption of a long-term plan to meet the needs of the Central Regional High School District and are in harmony with the detailed recommendations of the State Board of Education which are contained in the Administrative Code. (*N.J.A.C.* 6) These latter recommendations of pertinence to the matter, *sub judice*, are set forth as follows:

"6:22-5.1 General provisions

"(a) *School sites should be selected well in advance of actual needs.* The selection of a site for a school building involves technical problems and educational factors which require the cooperative efforts of the professional parties concerned. Suggestions for selecting a school site must be sufficiently *broad and flexible* to allow for variations in the character of the school district in which the site is located, the size and type of school to be built, and the nature of the educational program activities to be accommodated.

"(b) It is recommended that consideration be given to the following factors in site selection: size and shape, topography, accessibility, environment, safety, health of pupils and school personnel, accessibility of public utilities and services, surface and subsurface conditions, the orientation of projected building on the site, initial cost and development cost, and *the overall master plan for schools in the district.*

"(c) Before any action is taken to purchase or otherwise acquire sites intended for future schools or school expansion, it is required that the local school district must first receive approval of its adequacy from the Bureau of Facility Planning Services of the Department of Education. Within practical limitations of staff, the Bureau will assist in evaluating sites for school districts. Approval by the Bureau consultants will signify to the board of education that a thorough investigation and careful weighing of a number of factors have been made in approving the prospective school site. This approval will do much to create a favorable



reaction among voters when a referendum is required. By virtue of specialized training and wide experience, there are other persons particularly knowledgeable in the field of site selection who may be called upon for expert assistance. Advisory services should be utilized in selecting a suitable setting for the school plant.” (Emphasis supplied.)

“6:22-5.2 Size of site

“(a) The size of any school site should be determined largely by the nature and scope of the contemplated educational program. Actual layouts of the spaces needed by the various phases of the program should be made. Because the site-size problem varies in accordance with the needs of the type of school organization and in terms of the age and development status of the community or school district, the following rules must be taken as minimum for which all should strive and which most should exceed.

\*\*\*

“(c) For junior high schools and middle schools it is suggested that there be provided a minimum site of 20 acres plus an additional acre for each 100 pupils of predicted ultimate maximum enrollment.

“Example: A junior high or middle school of 500 pupils, projected maximum enrollment, would have a maximum site of 25 acres.

“(d) For senior high schools it is suggested that there be provided a minimum site of 30 acres plus an additional acre for each 100 pupils of predicted ultimate maximum enrollment.

“Example: A senior high school or 1,000 pupils projected maximum enrollment, would have a minimum site of 40 acres.

“(e) Larger school sites have become necessary for a variety of reasons. On-the-site parking for pupils, faculty, and the public have made increased demands on school space. Growing communities, which have not been able to make provision for adequate parks and recreation areas for the public, have found it both desirable and economical to combine public recreational and school recreational areas. Where public park land adjoins a public school site, it should be made suitable for and available to the school for its use in its out-of-doors program. Sometimes schools and communities jointly plan school and community facilities to get the maximum use of a site.

“1. The growing popularity of one-story schools in place of multi-storied structures makes its demand upon space, as does also the pressing realization that future additions to the building will probably be necessary in the not-far-distant future. It is true, too, that some schools like to have adequate space for school gardens and an agricultural demonstration area, and rate highly their educational value. The trend for providing space for a great variety of outdoor teaching areas necessitates larger sites. Larger sites result in substantial improvements in educational programs, community services, and efficiency of operation.

“2. Experience has indicated that ultimate site requirements should be met with the initial site acquisition because land adjacent to a new school soon becomes occupied with housing developments.

“3. Almost all suburban communities are burgeoning in population. Their possible destinies, in point of future population, are only vaguely felt and dimly perceived. A small restricted school site, a few years hence, is likely to prove a ponderous obstacle to adjustment to new conditions, and may prove to be one of the most compelling factors in the creation of a ‘blighted’ district. A large school site has always the opposite effect.

“4. Even for small schools a large site is essential. Actually for many activities such as baseball, tennis, track, soccer and football, the same space needs are felt by both large and small schools.”

#### “6:22-5.5 Accessibility of site

“(a) Schools should usually be located near the center of the present and the *probable future school population which is to be served*. Yet there are exceptions to this rule-of-thumb. Like the large supermarkets, schools are finding that a large fine site, perhaps removed from the center of population, is preferable to a small restricted site more centrally located. In other words, the amount of good space available is frequently a more compelling cause for site selection than is central location. The increasing ease of transportation tends to nullify the initial advantages of a centrally located site. In this case safety and convenience of approach are of greater relative importance.

“(b) Where transportation is involved, the maximum travel time for elementary pupils should rarely exceed 30 minutes and for secondary pupils one hour. Special paths for bicyclists should be planned, with covered racks for the vehicles.”  
(*Emphasis supplied.*)

#### “6:22-5.13 Consideration of local area master plans

“(a) Ideally, a site acquisition is *planned for several years in advance* of need, as a responsibility of the local board of education. Careful studies should be made of population trends, industrial, commercial and residential developments and other factors indicative of when and where new school sites will be required.

“(b) Community and *regional master-plans*, where existing, should be reviewed for their probable influence on the *future of the local school system*. Land-use maps are most frequently found where there is community planning and urban redevelopment. Such maps can provide much valuable information. Geodetic and soils survey maps are available and are most useful in preliminary studies of prospective sites. Other sources of basic information to be consulted in wise planning would include: pupil enrollment forecasts by the school administration or other experts, utility company studies, realtor and developers’ activities, aerial photographs, highway maps, reports of various land-use specialists, preschool or pupil spot maps, and dwelling unit maps. The nature of the local situation will govern the choice of devices or procedures to be used.

“(c) Boards of education are required to submit a copy of their plans to the local planning board for review in those municipalities where such agencies have been established.” (Emphasis supplied.)

Viewed in such a context, it is logical that the Board’s presently proposed plan must be found to be deficient in that it sacrifices long term need for short term expediency. It would crowd a present school site while ignoring the pressing and clear need for another site. It proposes a smaller immediate cost but almost certainly insures greater future expense. The hearing examiner so finds.

Thus, the hearing examiner has concluded that there was adequate substantial reason for the Commissioner’s refusal to lend his own approval to the Board’s proposal to construct an additional large schoolhouse on its presently owned high school site. There is a question that remains, however, and, simply stated, this question is whether such approval is necessary and required as an antecedent to the action herein proposed by the Board. Is the Commissioner’s approval required in such instances? If it is not, but if, instead, the Commissioner’s authority herein is advisory in nature, may the Board now proceed to exercise its own discretion.

The hearing examiner has examined these questions in the context of the school law (Title 18A, *Education*) and determines that the primary authority for the exercise of discretion herein rests with the Board and not with the Commissioner. This determination is grounded in the clear and precise language of two specific statutes which confer on local boards of education the authority to “acquire” land and to “erect, lease, enlarge, improve, repair or furnish buildings” thereon. The statutes, *N.J.S.A.* 18A:20-2 and 18A:20-4.2 provide that:

18A:20-2 “The board of education of any district *may*, in and by its corporate name, *acquire*, by *purchase* or lease, receive hold, hold in trust and sell and lease real estate and personal property and may take and condemn lands and other property for school purposes in the manner provided by law relating to the taking and condemnation of property for public purposes, subject to the restrictions provided in this title.”

18A:20-4.2 “The board of education of any school district may, for school purposes:

“(a) *purchase*, take and condemn *lands within the district* and lands not exceeding 50 acres in extent without the district but situate in a municipality or municipalities adjoining the district, but no more than 25 acres may be so acquired in any one such municipality, without the district, except with the consent, by ordinance, of such municipality;

“(b) grade, drain and landscape lands owned or to be acquired by it and improve the same in like manner;

“(c) *erect, lease for a term not exceeding 40 years, enlarge, improve, repair or furnish* buildings;

“(d) borrow money therefor, with or without mortgage; in the case of a

type II district without a board of school estimate, when authorized so to do at any annual or special school election\*\*\*.” (Emphasis supplied.)

Thus, the statutory prescription is clear. A local board of education may “acquire real estate” if such acquisition is authorized by the voters in the manner prescribed in the statutes, and it may use such property to erect a schoolhouse thereon. While such authority is tempered somewhat with respect to the initial purchase of property (*N.J.A.C. 6:22-5.1*), the authority with respect to the use of property once acquired resides with the local board of education (*N.J.S.A. 18A:11-1*), and does not reside with the Commissioner, absent clear and convincing evidence of an abuse of discretion. As the Commissioner said in *William A. Wassmer et al. v. Board of Education of the Borough of Wharton, Morris County*, 1967 *S.L.D.* 125 with respect to a decision of a board of education which was concerned with the elimination of double sessions:

“\*\*\* The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal.’ *Kenney v. Board of Education of Montclair*, 1938 *S.L.D.* 647, affirmed State Board of Education, 649, 653

“Further:

\*\*\* it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is *not the function of the Commissioner* in a judicial decision *to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards*. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.’ *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948)

“In this case the Commissioner finds no ground for interfering with the resolution adopted by respondent. The evidence does not support a charge of arbitrary conduct. Although the Board adopted the contested resolution soon after it took office, it is apparent that the matter had previously been considered and discussed by members of the Board and, in the case of some, before they were elected. The fact that the Board’s decision to eliminate double sessions immediately ran counter to the wishes and opinions of the professional staff and some of the parents does not establish its action as arbitrary. While the Commissioner would expect that all boards of education look to their professional employees for recommendations and guidance in matters in which educational judgments are to be made, the *board is not compelled to accept the suggestions or advice it receives*, for it has *the authority to make the ultimate determination*.\*\*\*” (Emphasis supplied.) (at p. 127)

Furthermore, there is no evidence of an abuse of discretion herein. While the recommendations of State officials and the Board's own consultants ran counter to the Board's proposal, the proposal is not without merit. It will, as noted *ante*, provide temporary alleviation of the problems. The school site in question is very large and in terms of size alone is generally within the guidelines set forth in the rules of the State Board of Education. (*N.J.A.C.* 6:22-5.2) The Board's proposal provides an inherent lower cost projection at this juncture. In the past there has not been a strict adherence to the guidelines of the State Board of Education with respect to all aspects of school planning procedures.

Accordingly and in summation, the hearing examiner finds that there is good reason to support the recommendation of State officials with respect to the Board's present and future school building needs but that these recommendations do not constitute an absolute bar to implementation of the proposal advanced by the Board. Therefore, the hearing examiner recommends that the Board act expeditiously to a practical implementation of its proposal in order that some relief may be afforded the pupils of its district.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and noted the findings and recommendations contained therein. These findings are, in essence, that the Commissioner's original determination with respect to the merits of the Board's proposal to build a second school on its present high school site was correct, that there was no evidence of an abuse of discretion by the Board, and that absent such evidence there is no authority for the Commissioner to intervene. This latter finding is grounded on the statutory prescription of *N.J.S.A.* 18A:20-4.2 which confers on local boards of education the authority to erect school buildings "\*\*\*\* when authorized so to do at any annual or special school election\*\*\*."

Thus, the hearing examiner finds the primary jurisdiction for decision in this matter rests with the Board and the electorate of the Central Regional High School District. At this juncture, the Commissioner concurs with this view.

The concurrence is grounded in a detailed search of the statutes and prior decisions of the Commissioner and the Courts.

In the decision of the State Board of Education in *Richard W. Wills v. Board of Education of Upper Freehold Township*, 1928 *S.L.D.* 114 (1916), the subject of consideration was the total sum of money to be expended for the purchase of land and for "the erection and equipment of a new schoolhouse." While by present standards the sum of money (\$5,000) for such erection and equipment was small, there was reason, in the decision, to set forth the authority by which the expenditure was to be made. In this regard, the State Board cited a portion of *Article 7, section 97, paragraph IV* of the "general school act" in support of a view that the local school board had the authority

\*\*\*\* to purchase, sell and improve school grounds; to erect, lease, enlarge,

improve, repair or furnish school buildings, and to borrow money therefor with or without mortgage; *provided*, that for any such act it shall have the previous authority of a vote of the legal voters of the district.”

(at p. 116) (*Emphasis in text.*)

The general school act of reference was entitled “An act to establish a thorough and efficient system of free public schools,” etc. It was approved by the New Jersey Legislature in 1903.

Thus, the authority to “erect” a schoolhouse has remained essentially unchanged to the present day. Such authority resides now, as it has for years, within the jurisdiction of local boards of education and the electorates which they serve. See also *Stephen Little v. Board of Education of Morristown*, 1928 S.L.D. 68; *Board of Education of the City of Lambertville v. Common Council of the City of Lambertville*, 1928 S.L.D. 51 (1913), aff’d State Board of Education 1928 S.L.D. 53, aff’d Supreme Court 1928 S.L.D. 56, reversed *E. & A.*, 1928 S.L.D. 56.

Since this authority is clear, the Commissioner will not, and may not, substitute his discretion for that of a local board of education absent a definitive showing that such discretion has been abused or, in some respect, was illegally exercised. *William A. Wassmer et al. v. Board of Education of the Borough of Wharton*, *supra*; *Boult and Harris v. Board of Education of Passaic*, *supra*. There is no such showing herein.

Accordingly, the Commissioner authorizes the Board to proceed to an implementation of its proposal to construct a second school on the large site presently occupied in part by its high school facility. This authorization is subject only to an approval of building plans and specifications as required by law and to an adoption of the Board’s proposal by the voters of the district pursuant to the statutory prescription in this regard. *N.J.S.A. 18A*. See *Kaveny v. Montclair Board of Commissioners*, 71 N.J.Super. 246 (1962); *Board of Education of East Brunswick Township v. Township Council, East Brunswick*, 48 N.J. 94, 104 (1966).

COMMISSIONER OF EDUCATION

November 15, 1974



**In the Matter of the Annual School Election Held in the  
School District of the Township of Wayne, Passaic County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the balloting for candidates, for three seats on the Board of Education of the Township of Wayne, at the annual school election held on February 13, 1974, were as follows:

	<b>At Polls</b>	<b>Absentee</b>	<b>Total</b>
Paul F. Ferguson	2174	15	2189
William L. Robertson	2080	17	2097
Mario J. Drago	2087	4	2091
John E. McLaughlin, Jr.	2047	3	2050
Joseph A. Hallock	1940	2	1942
Diana W. Young	1381	7	1388
Judith M. Lattimer	761	6	767

Ballots were also cast for a candidate for an unexpired term and for or against the proposed appropriations for the operation of the Wayne Township schools. The tally for such appropriations was announced to be:

	<b>At Polls</b>		<b>Absentee</b>		<b>Total</b>	
	<b>For</b>	<b>Against</b>	<b>For</b>	<b>Against</b>	<b>For</b>	<b>Against</b>
Current Expense	2183	2350	16	3	2199	2353
Capital Outlay	2274	2235	15	3	2289	2238

Following the election and pursuant to affidavit and letter complaints from Candidates McLaughlin and Hallock, the Commissioner of Education directed his representative to conduct an inquiry with respect to the election. Such inquiry was begun on March 14, 1974, and continued on April 17, 1974 and July 24, 1974. The latter date was used for a formal hearing. A total of six documents was received in evidence and testimony was elicited from seventeen witnesses. Subsequently, Candidates McLaughlin and Hallock filed a Memorandum of Law and counsel for the Wayne Township Board of Education, hereinafter "Board," replied. The report of the Commissioner's representative is as follows:

The principal complaint herein is that a total of 124 voters in Wayne Township were permitted to cast affidavit ballots at the annual school election but that such permission to vote was illegal and contrary to the statutory prescription with respect to the use of such ballots. The specific statutes upon which Candidates McLaughlin and Hallock rely are *N.J.S.A. 18A:14-49* and *N.J.S.A. 18A:14-52*. These statutes are recited in their entirety as follows and should be read *in pari materia* with other statutes contained in the Election Law: (*N.J.S.A. 19*)



18A:14-49 Claiming of right to vote

“Every person qualified to vote in any school election shall be at liberty, at any time while the polls are open, to enter the polling place and claim, in person, his right to vote at such election in his *proper polling district*, before the election officers, giving, at the same time, his full name and address to the election officer in charge of the signature copy register.”

*(Emphasis supplied.)*

18A:14-52 Procedure for obtaining ballot when duplicate permanent registration form cannot be found

“In any school election, if the duplicate permanent registration form of any person cannot be found in the signature copy register at the time he applies for a ballot and such person claims that he was permanently registered in such municipality at least 40 days prior to such election or that he was permanently registered in another municipality within the same county and filed or forwarded a change of residence notice to the commissioner of registration of the county or the clerk of the municipality, if the municipality is not the one in which the county seat is located, certifying that he has moved to the municipality in which he seeks to vote at least 40 days prior to such election, one of the school election officers shall require such person to make and sign an affidavit, which may be taken by any school election officer, in the form which shall have been prescribed by the commissioner of education, which form shall include a statement that such person was permanently registered at least 40 days prior to such election in such municipality or in another municipality within the same county and filed or forwarded a change of residence notice to the commissioner of registration of the county or the clerk of the municipality, other than the municipal clerk of the municipality in which the county seat is located, certifying that he has moved to the municipality in which he seeks to vote at least 40 days prior to such election, and that such person has the qualifications required to vote at such election. If such form has been properly filled out by a school election officer and signed by such person, such person shall be eligible to receive a ballot. The number of the ballot shall be recorded on such form and the form shall be transmitted to the superintendent of schools of the county, in the sealed packet required by this title.”

In the view of Candidates McLaughlin and Hallock these statutes clearly set forth the circumstances under which affidavit ballots may be used and such circumstances are “extremely limited.” (Memorandum of Law of Candidates McLaughlin and Hallock, at p. 15) Furthermore, they aver that:

“\*\*\* it is implicit that a person receiving an affidavit because his duplicate permanent registration cannot be found must have presented himself *in his proper polling district*. Clearly, therefore, N.J.S.A. 18A:14-52 is intended to protect from disenfranchisement a person who has complied with the law but whose voting records are not where they should be either because of a mistake or because he has moved. None of the affidavits case in

Wayne in 1974 fell into either of these categories.\*\*\*" (Memorandum of Law of Petitioners, at p. 16) (*Emphasis in text.*)

The Commissioner's representative finds this last avowal to be true in fact. There is no evidence at all that even one voter, of the 124 in Wayne who cast affidavit ballots out-of-district, did so because his/her permanent record form could not be found in its "proper polling district." *N.J.S.A. 18A:14-49* The evidence, instead, is that 123 voters in the Township of Wayne never presented themselves at such proper polling districts, and that one voter had no such district to which he could report. He was not legally registered in any district.

These findings were determined on the basis of a comparison of the contested affidavit ballots with poll lists and with the registration books maintained by the Passaic County Election Board. The Superintendent of the Election Board also attests to the truth of such findings.

Indeed, the hearing of July 24, 1974, was not devoted to the question of whether or not the 124 contested ballots were cast out-of-district but with peripheral matters. How long had such practices been employed? Were school officials or candidates involved in such balloting permissiveness? Why was the use of affidavits in this manner permitted? The answers to such questions may be set forth succinctly. The practice of permitting affidavit ballots to be cast out-of-district in Wayne Township is not a new one. It had been permitted by election officials in prior years (Tr. 18, 20, 22, 28, 37, 47, 88, 110, 112, 126) although the permissiveness varied in degree. (Tr. 52) In any event, in the annual election of 1974 the practice was widespread and was attributed by some witnesses to the fuel crisis which was a major deterrent to travel in February 1974. (Tr. 19, 30, 50, 66, 68, 76, 94) Other witnesses testified that such affidavit ballots were requested or permitted for reasons of convenience. (Tr. 42, 71, 89, 106, 133, 139) However, the privilege of affidavit voting was limited by election officials to employees of the school districts and to election workers and members of their immediate families. (Tr. 48, 63) In some cases election officials had lists of school employees furnished by school officials (Tr. 65, 67-68, 79), but this was, apparently, not always true. (Tr. 106-107)

There is no evidence that any of the candidates participated in any way in urging voters to use affidavit ballots. Neither is there evidence that school officials requested that the practice be allowed nor urged voters to use the privilege, although such officials apparently announced that affidavit voting out-of-district would be permitted. (Tr. 33, 55, 56, 68)

Finally, with respect to this principal complaint concerned with affidavit votes the Commissioner's representative finds that:

1. A meeting of election officials had been held prior to the election and a "Manual of Instructions (for) Election Workers" (P-1) had been reviewed. (Tr. 16, 46) This Manual provides a synopsis of the applicable statutes with respect to affidavit ballots and a Revised Affidavit Form.
2. An officer of the local teachers' association did urge his "Colleagues"

to get out and “\*\*\*vote for the school budget\*\*\*” (R-1) in a memorandum which was circulated to “All Teachers.” However, the Commissioner’s representative finds no impropriety in this fact. There is no evidence that school pupils were used to circulate the memorandum.

3. All of the disputed affidavit votes, with one exception, were cast by voters who were legally registered voters in Wayne Township but who voted out of their proper polling place. The one voter who cast an affidavit ballot who was not eligible to vote anywhere in Wayne Township in February 1974 was Richard K. Slavin. His eligibility had expired, according to Election Board officials, because for a period of four to five years he had not exercised his franchise.

This concludes a recital of the principal facts in the instant matter.

Candidates McLaughlin and Hallock also allege that other irregularities occurred at the election which serve as reason for the Commissioner to set it aside. Specifically, they avow that voters in some instances:

- (a) failed to write their home addresses in the poll book as required by law; (N.J.S.A. 18A:14-50) twelve allegations)
- (b) printed their names in the poll book instead of writing them; (three allegations)
- (c) signed the poll list of a district other than the one in which they were registered; (six allegations).
- (d) otherwise improperly wrote their names. (two allegations) (P-4)

The Commissioner’s representative has reviewed such allegations with respect to the poll lists and the registration books in the office of the County Election Board and finds that while such allegations are generally true they afford no serious cause for complaint. The poll lists are generally in order and such discrepancies as do exist provide no reason, standing alone, for the Commissioner to vitiate the election. Furthermore, the Commissioner’s representative finds that, contrary to the allegations (P-4), voters Rita Reale, George Kesse, and Betty Dionisos voted in the polling place appropriate to their ward and district.

In summary of the total findings, *ante*, the Commissioner’s representative finds that it is true in fact that at least 123 voters cast affidavit ballots in the Township of Wayne in the annual school election of February 13, 1974, and that these voters were not eligible for such privilege since they had not first reported to their “proper polling district” wherein their registrations were a matter of record. He further finds that at least one person voted by affidavit ballot who was not eligible to vote at all, and that there were other more minor irregularities in the election procedure as alleged by Candidates McLaughlin and Hallock.

These principal findings, *ante*, with respect to affidavit ballots, stand, in

the judgment of the hearing examiner, as evidence of a gross abuse of the election laws since certain groups, school personnel and election officials, of the electorate of Wayne were placed in a privileged position as a convenience without statutory authority. If allowed to go unchallenged, or unpunished, such procedure will invite even greater abuse. The comparison of signatures on the poll list with those in the registration book, as required by statute (*N.J.S.A. 18A:14-51*) is rendered impossible and the statute mocked. Duplicate voting is invited. The whole election process is subverted since future elections may with impunity be weighted for a variety of privileged groups.

Accordingly, and in full cognizance of the fact that there is no evidence that any of the candidates in this election aided or abetted the controverted procedure, the Commissioner's representative recommends that the 124 affidavit votes cast in the annual school election in the Township of Wayne be declared illegal and set aside. If this recommendation is accepted by the Commissioner, the results of the election with respect to all three seats for three-year terms of the Wayne Board of Education must be declared as indeterminate and the seats be declared vacant as the result of a failure to elect. The vote for the one-year term is not at issue here since the margin of the winning candidate exceeded 400 votes.

Finally, it is noted that the vote with respect to the capital outlay appropriation was approved by a total of only fifty-one votes and that such approval is also rendered a technical nullity if the recommendations set forth, *ante*, are followed. However, the appropriation is a relatively small one (\$61,200 of a budget in excess of \$13,000,000), and the total amount has already been certified to be raised for the 1974-75 school year. Thus, in effect, the question with respect to the approval of this appropriation is moot, and the Commissioner's representative recommends that it be allowed to stand intact. The appropriation was not challenged by the candidates.

This concludes the report of the hearing conducted by the Commissioner's representative.

\* \* \* \*

The Commissioner has reviewed the record of the instant matter, the hearing examiner report, and the exceptions thereto filed by counsel pursuant to *N.J.A.C. 6:24-1.16*. He accepts the findings of the hearing examiner and holds them for his own.

The Commissioner determines in the matter of the gross abuse of affidavit ballots, that all 124 of these ballots were illegal. They are herewith declared to be void and of no effect. Since this is so, it is necessary to determine the maximum effect that the voiding of these ballots could have upon the previously recorded votes for the candidates. The greatest possible effect is shown by deducting from any candidate a total of 124 (on the assumption that the candidate could have received 124 voided votes) and comparing the remainder to the previously announced votes of any other candidate (on the assumption that

that other candidate might have received none of the voided votes). When this is done, it is apparent that no one of the first five contenders would possess the clear plurality required for election. Such a simple arithmetic analysis shows that it is impossible to determine that any one candidate for a three-year term was elected. Accordingly, the Commissioner declares that the seats on the Board presently occupied by Messrs. Ferguson, Robertson and Drago are vacant by virtue of a failure to elect. Therefore, he directs the County Superintendent of Schools of the Passaic County to appoint members to fill these vacancies pursuant to *N.J.S.A. 18A:12-15* until the next regular school election when they shall be filled by the electorate for the unexpired term.

The above declaration renders it unnecessary to make a determination with respect to the allegations regarding the ballots of twenty voters who allegedly did not in all respects comply with statutory requirements when signing the poll list.

The Commissioner at this juncture reaffirms that which he has previously said *In the Matter of the Annual School Election Held in the School District of the Borough of Carteret, Middlesex County*, 1972 S.L.D. 167:

“\*\*\* [T]he Commissioner is constrained to say again that he deplors all such deviations from strict compliance with election laws. The right to vote is too sacred a right to be abused even in peripheral ways.\*\*\*”

(at p. 171)

The Board and its agents and the election workers of all school districts are admonished to require absolute compliance with the statutory requirements governing school elections in order that there may be no shadow of doubt concerning the announced results.

The Commissioner hastens to recognize that in the instant matter there is no showing that any candidate was responsible for the intolerable flaunting of the statutes that resulted in the above determination. In no sense is the determination herein a punishment for any act on their part.

The voidance of the 124 ballots rendered the vote on the capital outlay appropriation a technical nullity. However, the Commissioner finds no reason to take action in view of the fact that this item of the Board's budget was not challenged. Additionally, the affirmative act by the municipal governing body certifying this appropriation to the Passaic County Board of Taxation establishes it as a valid appropriation.

COMMISSIONER OF EDUCATION

November 15, 1974

**In the Matter of the Annual School Election held in the  
School District of the Township of Wayne, Passaic County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, November 15, 1974

For the Appellants Paul F. Ferguson, William L. Robertson, and Mario J. Drago: Rowinski, Gavenda & Rubin (A. Michael Rubin, Esq., of Counsel)

For the Appellee John E. McLaughlin, Jr.: Michael C. Rudolph, Esq.

For the Appellee Joseph A. Hallock: Joseph A. Hallock, Esq., *Pro Se*

For the Wayne Board of Education: Goodman and Rothenberg (Sylvan G. Rothenberg, Esq., of Counsel)

The State Board of Education has considered and reviewed the decision of the Commissioner, *In the Matter of the Annual School Election Held in the School District of the Township of Wayne, Passaic County*. It is noted that this matter is not technically ready in the appeal submission process, for a decision by this Board, since all Briefs have not been filed. However, the State Board determines that an action by it is required at this juncture, to insure an orderly electoral process in Wayne in 1975.

Accordingly, the State Board hereby affirms that portion of the Commissioner's decision which declares that the seats of Candidates Robertson and Drago are vacant by virtue of a failure to elect, and that such seats may be filled at the election of February 1975 for the unexpired terms. However, the State Board of Education reverses that part of the Commissioner's decision which is applicable to Candidate Ferguson, since under no circumstances could his total legal vote be smaller than that of Candidate McLaughlin whose vote total was fourth highest.

In all other respects, the Commissioner's decision is also affirmed and the Motion for a Stay of its effectiveness is denied. Such Motion has been rendered moot by the action of the Passaic County Superintendent of Schools with respect to the seat of two interim members of the Wayne Board of Education, and it is now inapplicable with respect to the seat of Candidate Ferguson.

December 4, 1974



**In the Matter of the Annual School Board Election Held in the  
School District of the Township of Wayne, Passaic County, New Jersey.**

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued December 17, 1974 — Decided December 23, 1974.

Before Judges Kolovsky, Lynch and Allcorn.

On appeal from New Jersey Board of Education.

Mr. A. Michael Rubin argued the cause for the appellants (Rowinski, Gavenda & Rubin, attorneys).

Mr. Michael C. Rudolph argued the cause for the respondent John E. McLaughlin, Jr.

Mr. Joseph A. Hallock, respondent, argued the cause pro se.

Mr. William F. Hyland, Attorney General, filed a statement in lieu of brief on behalf of the New Jersey Board of Education.

**PER CURIAM**

The appeal and cross-appeal were brought to review the determination of the State Board of Education with regard to the validity of the 1974 annual school election in Wayne for the selection of three members of the local board of education, each for a three year term. The board is composed of nine members, three of whom are elected each year. *N.J.S.A. 18A:12-11*.

The controversy arises as a result of the manner in which the election was conducted. In brief, the election officials in charge of eleven of the thirteen school election districts (all of which were at public school buildings) permitted various of the teaching and other school personnel employed at the respective polling districts and various of the election officials stationed at the respective polling districts (as well as some members of their families) to cast their ballots at the polling places situated at their respective places of employment, despite the fact that they resided and were registered voters in another election district and thus eligible to vote only at the polling place established for said election district.

This knowing and deliberate violation of the school elections law was accomplished by a perversion of a section of that law which was designed to enable the properly registered and qualified voter resident in the school district to vote where his "duplicate permanent registration form . . . cannot be found in the signature copy register" at his polling place. *N.J.S.A. 18A:14-52*. The eligibility of such voters to so vote is expressly limited to those who first execute



an affidavit to the effect that they were “permanently registered in such municipality at least 40 days prior to such election or . . . in another municipality within the same county and filed or forwarded a change of residence notice” to the appropriate official certifying that they moved to such municipality “at least 40 days prior to such election.” *Id.*

There is no dispute that 123 voters availed themselves of the opportunity to vote in election districts other than those districts in which they were resident and eligible to vote. No proofs were taken below as to the candidates for whom these 123 voters illegally cast their ballots. *Cf., Evid. R. 31; N.J.S.A. 2A:84A-25.*

The results of said election were certified as follows (including the votes cast by 123 ‘affidavit’ voters):

Paul F. Ferguson	2189
William L. Robertson	2097
Mario J. Drago	2091
John E. McLaughlin, Jr.	2050
Joseph A. Hallock	1942
Diana W. Young	1388
Judith M. Lattimer	767

Following the election, the respondents McLaughlin and Hallock filed a timely complaint with the Commissioner of Education. The Commissioner, after investigation and hearing, determined that the 123 ballots (plus the vote cast by one additional voter who was not eligible to vote in the election) were illegal, and declared them “to be void and of no effect.” He concluded that, deducting the 124 votes, none of the candidates “would possess the clear plurality required for election,” and declared all three positions vacant “by virtue of a failure to elect.” An appeal to the State Board by the three candidates receiving the highest number of votes resulted in an affirmance of that portion of the determination of the Commissioner declaring the seats of the second and third highest candidates vacant; the State Board, however, reversed as to “Candidate Ferguson [who received the greatest number of votes] since under no circumstances could his total legal vote be smaller than that of Candidate McLaughlin whose vote was fourth highest.” The present appeal and cross-appeal were taken from such determination.

We deplore the widespread and deliberate disregard of the plain command of the law evidenced here by the election officials, with the tacit approval of the school administration. The Legislature has constructed an integrated set of safeguards to guarantee to the greatest practicable extent the identity and the qualification of each person who claims entitlement to vote, in order to prevent fraud and other abuses.

Thus, the citizen otherwise eligible must “be registered to vote in an election district included within . . . the respective polling district . . . , and his name shall appear upon the signature copy register furnished for such . . . polling district,” *N.J.S.A. 18A:14-44*. In order to cast his ballot, the voter must “claim, in person, his right to vote . . . in his proper polling district . . . giving, at the

same time, his full name and address to the election officer in charge of the signature copy register.” *N.J.S.A.* 18A:14-49. He is then required to “sign his name without assistance . . . in an appropriate column of the poll list,” *N.J.S.A.* 18A:14-50. Only after “one of the election officers shall compare the signature . . . in the poll list with the signature theretofore made by the voter in the signature copy register” and finds the two signatures to be “the same or sufficiently similar” is the voter “eligible to receive a ballot.” *N.J.S.A.* 18A:14-51.

The disregard of these fundamental safeguards prescribed by the Legislature to assure the integrity of the electoral process undermines the very foundation upon which our government is established and exists.

Notwithstanding, inasmuch as the number of votes cast illegally is known and, on the basis of the vote totals recorded, renders uncertain the election only of the candidates receiving the second and third highest number of votes, the election should be set aside solely as to the two seats to which Mr. Robertson and Mr. Drago were declared elected. The total number of votes received by Mr. Ferguson (2189) was such that, even after deducting 124 votes therefrom, the remaining number (2065) leaves him as one of the winning candidates, *i.e.* among the three candidates receiving the highest vote totals. His election therefore must be confirmed. *Application of James T. Murphy, et al.*, 101 *N.J. Super.* 163 (App. Div. 1968), certif. den. 52 *N.J.* 172 (1968); Annotation, “Treatment of excess or illegal ballots when it is not known for which candidate or on which side of a proposition they were cast,” 155 *A.L.R.* 677 (1945).

Accordingly, the determination of the State Board of Education is affirmed. No costs.

**John Papa,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Palisades Park, Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Patrick J. Tansey, Esq.

Petitioner, a teacher with a tenure status employed by the Board of Education of the Borough of Palisades Park, hereinafter "Board," temporarily left his employment during 1970 to serve on active duty with the New Jersey National Guard. He alleges that the Board denied him his salary payments during that time, and that such denial constitutes a contravention of his statutory rights. His prayer is for a judgment to this effect and the payment of moneys due him forthwith. The Board denies that its actions controverted herein were in violation of law and avers that because petitioner waived any rights he may have had, no claim against the Board may now lie.

A hearing was conducted in this matter on December 11, 1973 at the office of the Bergen County Superintendent of Schools, by a hearing examiner appointed by the Commissioner of Education. Subsequent thereto, the parties filed respective Briefs. The report of the hearing examiner is as follows:

Petitioner began his employment with the Board on September 1, 1969. Prior to that date, petitioner's selective service classification was 2S. This 2S selective service classification deferred the holder from military induction for the duration of college studies. When petitioner completed his college program, his selective service classification was changed to 1A. (J-5) Holders of classification 1A were subject, at that time, to immediate induction into military service depending upon one's lottery number. When petitioner's classification was changed from 2S to 1A, he requested the Superintendent of Schools to write his local draft board for the purpose of obtaining a reclassification. Although the Superintendent did write to petitioner's draft board as requested, the classification remained 1A until petitioner began his employment with the Board on September 1, 1969. (J-3)

Petitioner then determined to join a National Guard unit in order to serve his country, while retaining his position with the Board. The Superintendent requested that petitioner join a unit which would allow him to train actively during the summer months. Obviously, such an arrangement would cause little disruption to the school system, because a substitute teacher would not be necessary if petitioner's training occurred during the summer period.

Petitioner testified that he applied to the New Jersey National Guard during December 1969, and was accepted and subsequently inducted into the National Guard on January 23, 1970. He further testified that he informed the Superintendent he would be going on active duty sometime after January 23, 1970.

The Superintendent testified he was initially informed that petitioner would be going on active duty by the following memo from petitioner dated March 26, 1970:

“This is to indicate that I have been activated for training by my National Guard unit for the remainder of the school year and will not be able to be in for the months of April, May, and June. I plan, however, to return for the start of the new school year in September, 1970.” (J-1)

Petitioner’s last day of teaching was March 26, 1970, and he returned to his position on September 2, 1970. (J-2) The Superintendent informed petitioner that his request for a leave of absence would have to be approved by the Board because, at that time, he was a probationary teacher. Petitioner did not acquire a tenure status within the school district until September 1972.

The following is the pivotal point of controversy in this matter. The Superintendent avers petitioner was informed sometime during the first three months of 1970 that if he had to actively serve with his National Guard unit during the regular school year, a substitute teacher would be engaged to replace him in his classroom. Petitioner would be released from his employment contract, and during the months he was serving in the National Guard he would not be paid by the Board. The Superintendent contends that petitioner, at that time early in 1970, agreed to this arrangement. Petitioner denies ever having agreed to take a leave of absence without pay from his position with the Board for the purpose of serving on active duty with the New Jersey National Guard.

In support of the position, petitioner points to his letter to the Superintendent, dated October 11, 1972, regarding his claim for salary for April, May, and June 1970, when he was serving on active duty. That letter reads in pertinent part as follows:

“Some information has recently come to my attention with respect to my rights concerning payment of salary while I was on leave for National Guard duty during the 1969-70 school year.

“As you will recall, I notified your office on March 26, 1970 that I had been called for duty by my National Guard Unit for the remainder of that school year.\*\*\*

“My records indicate that my last day of work that year was on March 26, and that I did not report back to work until September 2, 1970 in time for the opening of the new school year.

“The last check I received for the 1969-70 school year was on the 26th of

March and I received no pay for the months of April, May and June of 1970.

\*\*\*\* [I]t is my understanding that the law [N.J.S.A. 38A:4-4] requires that I should have been paid my full salary by the \*\*\* Board \*\*\* for the months of April, May and June of 1970.

\*\*\*

"I do hereby make request for any back pay which I may be entitled to and I would appreciate it if you would look into this situation for me and bring it to the attention of the Board of Education, who I am sure will want to rectify any oversight or error made in the past.\*\*\*\*" (J-2)

In response, the Superintendent sent the following memorandum to petitioner, dated October 16, 1972, which reads in pertinent part as follows:

"Today I received your letter dated October 11, 1972, regarding your absence in the Spring of 1970 from March 26th through April, May, and June of 1970. If you recall at that time I had discussed with you that particular fact that you would be granted a leave for military duty without pay, since it was our particular understanding that this would be the most equitable way to handle your prolonged absence during your first year of teaching, and I had indicated to you at that time, such a prolonged absence which works a rather severe hardship upon a school district, would require our hiring a regular teacher to replace you. Your feeling was, at that time, that you would want to keep your position and as such understood that we could not afford hiring two persons for the same position for more than three months. (April, May, June and part of March) If you remember we had attempted to gain some particular advantage for you by writing to the National Guard and requesting that your training be postponed to the summer. You had given me information as to whom to write to and had further indicated that it was your hope also that it would not be necessary for your (sic) [you] to be absent from school. In fact in September of 1969, I had written a letter to the draft board in Hackensack requesting a deferment for you because you had just been classified 1A.

"It is my understanding that since then you have been called on other occasions into active duty by the National Guard in the Spring of 1971 and again in the Spring of 1972. We have, in keeping with our Board P.P.E.A. [Palisades Park Education Association] agreement, Article XII, Section B-8, compensated you for such absence.\*\*\*\*" (J-3)

In an effort to eliminate some confusion regarding the nature of the National Guard training program in which petitioner was enrolled, the Superintendent sent another memo (J-4) dated October 18, 1972 to petitioner requesting clarification. Petitioner responded by memorandum dated October 26, 1972. (J-5) Obviously, the confusion remained, for on November 29, 1972, the Superintendent addressed a letter to the Commanding General of the New Jersey National Guard. Pertinent parts of that letter are reproduced as follows:

"This letter is being written to request your assistance in clarifying a

matter relative to a member of our faculty, Mr. John Papa [petitioner], who is a member of the New Jersey National Guard\*\*\*.

“Mr. Papa is requesting back-pay for a period of time in the Spring of 1970; at that time he enlisted in the National Guard and reported for initial training which was scheduled as part of his induction program. This program, I believe, took six months and he was absent from his job for three months.\*\*\* [H]e states he feels he is eligible under a statute which indicates payment to teachers when they are engaged in active duty ordered by the Governor.

“The basic question we have is whether or not Mr. Papa’s induction training is classified by the National Guard as activation ordered by the Governor.\*\*\*” (J-6)

In a letter response from the New Jersey Department of Defense, dated December 5, 1972, the Superintendent was informed, *inter alia*, that:

“\*\*\* Orders directing Private Papa to enter upon his initial tour of Active Duty for training were issued by this Headquarters. ‘By direction of the Secretary of the Army.’ Copy of the Special Order is enclosed.\*\*\*” (J-7)

After disclaiming authority to render a legal opinion for the Superintendent, the spokesman for the New Jersey Department of Defense continued in his letter (J-7):

“\*\*\* However, your attention is invited to 4:1-17.4 of the Civil Service Rules, which applies to State employees and states ‘a permanent employee who enlists in a reserve component of the Armed Forces of the United States or is otherwise required to perform an initial period of active duty for training pursuant to RFA Act of 1955 (Reserve Enlistment Program) shall be granted a leave of absence for such period of training. Such leave is not considered military leave.’\*\*\*”

It is noted that the first line of the Special Order referred to in the New Jersey Department of Defense response (J-7) states:

“\*\*\* By direction of the Secretary of the Army the following individuals ORDERED TO ACTIVE DUTY FOR TRAINING (ACDUTRA) with their consent and *the consent of the Governor of the State of New Jersey*\*\*\*.” (Emphasis supplied.)

The hearing examiner finds that the Superintendent of Schools and petitioner did reach an understanding to the effect that petitioner would take a leave of absence without pay from his teaching position if he were required to serve on active duty during the regular school year.

Petitioner argues in his Brief that one who is on active duty for training with the United States Army Reserves is entitled, under *N.J.S.A.* 38A:23-1, to full reimbursement of the salary he would have earned had he not been called to



service and cites *Parks v. Union County Park Commission*, 7 N.J. Super. 5 (App. Div. 1950).

Furthermore, petitioner argues that rights guaranteed by law may not be waived, and certainly may not be waived orally. In support of this argument, petitioner cites *Lange v. Board of Education of the Borough of Audubon*, 26 N.J. Super. 83 (1953) and *Olley v. Board of Education of Southern Regional High School, Ocean County*, 1968 S.L.D. 20. In *Lange, supra*, petitioner quotes the Court's holding that under teachers' tenure laws "\*\*\*\*one may not waive his tenure rights while keeping his position.\*\*\*\*" (at p. 88) In *Olley, supra*, petitioner finds a case analogous to the instant matter because in *Olley* the Commissioner of Education held that tenure for janitors, unlike tenure for professional employees, is a matter of personal privilege which is waived by the acceptance of employment for a definite term.

In support of his argument that he may not waive his rights under the law, petitioner cites an opinion of the Attorney General for the State of Minnesota as reported in the *Negotiation Research Digest* of the National Education Association, June 14, 1973 (at p. 11).

In its Brief, the Board admits that petitioner is entitled to his claimed reimbursement for the period of April, May, and June of 1970 pursuant to N.J.S.A. 38A:4-4. However, the Board takes the position that petitioner knowingly waived any rights he may have had under that law. The Board argues that a teaching staff member may waive his rights under law and cites the following cases in support of this position: *Board of Education of the City of Trenton v. State Board of Education et al.*, 125 N.J.L. 611 (Sup. Ct. 1941), A.2d 817; *Lange v. Board of Education of the Borough of Audubon*, 26 N.J. Super. 83 (App. Div. 1953); and *Weber et al. v. Board of Education of the City of Trenton*, 127 N.J.L. 279 (E. & A. 1941).

In summary, the hearing examiner finds that petitioner did agree to take a leave of absence without pay from his teaching position in the event that his tour of active duty with the National Guard conflicted with his teaching assignment. Whether N.J.S.A. 38A:4-4 is applicable in the instant matter is referred to the Commissioner for his determination.

The question of whether petitioner may waive any of his rights under N.J.S.A. 38A:4-4, if applicable, is also referred to the Commissioner.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto which have been filed by counsel. The Commissioner cannot agree that the determination of the issue herein depends upon whether petitioner did or did not waive his rights to salary compensation from the Board during the period of his military service in April, May, and June 1970. Even assuming, *arguendo*, that he did, it appears from the record that he must have



consented in a vacuum of knowledge regarding his clear statutory privileges. He asserted in his letter of October 11, 1972, that some information had "recently" come to his attention in this regard. There is nothing in the Superintendent's letter of October 16, 1972 to petitioner which supports a contrary conclusion.

Thus, if petitioner did consent to a waiver of his entitlement to salary from the Board during his period of service, it was not a valid waiver and must be considered a nullity under the circumstances. The Commissioner so holds.

The statutory law with respect to petitioner's entitlement is clear. The principal statute is *N.J.S.A. 38A:4-4* which provides as follows:

"(a) All officials and employees of this State or of any board or commission of the State or of any county, school district or municipality who are members of the organized militia shall be entitled to leave of absence from their respective duties without loss of pay or time on all days during which they shall be engaged in active duty, active duty for training or other duty ordered by the Governor; provided, however, that the leaves of absence for active duty or active duty for training shall not exceed 90 days in the aggregate in any one year.

"(b) Leave of absence for such military duty shall be in addition to the regular vacation allowed such officers and employees by the State, county or municipal law, ordinance, resolution, or regulation."

The Commissioner observes that this statute has not been interpreted by the courts, and certain of its provisions may be subject to varying interpretations. In this instance, the facts must be assessed in the context of the above statute. These facts lead to a conclusion that petitioner was entitled in 1970 to a "\*\*\*leave of absence\*\*\*without loss of pay or time\*\*\*" for a period not in excess of ninety days to perform military service. The Commissioner so holds. This conclusion is not tempered by the fact that the specific direction to petitioner was given by the Secretary of the Army, with the "consent of the Governor of the State of New Jersey." (J-7) Without such consent the directive would not have been given since the Governor of the State of New Jersey is the executive officer of the National Guard and/or the organized militia. He may prescribe regulations with respect to enlistment. *N.J.S.A. 38A:4-1* He shall nominate and appoint all flag officers of the militia. *N.J.S.A. 38A:5-1* He may accept the resignation of an officer's commission or warrant. *N.J.S.A. 38A:5-7* No change in branch, organization or allotment of a National Guard unit may be made "without the approval of the Governor." *N.J.S.A. 38A:7-1*

Accordingly, the Commissioner directs the Board to compensate petitioner for his ninety days of service on active duty with the New Jersey National Guard during the months of April, May, and June 1970.

COMMISSIONER OF EDUCATION

November 21, 1974

**Board of Education of the City of Rahway,**

*Petitioner,*

*v.*

**Municipal Council of the City of Rahway, Union County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Magner, Abraham, Orlando, Kahn & Pisansky (Leo Kahn, Esq., of Counsel)

For the Respondent, Alan Karcher, Esq.

Petitioner, the Board of Education of the City of Rahway, hereinafter "Board," appeals from an action of the Municipal Council of the City of Rahway, hereinafter "Council," certifying to the Union County Board of Taxation an amount of local tax appropriations for school purposes for the 1974-75 school year which is \$198,900 less for current expenses than the amount set forth by the Board in its proposed school budget which was rejected by the voters on February 13, 1974. The facts of the matter were educed at a hearing conducted on July 24, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Supplemental information was subsequently filed by the Board as required by the hearing examiner. The report of the hearing examiner is as follows:

At the annual school election the voters rejected the Board's proposal to raise by district taxation for current expenses the amount of \$4,902,907. The Board then submitted its proposed budget to Council for its determination of the amount necessary to operate a thorough and efficient school system in the City of Rahway for the 1974-75 school year, pursuant to the obligation imposed on Council by *N.J.S.A. 18A:22-37*.

After consultation between the parties, Council made its determination and certified to the Union County Board of Taxation an amount of \$4,704,007 for current expenses, a reduction of \$198,900 from the amount originally proposed to the voters by the Board. As part of its determination, Council suggested items of the budget in which they believed economies could be realized without jeopardy to the thorough and efficient educational program. These economies, totaling \$264,000, a figure considerably in excess of \$198,900, which was the amount of Council's original reduction of the Board's proposed current expense budget, were submitted to the hearing examiner.

The Board moved at the hearing to strike certain items which were not originally included by Council in the Answer to the Petition of Appeal and which caused the total of the line item reductions to exceed Council's original reduction of the Board's proposed current expense budget. (Tr. 5) The hearing

examiner granted this motion to the extent that Council was required to reduce its total of suggested economies to approximate its earlier reduction of \$198,900. (Tr. 10, 15) Thereupon, Council struck from its list of reductions certain line items. (Tr. 18) A listing of the remaining specific line item reductions by Council is set forth below:

# CHART I

Account Number	Item	Board's Proposal	Council's Proposal	Proposed Reduction
J110f	Supt. Off. Sals.	\$ 77,474	\$ 75,463	\$ 2,011
J120b	Legal Fees	6,500	5,000	1,500
J212	Supvrs. Sals.	185,499	120,341	65,158
J213	Teachers Sals.	3,215,831	3,135,828	80,003
J215b	Clerks Sals.	18,426	15,647	2,779
J216	Other Sal. Instr.	55,931	50,139	5,792
J240	Teaching Supls.	132,987	114,000	18,987
J250c	Misc. Exp. Instr.	18,875	17,328	1,547
J520c	Field Trips	1,500	-0-	1,500
J610a	Custodial Sals.	338,222	331,276	6,946
J640d	Telephone	16,750	9,900	6,850
J710	Maint. Sals.	35,899	31,774	4,125
J1010	Stud. Bod. Activs. Sals.	30,354	27,404	2,950
	TOTALS	\$4,134,248	\$3,934,100	\$200,148*

\*Note: The proposed reductions by Council exceed by \$1,148 the reduction in the amount certified to the Union County Board of Taxation by Council.

The hearing examiner, herewith, proceeds to deal *seriatim* with Council's proposed reductions in line items of the Board's budget and to make recommendations with regard thereto to the Commissioner.

## J110f Superintendent's Office-Salaries Reduction \$2,011

Council asserts that the Board budgeted \$32,511 for the salary of its Superintendent of Schools but did in fact hire the Superintendent for \$30,500, thus eliminating the need for \$2,011 in this line item.

The Board, while admitting this, maintains that the full amount as budgeted is necessary to pay the twelve-month salary of the Assistant Superintendent who had previously worked on a ten-month contract.

The hearing examiner recognizes that placing the Assistant Superintendent on a twelve-month work year may be beneficial to the school system. However, he fails to find in the Board's written documentation or the oral testimony adduced at the hearing sufficient compelling reasons to increase from ten months to twelve months the time allocated to this position. It is recommended, therefore, that the reduction be sustained.

*J120b Legal Fees*

*Reduction \$1,500*

Council notes that in recent years this line item has been under-budgeted and that actual costs have been funded from other over-budgeted accounts. Council maintains that such a procedure should be followed for the 1974-75 budget.

The Board shows that 1973-74 legal expenses totaled \$7,287, a sum in excess of the \$6,500 which was budgeted for 1974-75, and asserts that legal involvement is on the rise. (Tr. 50)

The hearing examiner finds that the Board's legal expenses for negotiations, hearings, arbitration, and litigation are increasing. Sound budgetary management dictates that a line item should be funded in accord with the Board's reliable estimates of expenditures without reliance upon funds made available by under-expenditures of other line items. Accordingly, it is recommended that \$1,500 be restored to this line item.

*J212 Supervisors Salaries*

*Reduction \$65,158*

Council avers that an increase of \$70,907 for three additional supervisors' salaries in a single year is excessive and that the Board should gradually work its way into the major organizational change it desires.

The Board advances in support of this line item increase its plan to eliminate four positions known as *Teachers Without Assignment*. (Tr. 28) Persons so designated have performed various administrative and supervisory functions. The Board asserts that more efficient administration and supervision requires that they be clothed with administrative title, authority, and certification.

The hearing examiner finds that the Board's reasons for eliminating "teachers without assignment" are sound and notes that in this the Council concurs. (Council's Brief in Answer, at pp. 4-5) However the hearing examiner finds in the record no compelling reason that such an administrative change be completed within one year, especially in light of the defeat of the budget by the voters. He recommends that \$32,579 be restored to this line item, and that the reduction be sustained to the extent of \$32,579.

*J213 Teachers Salaries*

*Reduction \$80,003*

Council contends that four new teachers are unnecessary in the light of decreasing school enrollment; that the Board made no allowance for savings realized by attrition by retirement or resignation of higher paid teachers; that no money was budgeted for driver education in 1973-74 and is not now needed; that \$8,331 in salaries for job placement services is superfluous in recognition of other job placement agencies available to pupils and graduates.

The Board asserts that four new teaching positions are necessary to implement its newly-adopted department chairmen program, that savings by attrition is at best speculative and cannot safely be assumed for budgeting purposes; that the failure to budget for the driver education program in the

1973-74 budget was an inadvertent omission; and that it is necessary for the Board to fund fifty-five percent of this federally aided program because of reduced federal funding.

The hearing examiner has weighed the contending parties' arguments concerning four additional staff members to serve as department chairmen. In keeping with the determination in J212, *ante*, and, for the reasons expressed therein, the hearing examiner believes that the Board should move more gradually to complete this phase of its staffing change. He further finds that \$21,672 is necessary to continue and modestly expand the present driver education instruction program and should be budgeted therefor. (Tr. 32) Additionally, he notes the Board's obligation to fund fifty-five percent of the salary for the job placement program. (Tr. 36) The hearing examiner recognizes, with respect to the controverted matter of estimating and making budgetary allowance for savings through attrition, that there is a wide variety of practices among school administrators who assist in preparing board of education budgets. In any system as large as that of Rahway, with a teaching staff exceeding 280, some savings may safely be estimated. In the instant case none was estimated or considered in budget preparation. (Tr. 48)

In consideration of the above facets of requirements bearing on line item J213, the hearing examiner recommends restoration of \$48,000 to this line item and that the reduction be sustained to the extent of \$32,003.

*J215b Clerks Salaries*

*Reduction \$2,779*

Council contends that the Board has adequate clerical help to operate in a thorough and efficient manner with its twenty clerk-typists presently employed.

The Board states that with the recent full staffing of its second child study team its needs for clerical assistance in this sector have increased. It asserts that because of lack of clerical support it is experiencing delay in implementing child study team recommendations. (Tr. 51-52)

The hearing examiner finds that the experienced delays occasioning inefficient functioning of the child study team provide compelling reason for restoration to this line item of \$2,779. It is so recommended.

*J216 Other Instructional Salaries*

*Reduction \$5,792*

Council argues that the Board's proposed increase of \$8,559 in a line item budgeted at \$47,372 in 1973-74 is excessive.

The Board maintains that the proposed increase is necessary to compensate teachers who conduct its numerous extracurricular programs, and its newly-established Saturday detention program. This program was not budgeted in 1973-74 but was operated with surplus funds for six months during that year in an effort to provide an alternative to suspending pupils for misbehavior. (Tr. 38) Additionally, the Board recites its desire to add two teacher aides for its Technology for Children and Job Placement programs at an expense of \$3,240.

The hearing examiner, while recognizing the value of such an alternative as the Board has devised to out-of-school suspension of pupils, finds in the record no compelling reason advanced to require its continuance at additional expense of \$900. The hearing examiner further notes that additional expenditure in the 1974-75 budget for daily detention has been provided at Board expense which may be utilized to achieve the same desired ends as the Saturday detention program. Nor does the hearing examiner find that sufficient need has been set forth for expansion of the Technology for Children or Job Placement programs to compel the expenditure of additional Board moneys for these programs in the face of the budget defeat. (Tr. 39)

In keeping with the above findings and in recognition that Council's proposed allocation, together with a limited restoration of \$1,652, will allow for normal increases and certain additional positions, the hearing examiner recommends that a reduction of \$4,140 be sustained, and that \$1,652 be restored to this line item.

*J240 Teaching Supplies*

*Reduction \$18,987*

Council asserts that this item may safely be reduced from \$132,987 to its budgeted level for 1973-74. The Board contends that inflation in this important area of operation has approximated sixteen percent in the past two years. The hearing examiner observes that in 1972-73 the Board actually expended \$115,511. In recognition of current inflationary pressures and noting that the Board proposes expenditures in this line item which will approximate those of recent years in quantity and number, the hearing examiner recommends that \$18,987 be restored to this line item.

*J250C Miscellaneous Instruction Expense*

*Reduction \$1,547*

Council avers that duties, at least proportionate to the amount of its reduction, were previously carried out by volunteers and should be continued in like fashion.

The Board denies that any duties or expenses in this line item were provided by volunteers and that, if the \$10,000 budgeted for a Middle States Evaluation in 1974-75 were disregarded, there would be a reduction in the amount budgeted for the numerous items provided by this line item.

The hearing examiner finds that the Board's representation is factually correct and, noting the modest provisions within this account, recommends that \$1,547 be restored to this line item.

*J520C Field Trips*

*Reduction \$1,500*

Council asserts that field trips were previously handled on a volunteer basis without cost to the Board and should be continued in this manner.

The Board states that previous State funding for its Introduction to Vocations program is no longer available, and it desires to continue this offering for another year at Board expense.



The hearing examiner finds that the Board has correctly stated the matter and that field trips were not previously conducted on a volunteer basis. The hearing examiner recommends that \$800 be restored to this line item in support of the Board's continuing program and that the reduction be sustained in the amount of \$700.

*J610a Custodial Salaries*

*Reduction \$6,946*

Council maintains that the Board's proposal to add one full-time "floating" custodian is non-essential to efficient operation and would add unnecessary costs thereto.

The Board contends that a "floating" custodian who could be assigned to any school in the district would reduce overtime costs, reduce costs for substitute custodians, and make for a more efficient program. (Tr. 42)

The hearing examiner finds that actual overtime custodial expenditures in 1972-73 exceeded by \$5,130 the amount budgeted for this purpose for 1974-75. Additionally, substitute custodial salaries for 1972-73 exceeded the amount budgeted by the Board in 1974-75 by \$6,133. (1974-75 Budget Summary, at p. 25) The hearing examiner finds that the Board's experience in these two areas demonstrates the need for restoration of \$6,946 to this line item. It is so recommended.

*J640d Telephone*

*Reduction \$6,850*

Council, while admitting that the Board's telephone facilities do need improvement, asserts that the Board should wait a year until a comprehensive study may be performed of the entire city's needs, including those of the school system.

The Board proposes to install a dial PBX system to replace its outdated and inadequate system. It states that this installation, at an annual increased cost of \$5,950, with an additional one-time installation charge, is necessary to handle the increased volume of incoming and outgoing calls. (Tr. 127) The Board stated that its proposed installation, because of its automatic features, will free the present switchboard operator to do necessary typing for the school offices, which she now is unable to do because of the requirement that she handle all incoming and outgoing calls. (Tr. 107)

The hearing examiner finds the testimony convincing that a proper study was made prior to formulation of the budget (Tr. 107), that there is a compelling need for a more adequate and efficient telephone system. (Tr. 111, 113) He finds that the Board has proposed an economical plan to meet both this need and its need for additional secretarial assistance for the school offices. In accord with this finding, the hearing examiner recommends restoration of \$6,850 to this line item.

*J710 Maintenance Salaries*

*Reduction \$4,125*

Council asserts that the Board's proposal to add one full-time painter to its present staff of two maintenance workers is unnecessary and that the Board



should continue to contract such services.

The Board argues that the increase in this line item providing for a full-time painter would eliminate the need to contract for painting during summers and vacation periods and provide more adequately for maintenance of certain old buildings within the district.

The hearing examiner finds no proof of compelling need for this added expenditure at this time. He recommends that the reduction of \$4,125 be sustained.

*J1010 Student Body Activities -- Salaries*

*Reduction \$2,950*

Council avers that the numerous increases in stipends for coaches, averaging less than \$50, are unnecessary, and that their elimination would in no way jeopardize the program. Similarly Council states that the Board has not demonstrated that it has a plan for an evolving expansion of the girls' program of intramural and varsity sports.

The Board substantiates its request for a \$4,561 increase in this line item by its proposal to introduce both boys' and girls' elementary grade intramural programs at a cost of \$2,400, girls' softball as a varsity sport at a cost of \$446 and numerous increments for continuing coaching and intramural programs.

The hearing examiner notes that, while boys' athletics have traditionally dominated the athletic scene in some high schools, recent court decisions require that girls be afforded similar opportunities as boys to engage in intramural and interscholastic athletic programs. In this instance, the Board is presently not offering comparable programs for girls in all instances. It is recommended that \$446 be restored to establish a coaching position for girls' softball. It is further recommended that the additional amount of \$104 be restored, which amount, together with increases approved by Council, will enable the Board to pay those stipends for extracurricular coaching for which it is obligated, according to the terms of its negotiated agreement. (P-1) However, the hearing examiner finds no compelling reasons set forth that require the Board in the face of the defeated budget to institute for the first time an additional program of intramural athletics for boys and girls in its elementary schools.

In summary, it is recommended that a reduction of \$2,400 be sustained and that \$550 be restored in this line item.

The hearing examiner notes that Council, while not making specific reduction to the Board's unappropriated balance, asserts that a portion thereof shall be applied by the Board to the revenue portion of its 1974-75 budget.

The hearing examiner has analyzed the pertinent facts provided by the Board Secretary concerning the Board's unappropriated current expense balance. This may be summarized as follows:

Unappropriated balance June 30, 1974	\$ 77,355.69
Appropriated to 1974-75 budget	<u>107,200.00</u>
Deficit in revenue funds available	\$ 29,844.31

There being available to the Board an already inadequate appropriated balance in the current expense account to meet its prior obligations, no useful purpose would be served by further recommendations in this regard.

In summary, it is recommended that the combined line items discussed, *ante*, be determined as follows:

#### CHART II

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
J110f	Supt. Off. Sals.	\$ 2,011	\$ —0—	\$ 2,011
J120b	Legal Fees	1,500	\$ 1,500	—0—
J212	Supvrs. Sals	65,158	32,579	32,579
J213	Teachers Sals.	80,003	48,000	32,003
J215b	Clerks Sals.	2,779	2,779	—0—
J216	Other Sals. Instr.	5,792	1,652	4,140
J240	Teaching Supls.	18,987	18,987	—0—
J250c	Misc. Exp. Instr.	1,547	1,547	—0—
J520c	Field Trips	1,500	800	700
J610a	Custodial Sals.	6,946	6,946	—0—
J640d	Telephone	6,850	6,850	—0—
J710	Maint. Sals.	4,125	—0—	4,125
J1010	Stud. Body Activs. Sals.	<u>2,950</u>	<u>550</u>	<u>2,400</u>
	TOTALS	\$200,148	\$122,190	\$ 77,958

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record of the instant matter, the hearing examiner's report, and the exceptions thereto filed pursuant to *N.J.A.C.* 6:24-1.16. The Commissioner concurs in all points with the findings and recommendations of the hearing examiner. Accordingly, it is found and determined that in addition to the amounts previously certified to the Union County Board of Taxation, the amount of \$122,190 for current expenses is required for the thorough and efficient operation of the school district during the 1974-75 school year. The Commissioner directs the Union County Board of Taxation to raise by public taxation the amount of \$122,190, in addition to the amount previously certified, for the current expenses of the Rahway School District for the 1974-75 school year.

COMMISSIONER OF EDUCATION

November 21, 1974

**Veronica Smith and Sayreville Education Association,**

*Petitioners,*

*v.*

**Board of Education of the Borough of Sayreville, Middlesex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Rothbard, Harris & Oxfeld, (Emil Oxfeld, Esq., of Counsel)

For the Respondent, Casper P. Boehm, Esq.

Petitioner, a teaching staff member employed by the Board of Education of the Borough of Sayreville, Middlesex County, hereinafter "Board," during the period February 1970 to June 1973, avers that such employment entitles her to the protection and privileges of a tenure status as a teaching staff member which the Board has denied her. She requests that the Commissioner of Education so determine and issue an Order restoring her to a position in the Board's employ. The Board denies petitioner's claims and grounds such denial on petitioner's certification status.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on March 7, 1974 at the office of the Middlesex County Superintendent of Schools, New Brunswick. A Memorandum of Law has been filed by each counsel. The report of the hearing examiner is as follows:

The principal assertion of the instant Petition of Appeal is that petitioner had acquired a tenure status as a teaching staff member employed by the Board at the time in 1973 when her primary position as a vocational education teacher was abolished and that, as a registered nurse who had performed some of the duties of a school nurse for the Board, she was entitled to fill a position of school nurse when such position became vacant. The Board denies that it ever assigned petitioner to perform the duties of a school nurse and also denies that she had any entitlement or qualification for such position. The facts of this matter are as follows:

Petitioner has been a registered nurse in the State of New Jersey since 1948 and has maintained such registration to the present day. (P-1) However, she has never made application for, or been issued, a School Nurse Certificate by the State Board of Examiners. (Tr. 34) This is the certificate required for a teaching staff member who serves as school nurse. Her status with respect to the school nurse certificate is set forth in an affidavit submitted to the hearing examiner on January 17, 1974, as follows:

\*\*\*\* As of now I need only 9 more credits for a school nurse's certificate,

and I have 105 credits toward the degree of Bachelor of Arts in Health Science and need only 23 more credits for that degree.\*\*\*" (at p. 6)

Petitioner has possessed an "Emergency Certificate" as a "Teacher of Nurses Aides" which was first issued to her in January 1971. (P-5) This certificate was renewed thereafter in July 1971 and in September 1972. It expired on July 1, 1973. (See endorsements of the Middlesex County Superintendent of Schools, reverse side of P-5.) Additionally, in June 1973, the State Board of Examiners issued a second certificate to petitioner (P-6) which states that she has completed "all of the requirements" and "is authorized to serve in the public schools of New Jersey \*\*\* as a "Teacher of Practical Nursing". Further, in response to a request from the hearing examiner, an evaluator of the State Board of Examiners has forwarded the following opinion with respect to petitioner's eligibility in 1973 for a Provisional Nurse Certificate:

"If she has current registration as a nurse in New Jersey, she would have been eligible for a provisional school nurse certificate any time in June 1973.

"To qualify for the regular certificate to serve as school nurse she will need to complete an approved school nursing program and be recommended by the college for the certificate."

This completes a recital of petitioner's certification status as an employee of the Board during the period February 1970 to June 1973. Her work experience during that total period was generally that of a teacher pursuant to her certification, although for three full years of the total period she did perform some substitute nursing duties for a part of each school day. (Tr. 19-20) It is this latter work experience which, when considered in conjunction with her certification status, poses the issue for determination in this matter.

Petitioner's actual employment with the Board began in February 1970 pursuant to a contract awarded her by the Board dated February 12, 1970 (P-2), and was continued by a separate contract of employment in each of the three academic years that followed. (P-2a, b, c) Thus, in June 1973, at the close of the academic year, petitioner had been employed by the Board for approximately three years and four months, while certified as a "teacher" on an emergency basis, but at that juncture she was issued the regular certificate, *ante*, (P-6) as a "Teacher of Practical Nursing." (See also P-8.)

Petitioner's duty assignments during all of the aforementioned period of three years and four months were varied but, in major part at least, were those of a regular teacher rather than those of a school nurse. (Tr. 13, 16, 19, 20, 60) These duties consisted of assignment to a job-orientation vocational program as a teacher of nurses aides (Tr. 13), conducting classes devoted to skills required for sewing (Tr. 19) and home economics (Tr. 20), and teaching the use of various types of small machines. (Tr. 16) Petitioner's assignment schedules indicate that, in general, approximately six-eighths of her total school day were devoted to such teaching assignments in the period 1970-73. (P-4a, b, c) The balance of her

schedule each day generally included a planning period and a combined lunch and duty period.

In March 1973 petitioner was informed by her school principal that there was an insufficient number of pupils enrolled in the job orientation program, her principal position, and that the school system would not offer her a contract of employment for the 1973-74 academic year. (R-1) This decision was confirmed by formal action of the Board on April 17, 1973. (Tr. 86-87) Thus, in effect, her principal position of employment was abolished at that juncture.

While not contesting this fact, petitioner maintains that her total service in the Board's employ entitled her to a tenure status, and that the part of such service wherein she had performed the duties of a school nurse created for her the right to fill a nurse's position if one became vacant. Such a position did, in fact, become vacant but it was not offered to petitioner and the present Petition of Appeal ultimately ensued. As noted, *ante*, the principal contention herein is concerned with an evaluation of those duties which petitioner performed while substituting for the school nurse at the lunch hour during a small part of the school day during the period from September 1970 to June 1973.

In this regard, it may be stated that petitioner did indeed perform some of the routine duties of a school nurse during the three-year period in question. For daily periods of 20, 25, or 30 minutes throughout that period she performed first aid functions (Tr. 14), administered and "read" time tests, and generally attended to pupils who came in. (Tr. 56) However, it appears from petitioner's testimony that such duties were limited in scope. (Tr. 57-58) She had no responsibility for health records, supervised no clerical employees, scheduled no dental exams, ordered no nurse's supplies, and scheduled no examinations of any kind on a regular basis. (Tr. 58)

In assessing such record, however, it is petitioner's contention that the duties she did perform in the nurse's office and the qualifications she held as a nurse, entitled her to fill a vacancy as a school nurse when the vacancy occurred in the summer months of 1973. She argues that the Board was not free to employ a person other than petitioner to fill such vacancy in the absence of notice to petitioner that such vacancy had been created. Therefore, she avers that the Board's employment of a person other than petitioner to fill the school nurse position should be rendered a nullity.

It is the Board's contention, with respect to such service by petitioner, that the duties she did perform in the nurse's office were those that are routinely performed by a school "monitor" and that such duties have no more significance, in terms of a tenure entitlement, than the duties performed by hall monitors or by teachers assigned to duty in the library or cafeteria. (Tr. 54) Further, the Board maintains that it did not assign petitioner to such duties but that the assignment was made by the school principal, and therefore tenure could not have accrued to petitioner under those circumstances. In support of this argument the Board cites *Herbert J. Buehler v. Board of Education of the Township of Ocean, Monmouth County*, 1970 S.L.D. 436, affirmed State Board of Education 1971 S.L.D. 660, affirmed Superior Court of New Jersey,

Appellate Division, November 2, 1972.

The hearing examiner has assessed the facts and arguments and sets forth the following findings. Petitioner's employment by the Board embraced a total period of three years and five months of service, a period more than sufficient to have earned for her an entitlement to a tenure status as a teaching staff member if all other requirements of the statute have been met. *N.J.S.A. 18A:28-5* However, the statutory mandate in this regard also requires that the teacher who claims such entitlement must possess an "appropriate" teaching certificate, which the Commissioner has defined as either a "provisional" or "standard" certificate issued by the State Board of Examiners. (See *Robert Anson, Norman Shimp and John L. Henderson v. Board of Education of the City of Bridgeton, Cumberland County*, 1972 *S.L.D.* 638.) The statute of reference, *N.J.S.A. 18A:28-5*, provides:

"The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, \*\*\* and such other employees as are in positions which require them to hold *appropriate certificates* issued by the board of examiners, serving in any school district or under any board of education *excepting those who are not the holders of proper certificates in full force and effect*, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member of other just cause and then only in the manner prescribed by subarticle B, of article 2 of chapter 6 of this title, after employment in such district or by such board for:

"(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

"(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

"(c) the equivalent of more than three academic years within a period of any four consecutive academic years\*\*\*." (*Emphasis supplied.*)

Thus, even assuming, *arguendo*, that petitioner's record of service and certification status as a teacher in June 1973 entitled her to the benefits of tenure as a teacher, a basic question remains with respect to her claimed tenure entitlement as a school nurse since she has never held a certificate for such position.

The questions for determination herein are as follows:

(a) Did petitioner possess a tenure status as a teacher at the time her position was abolished in June 1973?

(b) If she did possess a tenure status as a teacher, was she entitled at that juncture on the basis of such tenure, to be placed in another position as school nurse because additionally for a period of approximately three



years she had performed some of a nurse's duties during a small segment of the school day, without holding an appropriate school nurse's certificate but with an eligibility for a provisional certificate in June 1973?

While the two questions, *ante*, are interrelated, it must be emphasized again that the only claim by petitioner herein is to be placed in a position as a school nurse, which position became vacant after petitioner's teaching position was abolished by the Board.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exceptions thereto filed pursuant to *N.J.A.C. 6:24-1.16*.

Petitioner served the Board as a vocational education teacher for an uninterrupted period of time in excess of three academic years within a period of four academic years. Initially, she possessed an emergency certificate, but at the end of this period of service and prior to the termination of her teaching contract she was issued standard certification as a teacher of practical nursing. Respondent argues that this certificate was not received prior to the end of the 1972-73 academic year, and that it has no bearing upon the tenure entitlement of petitioner. The Commissioner does not agree. It was stated in *Mildred Givens v. Board of Education of The City of Newark, Essex County*, 1974 S.L.D. 906:

“\*\*\* Fairness alone dictates that \*\*\* teachers ought not be penalized by the administrative delay which necessarily exists in processing great numbers of applications for certificates by teachers required to staff public schools serving nearly one and one-half million New Jersey school children\*\*\*.” (at p. 910)

In the instant matter it is clear that petitioner had made application for her standard certificate as a teacher prior to the close of the 1972-73 academic year. It is also clear that this application was made through the school administrator's office, so that agents of the Board were aware of its existence. This being so, petitioner may not be barred from tenure by administrative delay in the issuance of the standard certificate. *Givens, supra* Additionally, it is shown that her contract had not expired prior to her receipt of the standard certificate.

It is clear that, during her entire period of service to the Board, petitioner worked in a teaching position which required that she hold a valid teaching certificate and that for a portion of this time she possessed an emergency certificate. The Commissioner has previously spoken regarding the tolling of time toward tenure while serving under an emergency certificate in *Joann K'Burg v. Board of Education of the Township of Lower Alloways Creek, Salem County*, 1973 S.L.D. 636 wherein he said:



“\*\*\* To hold \*\*\* that an ‘emergency certificate’ to teach is not a valid nor appropriate certificate, would leave the untenable alternative that the State Board of Education, through its own rules, authorizes the State Board of Examiners to issue invalid and inappropriate certificates to teach. \*\*\* While emergency certificates are issued to those persons who meet minimal professional qualifications for the field of education, the fact is, that stated requirements are met.\*\*\*”

“Accordingly, the Commissioner determines that an ‘emergency certificate’ is a valid and appropriate certificate to teach for the stated one-year period so indicated on its face, subject to renewal upon proper request by the local board of education.

“The question of whether petitioner has or has not acquired tenure does not turn, as the Board asserts, on the date and subsequent effect of the administrative memo \*\*\* tendered her \*\*\*. The true test of whether a tenure status has accrued is, as articulated in *Ahrensfield v. State Board of Education*, 126 N.J.L. 543 (1941), whether the precise conditions laid down in the applicable statutes are met. In this case, the applicable statute is N.J.S.A. 18A:28-5. In this instance, these ‘precise’ conditions are met, because petitioner has clearly served the requisite period of time in the Board’s employ and acquired possession of a standard teaching certificate during the course of the academic year *while she was still employed*.\*\*\*”

“When the standard certificate was issued to her during her fifth year of employment, all conditions for permanent tenure were then met.\*\*\*”  
(*Emphasis in text.*) (at pp. 639-640)

In the instant matter, the same sequence of events occurred as in *K’Burg, supra*. When petitioner had served a period in excess of three academic years within a period of four academic years and became the recipient of a standard teaching certificate while still under contract to the Board in June 1973, she was at that time a tenured teacher in the Board’s employ. The Commissioner so holds. *Thomas Smith, Jr. v. Board of Education of the Township of Egg Harbor, Atlantic County*, 1974 S.L.D. 430

The Board, however, abolished petitioner’s vocational teaching position. Regarding such matters, the Legislature has spoken plainly in N.J.S.A. 18A:28-9 wherein it says:

“Nothing in this title or in any other law relating to tenure of service shall be held to limit the right of any board of education to \*\*\* abolish any such positions for reasons of economy \*\*\* or for other good cause \*\*\*.”

Certain of petitioner’s rights are preserved regarding reemployment by N.J.S.A. 18A:28-12, but the Board acted within the parameters of its discretion when it abolished the position.

There remains only to determine whether petitioner’s part-time assignment in the health office entitled her to employment as the school nurse when this

position became vacant in July 1973. This part-time assignment was limited to one-half hour daily during the lunch hour of the school nurse and encompassed some, but not all, duties of the regular school nurse. Petitioner was never appointed by the Board to a part-time school nurse position. Nor was it incumbent upon the Board that she be so appointed nor that she be certified as a school nurse. The Commissioner, in a similar situation involving the assignment of temporary school health office coverage to guidance counselors, in *Leona Smith, Mort Robin and Jan Campbell v. Board of Education of the Borough of Caldwell-West Caldwell, Essex County*, 1972 S.L.D. 232, said:

“\*\*\* N.J.S.A. 18A:40-1 simply provides, *inter alia*, that each local board of education ‘\*\*\* shall employ \*\*\* one or more school nurses \*\*\*’ and ‘\*\*\* adopt rules, subject to the approval of the state board, for the government of such employees.’ There is no provision in this statute that mandates the coverage that a nurse must give, but the clear implication, by the limited nature of the mandate, is that some schools will share nursing services, and \*\*\* *at some times will be without the physical presence of a nurse in the building.*\*\*\*” (Emphasis supplied.) (at p. 238)

And,

“\*\*\* Therefore, it must be accepted as fact that there is a recognition in the statutes that nurses are not always present in school buildings, and that at such times, some of the responsibilities for the implementation of the rules of the State Board, and the local board, must be borne by other employees of the school system.\*\*\*” (at p. 239)

And,

“\*\*\* Neither is it ‘unreasonable,’ in the Commissioner’s view, that the Board decided to assign staff members \*\*\* to perform some of the nurse’s referral chores, when the nurse was absent from the building.\*\*\*

“The Commissioner opines that the only ultimate, eminently satisfactory provision, to properly provide for each and every emergency health situation \*\*\* would be a licensed doctor of medicine in each of the buildings at all times they are in session. However, common sense dictates that such provision mandated by law would be one totally distorted and out of proportion to need. Even a mandated provision of a nurse for every school building on all occasions would seem to be illogical and to exceed the requirements of the statutes.\*\*\*” (at pp. 239-240)

The Commissioner determines that precisely the same reasonable assignment was made for temporary health office coverage in the instant matter. He further determines that, while the Board could have required that petitioner apply for and possess a school nurse certificate, it was not derelict in duty in not making this requirement. Such assignment was reasonable in that petitioner, being trained as a registered nurse, was eminently qualified to perform such limited duties.

Petitioner's position having been abolished, her sole claim to an alternate position must rest in the seniority rights which are clearly set forth in *N.J.A.C.* 6:3-1.10 which provides, *inter alia*:

“\*\*\* (h) 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\*\*\*.”

Herein, petitioner had not previously worked in another category, nor was she entitled to dual classification both as a teacher *and* as a nurse by reason of her limited health office duties, lack of appointment as a school nurse, and lack of certification for such a position.

The Commissioner determines that petitioner was neither tenured as a school nurse at any time, nor was she entitled to appointment as a school nurse when that position became vacant. Her sole entitlement is to remain upon the Board's preferred eligibility list in the single category to which her service as a teacher has qualified her. There being no other relief which may be properly afforded, the Petition is dismissed.

COMMISSIONER OF EDUCATION

November 21, 1974

Pending before State Board of Education

Sharon Ann Pinkham,

*Petitioner,*

*v.*

Board of Education of the Borough of South River, Middlesex County;  
Alfred E. Losiewicz, as Principal of South River High School;  
Juanita Fieseler, as Physical Education Instructor, South River High School,

*Respondents.*

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioner, Rutgers Legal Aid Clinic (Joseph E. Buckley, Jr., and Timothy Weeks, Esqs., of Counsel)

For the Respondents, Golden, Shore and Paley (Philip H. Shore, Esq., of Counsel)

Petitioner, a pupil enrolled in the twelfth grade in South River High School, failed a required course in physical education for the 1973-74 academic year and was not awarded a diploma of graduation. She alleges unjust sex discrimination and a denial of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that female pupils of the school are allegedly required to satisfactorily complete more stringent requirements than are male pupils, since only female pupils are required to take written tests in physical education courses. She prays that the Commissioner of Education order respondents to issue her a diploma of graduation and to discontinue the alleged discriminatory practice of testing girls but not boys in South River High School physical education classes.

Respondents deny that male pupils are subjected to less stringent requirements than female pupils in physical education courses, or that respondents have violated any statutory or constitutional provision.

The Petition of Appeal was filed with the Commissioner on June 20, 1974, and it was requested that he shorten the time requirements for Answers from respondents and order an immediate conference of counsel for the purpose of discovery. On June 21, 1974, a hearing date was set down for July 3, 1974, with a conference of counsel immediately preceding. The hearing examiner appointed by the Commissioner conducted two days of hearing on July 3 and July 12, 1974 at the State Department of Education, Trenton.

At the beginning of the hearing, respondents moved to adjourn the hearing to allow more time for discovery in the preparation of respondents' case, and to allow public excitement to subside after the extensive media coverage of the case. (Tr. 1-8) Respondents further alleged that the State Department of Education had already prejudged the case, by requiring that respondents submit into evidence copies of the policy of the South River Board of Education, hereinafter "Board," and such administrative directives and physical education

department directives as pertain to the instant matter. (Tr. I-10)

At the hearing, the hearing examiner denied respondents' Motion to Adjourn. He also categorically denied that there was any prejudgment of the matter by the State Department of Education or the Commissioner, as the result of the extensive news coverage. The hearing examiner pointed out that the routine requirement that certain documents be submitted into evidence is authorized by *N.J.S.A. 18A:6-24*, which reads as follows:

"Testimony as to the facts involved in any controversy or dispute in which the commissioner has jurisdiction shall, if so required by the commissioner, be presented by the parties in the form of written statements verified by oath and accompanied by certified copies of all official documents \*\*\* necessary to a full understanding of the questions involved."

The hearing examiner assured respondents at the hearing that additional time, if requested, would be allowed for them to prepare a defense, provided that the hearing examiner was convinced that such was necessary for a complete understanding of the pertinent facts. (Tr. I-17)

At the hearing, petitioner moved that the names of the Middlesex County Superintendent of Schools and the Superintendent and Board Secretary of the South River School District be stricken as respondents in this case. The Motion, which was unopposed, was granted.

At the conclusion of petitioner's case, respondents moved to strike the names of Juanita Fieseler and Alfred Losiewicz as respondents in this case (Tr. II-70), and to dismiss the entire matter for failure by petitioner to set forth a cause of action. (Tr. II-70) The Motion was denied by the hearing examiner, subject to a final determination by the Commissioner, on grounds that a *prima facie* case had been presented by petitioner and that the principal and the physical education teacher are proper respondents. The hearing examiner recommends that the Commissioner deny both respondents' Motion to Dismiss and Motion to Strike the names of Alfred E. Losiewicz and Juanita Fieseler.

A recitation of those facts which are uncontroverted is set forth as follows:

All pupils in South River High School, including petitioner, are required to be enrolled in one period daily of health instruction for one quarter of the academic year, and one period daily of physical education for three quarters of the academic year.

For at least the past three academic years, from September 1971 through June 1974, it was the practice of teachers of girls' physical education classes to administer written tests to their pupils. During the same period no such tests were required of boys. (Tr. I-93) It is this difference in requirements that gives rise to the instant matter.

Petitioner received the following grades in health and physical education for the senior year:

First Marking Period (Health)	– B
Second Marking Period (P.E.)	– E
Third Marking Period (P.E.)	– C
Fourth Marking Period (P.E.)	– E
Final Average	– E

(P-1)

The grade “E” in South River High School is a failure, but permits the pupil to enroll in a summer school make-up course; thus, petitioner was eligible to enroll in a summer school course. Petitioner, although allowed to participate in the graduation ceremony with her class, lacked the single requirement of satisfactory completion of physical education in the twelfth grade and was not awarded a diploma of graduation pursuant to the requirement of *N.J.S.A. 18A:35-7* which reads:

“Every pupil, except kindergarten pupils, attending the public schools, insofar as he is physically fit and capable of doing so, as determined by the medical inspector, shall take such [physical training] courses,\*\*\* and the conduct and attainment of the pupils shall be marked as in other courses or subjects, and the standing of the pupil in connection therewith shall form a part of the requirements for promotion or graduation.”

Neither party to the dispute challenges that successful completion of physical education by all who are physically able is a requirement which must be met in order to receive a diploma.

At the pre-hearing conference of counsel two issues were agreed upon. The hearing examiner herewith sets forth his findings with respect to the agreed-upon issues.

#### ISSUE NO. 1

“Does the South River Board of Education require the administration of written tests to female students in physical education, and not make such requirements on male students in physical education.” (Tr. 1-3)

An examination of the Board’s policy manual (R-4) reveals no mention of the requirement of tests in any subjects within the high school, but says only that:

“\*\*\* The Board of Education retains full legislative authority over the schools in accordance with the Education Laws of the State of New Jersey, and the expressed will of the electorate, but delegates all executive, supervisory and instructional authority to its employees \*\*\*; legislative service implies \*\*\* the power to pass judgment upon employees and their work, and the power to veto acts of any or all employees when such acts are deemed improper, disadvantageous to the legal rights or obligations of the school district \*\*\*.” (R-4, unp)

The South River High School Manual for Teachers (R-5) makes no reference to the requirement of written tests in physical education but recognizes the importance of tests as an evaluation procedure. With respect to failure of pupils, it makes this statement:

“\*\*\* If the student’s ability is such that repetition will not help to *significantly* improve upon the cognitive and affective skills to be acquired in the course and his effort has been real and earnest, the teacher should give *very serious consideration* to passing that student \*\*\*. If, on the other hand, a student possesses the ability to achieve these skills but his effort has been such as to indicate that a repetition of the course might benefit him, then the teacher should make the decision to fail the student. \*\*\*”  
(*Emphasis the Board’s.*) (R-5, unp)

The Teacher’s Manual further states:

“\*\*\* In order to forestall the possibility of a student’s passing by working hard the first half of the year and coasting for the rest of the year, the student must pass at least two out of the last three marking periods. \*\*\*”  
(R-5, unp)

An analysis of the policies set forth in the above-named manuals leads the hearing examiner to the conclusion that the physical education teacher followed precisely those directives in arriving at the final physical education grade she assigned to petitioner.

A thorough review of the Board’s approved course of study for physical education for boys (R-7) verifies that no mention is made therein of written tests for boys. However, in the Board’s approved course of study for girls’ physical education (R-6, at p. 27) mention is made of written tests. The girls’ course of study explicitly requires that at least two written tests must be given each marking period. It further specifies that the marking period grade shall be computed by weighting the daily average physical education grades as two-thirds and the written test average as one-third.

N.J.S.A. 18A:33-1 requires that:

“Each school district shall provide, \*\*\*courses of study suited to the ages and attainments of all pupils \*\*\* but *no course of study shall be adopted or altered except by the recorded roll call majority vote of the full membership of the board of education of the district.* (*Emphasis supplied.*)

N.J.A.C. 6:27-1.3 makes it a requisite that:

“(a) The curriculum shall comply with statutory requirements and shall be that which has been adopted by the local board of education and approved by the State Board of Education. \*\*\*”

Thus, it is seen that every course of study must be approved by the local



board of education to meet the statutory and Administrative Code requirements of the State of New Jersey.

No documentary proof or testimony other than the Board's adopted courses of study, *ante*, gave indication that the Board had directed that tests be administered to girls and not to boys in physical education classes. However, it is the finding of the hearing examiner that both courses of study were approved by the Board and therefore express the Board's policy with regard to the teaching of physical education. It is likewise clear that the Board, by its approval of these thorough and detailed courses of study, has required the administration of written tests to girls and has not placed a similar requirement upon boys in physical education classes. Such requirements, once adopted, are incumbent upon the teachers who teach the courses. The teachers must follow such directives or be subject to charges of inefficiency or insubordination. The hearing examiner cannot agree with respondents' contention that the Board in this instance left to its teachers the discretion whether or not to give written tests.

The hearing examiner refers to the Commissioner the issue whether the above finding constitutes sex discrimination pursuant to the Fourteenth Amendment of the Constitution of the United States, the New Jersey Constitution, or *N.J.S.A.* 18A:36-20 which was signed into law January 14, 1974, and reads:

"No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin."

#### ISSUE NO. 2

"Is the requirement by a teacher in the South River School System requiring written tests in physical education for female students discriminatory against petitioner." (Tr. I-3)

It was agreed at the conference of counsel to limit the testimony at the hearing to the events which occurred during the fourth marking period.

During the 1973-74 academic year petitioner was absent from school a total of fifty-one days. (P-1) She testified that these absences were the result of persistent infections and a slight case of diabetes. Petitioner was absent eleven days out of forty-five and one-half possible days during the fourth marking period.

Petitioner's physical education teacher gave two tests during the fourth marking period, the first in tennis. Petitioner failed to take this test and was encouraged to make it up within a reasonable time. (Tr. I-67; Tr. II-101) She did not do so and was assigned a grade of zero for the test. She was warned by a failure warning notice (R-1) during the marking period. (Tr. I-50) She testified at the hearing that she paid little attention to the notice (Tr. I-54), and that she had

“\*\*\* gotten them before and pulled B’s\*\*\*.” (Tr. I-50)

She also stated that she

“\*\*\* didn’t think it [the tennis test] would count that much.\*\*\*” (Tr. I-64)

The hearing examiner finds that petitioner also had available to her, as had all other pupils, the opportunity to take an optional test to improve her grade (Tr. II-102), and that she could have made up classes that she had missed because of absences had she so chosen. (Tr. II-99) She did not use the opportunity to compensate for any of the eleven days she was absent during the fourth marking period.

Petitioner did not take her written badminton test during the fourth marking period and achieved a grade of forty-six which, averaged with the zero on the tennis test, resulted in a written test average of twenty-three. She did not avail herself of the opportunity to take an optional test. Her average daily physical education grade which was computed as two-thirds for participation and attitude, and one-third for physical skill tests as directed by the course of study, was eighty-five for the marking period.

The hearing examiner finds that the Course of Study directive was precisely followed by the teacher in computing petitioner’s fourth marking period grade as follows:

Average daily gym grade	— 85
Weighted by adding an additional	— 85
Average tests grade	— 23
	3 /193
Grade — 4th marking period	64

(Tr. II-89)

South River High School accords seventy percent to be a passing grade. Thus petitioner was failed for the marking period and for the year in physical education, having received two failures in the last three marking periods. No final examination in physical education is given in the high school at the end of the year.

There is no indication that the teacher exacted any severe penalty for petitioner’s eleven days of absence during the fourth marking period or for her total of fifty-one absences throughout the academic year. There is no allegation that the teacher is other than an experienced and well-trained, conscientious, professional staff member. (Tr. II-98) The sole issue is one of alleged discrimination against female pupils. This issue was raised by petitioner after she had been notified that she had failed physical education and would not be awarded a diploma of graduation. (Tr. I-51)

Petitioner contends that, had she not been required to take written tests in

physical education, her marking period grade would have been passing and the equivalent of eighty-five percent. The hearing examiner finds that this would have been so, provided that no other evaluative criteria had been substituted for the written tests. However, he finds this assertion to be highly conjectural, since it is reasonable to assume that other evaluative criteria could have otherwise been used in lieu of written tests.

The hearing examiner will now set forth excerpts from the testimony of certain expert witnesses called to testify by petitioner.

Testimony from Dr. Nadine Shannler Schwartz, Associate Professor at Trenton State College with a specialty in Philosophy of Education, was as follows:

“\*\*\* My opinion is that the giving of written tests in physical education only to girls and not to boys is not educationally defensible. \*\*\*”

(Tr. I-121)

And,

“\*\*\* Written tests probe particularly the area of cognitive development and if written tests are given only to girls and not to boys, then in terms of cognitive development alone, one might suppose that that would assume that girls somehow have less ability cognitively than boys \*\*\*.”

(Tr. I-125)

And,

“\*\*\* There is nothing in the research of cognitive development of which I am aware, that indicates that there is any difference in cognitive abilities between boys and girls \*\*\*. So, on the cognitive basis, there appears to be no educational justification for giving written exams to women but not to men.\*\*\*”

(Tr. I-126)

And,

“\*\*\* I would have no objection to any teacher giving written tests as a way of evaluating \*\*\* what a student knows \*\*\* or \*\*\* doesn't know so that that teacher can make some sane judgments about where to teach from there but where the effects of such testing procedure is in my view discriminatory, then I think also that it is educationally indefensible.\*\*\*”

(Tr. II-42)

Similar testimony was heard from Dr. Felix A. Ucko, a psychiatrist, who, when asked his opinion of giving written tests in physical education to girls and not to boys, said:

“\*\*\* [T]here is no difference justifying giving different tests. \*\*\*” (Tr. II-48)

And,

“\*\*\* [A]ny group that’s prejudiced against by having to go through different life experiences will be psychologically damaged whether it’s by reason of sex, by reason of race, religion, or whatever it may be.\*\*\*”

(Tr. II-51)

When asked what impact such a practice may have on a person’s ability to succeed, he said:

“\*\*\* [I]t can have a detrimental impact. Theoretically it could also have a favorable impact. Some people who are prejudiced against, \*\*\* may even try harder and therefore excel. \*\*\*”

(Tr. II-54)

The hearing examiner leaves to the Commissioner to determine, within the context of the above-stated facts and testimony, whether the Board’s policies and/or the teacher’s practices in requiring written physical education tests of petitioner and other girls within South River High School constituted illegal sex discrimination when such requirement was not made of boys.

It is likewise left to the Commissioner, in the event of an affirmative determination, to decide whether petitioner is entitled to a diploma of graduation, considering her performance as a pupil as described above.

The hearing examiner finds no similar case of reference previously decided by the courts, by the Commissioner of Education, or by the Division on Civil Rights of the Department of Law and Public Safety.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner, including the exceptions, objections, and replies pertinent thereto which have been filed by respective counsel. The primary prayer of the Petition of Appeal, that petitioner be awarded a diploma by the Board, has been rendered moot by circumstances. Petitioner has attended summer school and a diploma has been awarded to her by the Board. This is a stipulated fact.

Accordingly, the Commissioner finds no need herein to make specific determinations with respect to this primary claim, or with respect to the assertions upon which the claim is founded, since it is well established that the Commissioner does not decide moot issues. *Tedesco v. Board of Education of Lodi*, 1955-56 S.L.D. 69; *McAllister v. Board of Education of Lawnside*, 1951-52 S.L.D. 39; *Rodgers v. Board of Education of Orange*, 1956-57 S.L.D. 50 In *Moss Estate, Inc. v. Metal & Thermit Corporation*, 73 N.J. Super. 56, 67 (Chan. Div. 1962), the Court said:

“\*\*\* It is the policy of the courts to refrain from advisory opinion, from deciding moot cases, or generally functioning in the abstract, and ‘to

decide only concrete contested issues conclusively affecting adversary parties in interest.' *Borchard, Declaratory Judgments* (2d ed. 1941), pp. 34-35\*\*\*\*"

Neither does the Commissioner deem it necessary at this juncture to consider the other specific, or proposed amended, prayers of the Petition. They, too, have been rendered moot by the primary fact that petitioner has received her diploma, or, in the case of the amended prayer, are untimely.

The Commissioner is constrained by the controversial nature of this case, however, to offer some general dicta with respect to the evaluation of the academic achievement of pupils which, while not specifically required herein, may have a more general application. Such dicta in the circumstances is not inappropriate. *Kennedy Memorial Hospital v. Heston*, 58 N.J. 576 (1971)

The principal question for discussion is concerned with the authority to decide matters of curriculum content and assessment and classroom procedure. What authority may a local board of education exercise? What are a teacher's prerogatives?

It is clear that local boards of education in this State are responsible for the "government and management" of their school districts (N.J.S.A. 18A:11-1), and that such responsibility embraces matters of curriculum content and the services to be performed by school employees. As the Commissioner said in *Michael A. Fiore v. Board of Education of the City of Jersey City, Hudson County*, 1965 S.L.D. 177, 178:

\*\*\*\* The Legislature has committed the operation of local schools to district boards of education. It has provided a system of administrative appeals from such boards to the Commissioner, R.S. 18:3-14, and thereafter to the State Board, R.S. 18:3-15. The powers of boards of education in the management and control of school districts are broad. *Downs v. Board of Education, Hoboken*, 12 N.J. Misc. 345, 171 A. 528 (Sup. Ct. 1934), affirmed *sub nomine Flechtner v. Board of Education of Hoboken*, 113 N.J.L. 401 (E. & A. 1934) Subject to statutes relating to tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered by each and the compensation to be paid for such services. Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 C.J.S., *Schools and School Districts*, §128, p. 920; *Boult v. Board of Education of Passaic*, 135 N.J.L. 329 (Sup. Ct. 1947), affirmed 136 N.J.L. 521 (E. & A. 1948). Where, however, the board's action is patently arbitrary, without rational basis, or induced by improper motives, the rule is otherwise. *Kopera v. West Orange Board of Education*, 60 N.J. Super. 288, 294 (App. Div. 1960); *East Paterson v. Civil Service Dept. of N.J.*, 47 N.J. Super. 55, 65 (App. Div. 1957); cf. *Moore v. Haddonfield*, 62 N.J.L. 386, 391 (E. & A. 1898); *Peter's Garage, Inc. v. Burlington*, 121 N.J.L. 523, 527 (Sup. Ct. 1939).\*\*\*\*"

Thus the powers of a local board of education are "broad" and they encompass the authority to determine the "services to be rendered" by staff employees. Certainly such authority must include the entitlement of local boards to assign teaching staff members to positions they are certificated to fill. *N.J.S.A.* 18A:1-1 The authority must also include, in general terms, the course of study deemed appropriate by the Board to be taught. *N.J.S.A.* 18A:33-1; *N.J.A.C.* 6:27-1.3

The Commissioner holds, however, that such authority and its exercise is not without limitations in the day-to-day educational process, and particularly with respect to those procedural means which teachers employ to insure that an approved course of study is effectively pursued. It is the teacher who must, by virtue of professional skill and expertise, transform the course of study from an inert document to a living reality through the employment of a variety of techniques and procedures. Flexibility is required if this goal is to be achieved.

Thus a teacher may decide that certain visual aids should be employed, or that supplemental readings are required in addition to those deemed appropriate by the Board. It is the teacher who must determine each day an appropriate lesson plan. It is the teacher alone who may assess the learning which has occurred; by oral quizzes, by written tests, by special assignments.

May such responsibility, which is necessitated in the first instance by the very nature of individual differences between and among pupils, and class differences, be subverted by an inflexible rule grounded in another difference; namely, that one class is composed of pupils of one sex while a neighboring class contains only pupils of the opposite sex? If it may, is it not required, as well, that all classes in math or history or in shop be given identical programs and be assessed identically?

The Commissioner cannot subscribe to such a subversion of a teacher's authority to measure pupil achievement as the teacher deems it appropriate to measure. He holds instead that each teacher has the responsibility to develop the procedures of a program of appropriate instruction and assessment for each class assignment, and that such responsibility and authority requires a diversity of approach and not one limited by other criteria; i.e., intelligence, sex, social composition, etc.

As the Commissioner said in *Bertha S. Gebhart v. Hopewell Township Board of Education*, 1938 S.L.D. 570 (1927), aff'd. State Board of Education 576 (1928), while quoting from Voorhees on "The Law of Public Schools," p. 214, par. 85:

\*\*\* The power to make rules does not imply that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal vote. Nor is it necessary that any prohibitive rule exist in order to justify punishment for flagrant misconduct. No system of rules however carefully prepared can provide



for every possible emergency or meet every requirement. In consequence much must necessarily be left to the individual members of the school board, and to the superintendents of *and the teachers in the several schools*. It follows that any reasonable rule adopted by a superintendent, or a teacher merely, not inconsistent with some statute or some other rule prescribed by higher authority, is binding upon the pupils.\*\*\*” (*Emphasis added.*) (at p. 573)

And, quoting Trusler in “Essentials of School Law” at pp. 84-85:

“\*\*\*” The right of the teacher to formulate reasonable rules and regulations for the government of the school has been excellently expressed by Mr. Justice Lyon as follows: ‘While the principal or teacher in charge of a public school is subordinate to the school board \*\*\* and must enforce rules and regulations adopted by the board for the government of the school and execute all its lawful orders in its behalf, he does not derive all his powers and authority in the school and over his pupils from the affirmative action of the board.\*\*\*’ ” (at p. 574)

While in *Gebhart, supra*, the Commissioner was principally concerned with rules of discipline, it can hardly be argued that a teacher, in the classroom, has a lesser “power and authority” with respect to the procedural conduct of the class or classes in matters of curriculum content and assessment. In fact, in the context of a teacher’s professional preparation, the opposite would appear to be true.

It follows, then, that the Commissioner determines that a requirement by a local board of education which specifies and mandates tests for girls but not for boys is one which is inappropriate. Such specifics are not a matter within the expertise of a board but of the professionals it employs. In the context of this determination the Commissioner recommends that this Board, and all local boards of education, examine all courses of study in order that an equitable approach to pupil assessment and evaluation may be assured.

In summation, the Commissioner holds that an assessment program is not, *per se*, discriminatory, because it is employed in one class and not in another when the distinction between classes is one based on sex or curricular criteria. To the contrary, the Commissioner holds that such programs may be developed with flexibility by individual teachers, according to their assessment of the need, when the programs are within broad and general guidelines adopted by local boards of education. In such instances, absent evidence of a gross abuse of discretion, the Commissioner will not intervene to interpose his judgment for that of the teacher or of a local board of education.

The Petition herein has been rendered moot by circumstance and is dismissed.

COMMISSIONER OF EDUCATION

November 27, 1974

Pending before State Board of Education



**Board of Education of the Borough of Oakland,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Oakland, Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

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

For the Respondent, William De Lorenzo, Jr., Esq.

Petitioner, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Oakland, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37, certifying to the Bergen County Board of Taxation a lesser amount of appropriations for school purposes for the 1974-75 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted August 29, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

At the annual school election on February 13, 1974, the voters of the Borough of Oakland rejected the Board's proposal to raise \$3,344,026 by local taxes for current expenses and \$15,133 for capital expenditures in the 1974-75 school year. The budget was then sent to Council for its determination of the amount of tax funds required to maintain a thorough and efficient school system.

Subsequently, after consultation with the Board and a review of the budget, Council made its determination and, pursuant to law (*N.J.S.A.* 18A:22-37), certified to the Bergen County Board of Taxation an amount of \$3,172,214 for current expense and \$10,133 for capital outlay. The pertinent amounts may be shown as follows:

	<b>Current Expense</b>	<b>Capital Outlay</b>	<b>Totals</b>
Board's Proposals	\$3,344,026	\$15,133	\$3,359,159
Council's Certification	3,172,214	10,133	3,182,347
Reduction	171,812	5,000	176,812

The Board contends that the reduction by Council will leave an amount of money insufficient to provide a thorough and efficient system of education for the pupils of the district and appeals to the Commissioner of Education for a restoration of funds.

As part of its determination Council suggested items of the budget in which it believed economies could be effected without harm to the educational program as follows:

# CHART I

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
Current Expense:				
J110f	Supt. Off.	\$47,733	\$38,802	\$ 8,931
J110g	Centr. Res.	11,795	8,655	3,140
J110i	Bus. Adm. Off.	43,082	42,160	922
J110n	Other Adm. Pers.	37,748	35,097	2,651
J120b	Legal Fees	6,000	3,000	3,000
J130a	Board Exp.	3,475	3,375	100
J130f	Supt. Off. Exp.	2,500	2,000	500
J130g	Other Exp. Res.	1,000	800	200
J130i	Bus. Adm. Exp.	2,100	1,900	200
J130m	Prtg. & Publ.	3,950	3,450	500
J130n	Misc. Adm. Exp.	2,800	2,300	500
J211	Prin. Sals.	131,745	131,689	56
J212	Supvr. Instr.	29,900	9,900	20,000
J213	Tchrs. Sals.	2,045,241	2,025,841	19,400
J213.1	Sub. Tchrs.	38,580	30,000	8,580
J213.2	Bedside Tchrs.	10,440	8,440	2,000
J213.3	Supp. Tchrs.	101,121	86,121	15,000
J214a	Sch. Library	61,756	60,796	960
J214c	Sals. Ch. St. Tm.	63,517	58,117	5,400
J215a	Secys. Prin. Off.	104,926	98,556	6,370
J215c	Other Cler. Serv.	17,568	17,008	560
J216	Other Sals.—Instr.	27,329	22,084	5,245
J220	Textbooks	28,425	25,000	3,245
J230c	A-V Mats.	14,420	10,000	4,420
J230d	Radio & TV	400	200	200
J240	Tchg. Supls.	28,570	26,070	2,500
J250a	Misc. Supls.	9,240	8,240	1,000
J250b	Travel-Other Exp.	4,345	3,500	845
J250c	Misc. Exp.	28,530	26,530	2,000
J410a-1	Sch. Physician	1,728	1,600	128
J410a-3	Sch. Nurses	61,777	61,553	224
J420a	Supplies	1,500	1,380	120
J420c	Misc. Exp.	11,700	9,000	2,700
J510b	Vehicle Drivers	25,499	25,324	175
J520a	Trans Contr.	90,250	84,250	6,000
J520c	Field Trips	5,930	5,730	200
J550b	Veh. Supls.—Oil	330	250	80
J640a	Water	2,325	2,125	200
J640d	Telephone	10,280	9,000	1,280
J650b	Other Veh. Supls.	600	300	300
J710b	Sals. Bldg. Rep.	15,024	14,524	500

Account Number	Item	Board's Proposal	Council's Proposal	Amount Reduced
J710c	Repair Equip.—Sals.	800	500	300
J720a	Contr. Serv.—Grnds.	14,500	10,500	4,000
J720b	Repair Bldgs.	59,407	49,407	10,000
J720c	Repair Equip.	7,960	6,960	1,000
J730a	Rep. Instr. Equip.	7,000	6,000	1,000
J730b	Repl. Non-Instr. Equip.	10,000	9,000	1,000
J730c	Instr. Equip.	30,000	15,000	15,000
J730c-3	Equip. Maint. Plant	3,405	2,905	500
J730c-6	Equip. Adm.	4,500	3,500	1,000
J740a	Grnds. —Other Exp.	900	600	300
J740b	Repair Bldgs.	6,000	5,500	500
J740c	Repair Equip.	400	200	200
J870	Tuition	105,000	100,000	5,000
J920	Food Servs. Exp.	1,150	900	250
J1010	Sals. Stud. Body Activ.	9,050	8,300	750
J1020	Other Exp.	3,790	3,290	500
TOTAL — Reduction				\$171,812
Capital Outlay:				
L1230c	Bldg. Alter.	\$ 16,053	\$ 11,053	\$ 5,000
TOTAL — REDUCTION				5,000
GRAND TOTAL — REDUCTION				\$176,812

It is noted by the hearing examiner that many of the reductions deemed appropriate by Council are very small ones; i.e. J211 — reduction \$56; J130a — reduction \$100. Such reductions, and others of proportionately greater significance, will be the subjects of a combined recommendation in chart form at the conclusion of a narrative discussion of the larger reductions herein controverted. Initially, however, it is necessary to offer some general comments and to set forth a few of the arguments of the parties with respect to the budget as a whole entity.

Some of the most basic arguments in this matter are grounded in the fact that the pupil population of the Oakland schools is decreasing. According to the Board's own figures (P-1), this population declined from 2,699 pupils enrolled in June 1973 to 2,610 pupils in September 1973, and to 2,518 pupils in September 1974. (Note: The Board's projected enrollment had been 2,583.) (P-1)

Council argues that there is great significance in this fact of a decreased enrollment which is not reflected in decreasing expenditures for staff, supplies, etc. Council further avers that the Board has budgeted "\*\*\*\*for any possible need in each line item \*\*\*" (R-2, at p. 2), and that such budgeting places an unwanted tax burden upon the public.

The Board disputes these avowals although it does appear from an

examination of the Board's budget statements that a considerable amount of money has been and is available to the Board in unappropriated balances. In fact, \$255,397.95 was available to the Board in unappropriated current expense balances on June 30, 1973 (P-1) and, according to testimony at the hearing, *ante*, an unappropriated balance of approximately \$200,000 remained on June 30, 1974. (However, \$30,000 of this sum was appropriated for expenditures in school year 1974-75, and the Board also avers that approximately \$65,000 of such amount is required at this juncture for unanticipated obligations which must be met.) (P-2)

At the conclusion of this report the hearing examiner will recommend that certain items of necessary expenditures be funded from these unappropriated balances. The Board's obligations for the 1974-75 school year are now fairly well established. Accordingly, if there is no clear need for such idle balances, they should, in the judgment of the hearing examiner, be used although such use will probably preclude any appropriation from balances in school year 1975-76.

An analysis of major budget items in dispute is as follows:

*J110f,g,i,n Superintendent's Office*

*Reduction \$15,644*

The reduction herein considered is a combined amount pertinent to the operation of the central offices of the Oakland School System. However, while the Board delineates only four subaccounts in its overview of account itemization (P-1), a total of eight expenditures are proposed for reduction by Council. Four of these proposed reduced expenditures (totaling \$10,647) are budgeted by the Board to implement salary agreements it has made with administrative staff. Four other proposals are concerned with an allowance for the compensation of substitute secretaries (\$257), educational workshops (\$2,300 and \$840), and for public relations material (\$1,600).

The hearing examiner recommends that all of the four salary agreements be funded in full (\$10,647) since it is the Board, and not Council, which has the obligation to negotiate the terms and conditions of employment for those employed in its schools (*Chapter 303, Laws of 1968*), and to contract for such employment thereafter. *N.J.S.A. 18A:29-4.1, 4.3* None of the money for salaries which is herein controverted is for a new position but for established ones found to be necessary and approved in prior years. A small decreased pupil enrollment has little measurable effect on such central office positions.

However, the hearing examiner recommends that other reductions deemed appropriate by Council within this account be sustained. The workshops and public relations material proposed by the Board appear to be educationally desirable but the hearing examiner cannot find them to be essential in the context of Council's determination.

Summary: Amount of Reduction	\$15,644
Amount Restored	10,647
Amount Not Restored	4,997

*J212 Supervisors of Instruction*

*Reduction \$20,000*

The reduction controverted herein is proposed by the Board to be expended for the services of a curriculum specialist. The position was proposed and budgeted for school year 1973-74 but was not filled and, in effect, it is a new position which Council opposes.

In the context of the voters' rejection of the budget and Council's determination, the hearing examiner finds that this position is not required for the operation of a thorough and efficient system of education in Oakland in the 1974-75 school year. Such curriculum coordination must therefore be achieved in other ways.

Summary: Amount of Reduction	\$20,000
Amount Restored	-0-
Amount Not Restored	20,000

*J213 Salaries--Teachers*

*Reduction \$19,400*

Council proposes to eliminate two new positions which the Board had budgeted for the 1974-75 school year. The Board concedes that one of the positions is not required at this juncture, but avers that the other position, that of an art teacher, is needed to insure more balanced class sizes. However, the Board's testimony with respect to such need is limited and not convincing in the context of a smaller pupil enrollment.

Accordingly, the hearing examiner recommends that Council's determination be allowed to stand.

Summary: Amount of Reduction	\$19,400
Amount Restored	-0-
Amount Not Restored	19,400

*J213.1 Salaries--Substitute Teachers*

*Reduction \$8,580*

The Board actually expended only \$20,654 for substitute teachers in the 1972-73 school year but budgeted \$35,580 for such expenditures for 1973-74 and has proposed \$38,580 for 1974-75. It is further proposed by the Board that the salary for substitute teachers be increased by \$1.00 per day, but no total cost projection of the effect of this increase is set forth. Neither does the Board itemize its expense requirement for substitutes during the 1973-74 school year although a record of such expenditures is at hand.

Council states the position that "\*\*\*\* \$30,000 in this budget would be more than adequate based on the experience of both 1971-72 and 1972-73.\*\*\*\*" (R-2-Exhibit 2, at p. 4)

The hearing examiner finds for Council on the basis of the record before him. A finding to the contrary would be both speculative and conjectural.

Summary: Amount of Reduction	\$8,580
Amount Restored	-0-
Amount Not Restored	8,580

*J213.3 Supplemental Instruction*

*Reduction \$15,000*

The Board does approximate its expenditures from this account at \$47,800 for the 1973-74 school year and states that it does not anticipate a reduction in the number of pupils within the program in school year 1974-75. However, the Board's itemization of proposed expenditures indicates that \$78,424.45 was spent from account J213.3 in school year 1972-73, \$82,097 was budgeted for school year 1973-74, and \$101,121 was proposed for expenditure in school year 1974-75.

Council avers the expenditures herein should be "\*\*\*\* held to the same utilization level provided in the 1973-74 budget.\*\*\*\*" (R-2-Exhibit 2, at p. 4)

The hearing examiner cannot find an explanation for the dichotomy noted above with respect to the Board's needs and budgeted expenditures for the 1973-74 school year. However, he notes that the Council's reduction will leave an amount of money in excess of that which the Board budgeted for school year 1973-74. There is no testimony by the Board that there will be an increased requirement.

Accordingly, the hearing examiner recommends that the determination of Council be allowed to stand.

Summary: Amount of Reduction	\$15,000
Amount Restored	—0—
Amount Not Restored	15,000

*J215a Salaries--Secretaries and Clerks--  
Principals' Offices*

*Reduction \$6,370*

The total reduction deemed appropriate by Council within this account is comprised of two parts: a reduction of \$5,850 for "continuous progress clerical aides," and a second reduction of \$520 for secretarial substitutes. In general, the Council's argument with respect to the reduction for substitutes is that all members of the clerical staff will not use all of their allotted sick leave but that the Board has budgeted for just such use.

The Board avers that the clerical aides are required to be provided as a part of the negotiated agreement with its teaching staff, but sets forth no argument with respect to the reduction of \$520 for the employment of substitutes.

On the basis of very limited testimony the hearing examiner finds that the money proposed for the employment of aides is required by the Board's negotiated agreement to this effect, but that the provision for substitutes is in excess of the Board's need.

Summary: Amount of Reduction	\$6,370
Amount Restored	5,850
Amount Not Restored	520

*J520a Transportation*

*Reduction \$6,000*

The Board states it had budgeted the cost of a possible additional transportation route within this account and provided an eight percent allowance for an increase in the cost for transportation services. Council avers that the new proposed route will not be required.

However, the Board's contracted transportation costs for the 1974-75 school year are now firmly established and, it appears, from a late document submitted by the Board at a time subsequent to the hearing, *ante*, that a total sum in excess of \$5,000 will not be required for pupil transportation costs. Accordingly, and in recognition of the fact that some emergency factors may have an impact on such costs, the hearing examiner recommends that a total of \$3,500 of the reduction deemed appropriate by Council be sustained but that \$2,500 be restored for use by the Board.

Summary: Amount of Reduction	\$6,000
Amount of Restored	2,500
Amount Not Restored	3,500

*J720b Repairs to Buildings*

*Reduction \$10,000*

The Board expended \$52,219.45 for the contracted repair of buildings in the 1972-73 school year, and budgeted \$28,380 in 1973-74. It proposed to spend \$59,407 for such costs in school year 1974-75, and included therein the sum of \$20,000 for repair of the roof in the Dogwood Hill School. (Note: The contracted price for this repair, it was testified, is \$45,705. The Board has listed the amount of \$25,705 as a necessary amount to be deducted from unappropriated balances.)

Council avers that the amount of expenditure which it deemed appropriate herein will provide a sum for repairs equal to that which the Board budgeted in school year 1973-74 plus the sum of \$20,000 itemized, *ante*, for roof repair.

The Board's documentation of need herein is general and not specific in nature. It states that the postponement of necessary repairs is "false economy" and that all proposed expenditures from this account are "essential." (P-1)

However, in the absence of a more specific delineation of the need, the hearing examiner finds the reduction of Council to be a reasonable one, if the over-expenditure for roof repair is funded from unappropriated balances.

Summary: Amount of Reduction	\$10,000
Amount Restored	-0-
Amount Not Restored	10,000

*J730c Equipment for Instruction*

*Reduction \$15,000*

The Board expended \$21,642.17 for instructional equipment in school year 1972-73, budgeted \$25,000 for such equipment in 1973-74, and \$30,000 in 1974-75. Council's reduction, if permitted to stand, would thus provide a smaller amount than the Board expended in 1972-73.



The hearing examiner recommends that the expenditure herein be programmed at the same level as in the 1973-74 school year, and that the sum of \$10,000 be restored for the purchase of necessary equipment by the Board:

Summary: Amount of Reduction	\$15,000
Amount Restored	10,000
Amount Not Restored	5,000

The recommendation of the hearing examiner with respect to other reductions deemed appropriate by Council are contained in the following chart:

## CHART II

ACCOUNT Number	Item	Amount of Reduction	Recommended Amount Restored	Recommended Amount Not Restored
Current Expense:				
J120b	Legal Fees	\$ 3,000	\$ 2,000	\$ 1,000
J130a	Board Exp.	100	-0-	100
J130f	Supt. Off. Exp.	500	100	400
J130g	Other Exp. Res.	200	200	-0-
J130i	Bus. Adm. Exp.	200	-0-	200
J130m	Prtg. & Publ.	500	300	200
J130n	Misc. Adm. Exp.	500	450	50
J211	Prin. Sals.	56	56	-0-
J213.2	Bedside Tchrs.	2,000	-0-	2,000
J214a	Sch. Library	960	960	-0-
J214c	Sals. Ch. St. Tm.	5,400	5,400	-0-
J215c	Other Cler. Serv.	560	-0-	560
J216	Other Sals.-Instr.	5,245	3,000	2,425
J220	Textbooks	3,425	-0-	3,425
J230c	A-V Mats.	4,420	2,000	2,420
J230d	Radio & TV	200	-0-	200
J240	Tchg. Supls.	2,500	-0-	2,500
J250a	Misc. Supls.	1,000	-0-	1,000
J250b	Travel-Other Exp.	845	200	645
J250c	Misc. Exp.	2,000	-0-	2,000
J410a-1	Sch. Phys.	128	128	-0-
J410a-3	Sch. Nurses	224	-0-	224
J420a	Supplies	120	-0-	120
J420c	Misc. Exp.	2,700	1,000	1,700
J510b	Veh. Drivers	175	175	-0-
J520c	Field Trips	200	-0-	200
J550b	Veh. Supls.	80	80	-0-
J640a	Water	200	200	-0-
J640d	Telephone	1,280	780	500
J650b	Other Veh. Supls.	300	300	-0-
J710b	Sals. Bldg. Rep.	500	500	-0-
J710c	Repair Equip.-Sals.	300	300	-0-

Account Number	Item	Amount of Reduction	Recommended	Recommended
			Amount Restored	Amount Not Restored
J720a	Contr. Serv.—Grnds.	4,000	—0—	4,000
J720c	Repair Equip.	1,000	1,000	—0—
J730a	Repl. Instr. Equip.	1,000	—0—	1,000
J730b	Repl. Non-Instr. Equip.	1,000	—0—	1,000
J730c-3	Equip. Maint. Plant	500	500	—0—
J730c-6	Equip. Adm.	1,000	1,000	—0—
J740a	Grnds.—Other Exp.	300	—0—	300
J740b	Repair Bldgs.	500	—0—	500
J740c	Repair Equip.	200	200	—0—
J870	Tuition	5,000	5,000	—0—
J920	Food Servs. Exp.	250	—0—	250
J1010	Sals. Stud. Body			
	Activ.	750	—0—	750
J1020	Other Exp.	500	—0—	500
	<b>TOTAL</b>	<b>\$55,818</b>	<b>\$25,829</b>	<b>\$29,989</b>
Capital Outlay:				
L1230c	Bldg. Alter.	\$ 5,000	—0—	\$ 5,000
	<b>GRAND TOTALS</b>	<b>\$60,818</b>	<b>\$25,829</b>	<b>\$34,989</b>

In summary, the recommendations of the hearing examiner are set forth as follows:

Account Number	Item	Amount of Reduction	Recommended	Recommended
			Amount Restored	Amount Not Restored
J110f, g, i, n	Supt. Off.	15,644	\$10,647	\$ 4,997
J212	Supvr. Instr.	20,000	—0—	20,000
J213	Tchrs. Sals.	19,400	—0—	19,400
J213.1	Sub. Tchrs.	8,580	—0—	8,580
J213.3	Supp. Tchrs.	15,000	—0—	15,000
J215a	Secys. Prin. Off.	6,370	5,850	520
J520a	Trans. Contr.	6,000	2,500	3,500
J720b	Repair Bldgs.	10,000	—0—	10,000
J730c	Instr. Equip.	15,000	10,000	5,000
	<b>SUBTOTALS</b>	<b>\$115,994</b>	<b>\$28,997</b>	<b>\$86,997</b>
CHART II		<b>60,818</b>	<b>25,829</b>	<b>34,989</b>
	<b>GRAND TOTALS</b>	<b>\$176,812</b>	<b>\$54,826</b>	<b>\$121,986</b>

The "Recommended Amount Restored," *ante*, is in reality the amount of additional money, over and above the determination of Council, which the

hearing examiner deems necessary to support a continuing thorough and efficient school system in Oakland in the school year 1974-75. However, the hearing examiner finds no reason to find that the sum of \$54,826 is required to be raised by an additional tax levy since such sum is already available to the Board in unappropriated balances. This may be shown as follows: (P-2)

Unappropriated Balances – June 30, 1974	
Current Expense	\$198,453
Balance Appropriated 1974-75	<u>30,000</u>
Net	168,453
Itemized Unanticipated Costs	<u>65,859</u>
Net	\$102,594

Thus, all of the recommended restoration of funds deemed necessary by the hearing examiner, *ante*, may be secured from these balances, and there will still remain an unappropriated sum of approximately \$47,768. In the context of the defeat of the Board's budget proposals by the voters and Council's determination, the hearing examiner recommends use of this money to fund these budget obligations. It must be observed that, in such a circumstance, a contrary recommendation to fund the additional obligation through another tax levy would simply add to already ample reserves.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report and recommendations of the hearing examiner and finds it necessary, at this juncture, to comment in some detail on the exceptions filed thereto pursuant to *N.J.A.C.* 6:24-1.16.

At the hearing, Council offered a document in evidence, denied by the hearing examiner, which contained a list of supplemental budget reductions provided to the Board for their consideration, "\*\*\*\*to assist them in determining alternate areas of reduction so as to accomplish the suggested reduction determined to be proper by the Mayor and Council \*\*\*." (Council's Exceptions, at p. 1) This supplemental budget reduction list was offered in addition to, and in excess of, the recommended line item economies initially effected by Council, amounting to \$176,812, which Council set forth in support of its reduction of the Board's budget.

Council now attacks the hearing examiner's ruling regarding its offer and asserts that this ruling was improper and in violation of *N.J.A.C.* 6:24-1.10 which reads as follows:

"If the parties and the Commissioner are unable to agree upon a statement of the material facts, the Commissioner shall schedule a hearing in the matter upon reasonable notice to all parties of the time and place thereof. At such a hearing the parties shall be afforded opportunity for submission of oral testimony and documentary evidence."

The Commissioner cannot agree that the hearing examiner's ruling was improper in any respect. The guidelines setting forth Council's obligation in school board budget matters are enumerated quite clearly in the unanimous opinion rendered by the New Jersey Supreme Court in *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick*, 48 N.J. 94 (1966) which states in pertinent part as follows:

“\*\*\* All in all, it is evident that, when preparing the budget which it ultimately determines to be necessary and appropriate in view of the nature of the local community, its educational needs and financial abilities, the local board must have clearly in mind the educational mandate in our Constitution and the State's statutory and administrative requirements. It, of course, retains a considerable measure of discretion, particularly when dealing with matters which the State's supervisory agencies have recommended rather than directed; but in no event may it disregard the general standard in the Constitution or the specific standards which have been announced legislatively or administratively. *In the course of its endeavors, the local board affords suitable hearing to the local citizenry (N.J.S.A. 18:7-77.1 and 77.2) \* and soundly brings together its intimate knowledge of local conditions and needs and the wide educational expertise of its members and professional staff.*

“Though the law enables voter rejection, it does not stop there but turns the matter over to the local governing body. That body is not set adrift without guidance, for the statute specifically provides that it shall consult with the local board of education and shall thereafter fix an amount which it determines to be necessary to fulfill the standard of providing a thorough and efficient system of schools. Here, as in the original preparation of the budget, elements of discretion play a proper part. The governing body may, of course, seek to effect savings which will not impair the educational process. But *its determinations must be independent ones properly related to educational considerations rather than voter reactions.* In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and *its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.* Where its action entails a significant *aggregate reduction* in the budget and a resulting appealable dispute with the local board of education, *it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.* This is particularly important since, on the board of education's appeal under R.S. 18:3-14, the Commissioner will undoubtedly want to know quickly what individual items in the budget the governing body found could properly be eliminated or curbed and on what basis it so found. Cf. *Davis, supra* § 16.05.\*\*\*” (*Emphasis supplied.*) (at pp. 105-106)

\* now N.J.S.A. 18A:22-8 and 22-10

See also *Board of Education of the City of Elizabeth v. City Council of*

*Elizabeth*, 55 N.J. 489 (1970); *Board of Education of Trenton v. City Council of Trenton*, 1967 S.L.D. 172; *Board of Education of Haledon v. Mayor and Council of Haledon*, 1970 S.L.D. 70, aff'd State Board of Education, 1970 S.L.D. 75.

Council's offer of supplemental budget reductions from which the Board might select reductions in the amount already reduced by them was, therefore, improper, arbitrary, and violative of its obligations to the Community as set forth in *East Brunswick*, *supra*. The hearing examiner's ruling in this regard is entirely correct.

Council's exceptions regarding the possible misuse of surplus funds by the Board, and the refusal of the hearing examiner to permit testimony concerning "anticipated surplus" are likewise set aside. That testimony would have been irrelevant, absent a formal charge of arbitrariness, or that the Board withheld information from Council. Moreover, Exhibit P-2 shows the actual unexpended free balance which was used by the hearing examiner in making his ruling and his final recommendation.

Regarding Council's exception to staffing requirements, the record shows that no additional staff were allowed by the hearing examiner. Additionally, he let stand a combined reduction in the J212 and J213 accounts of \$62,980. Therefore, this exception by Council is likewise set aside.

The hearing examiner's recommendation in account J730c, Equipment for Instruction, is supported logically by records of the Board's prior expenditures in this account. Accordingly, Council's exception thereto cannot be supported, and the recommendation of the hearing examiner will stand.

The Board's exceptions to the hearing examiner's report have been carefully examined. Several of those exceptions argue further the need for additional staff which has been considered and denied by the hearing examiner. A review of the record in this regard supports the conclusion that no change in his original findings and recommendations is warranted.

The Board's final exception alleges that its unappropriated balance is dangerously low. However, as has been pointed out in prior decisions of the Commissioner, there is no statutory authority for a board of education to carry any surplus, although sound business practice dictates that boards carry surplus funds for unanticipated emergencies. *Board of Education of Penns Grove-Upper Penns Neck Regional School District v. Mayor and Council of the Borough of Penns Grove and Township Committee of the Township of Upper Penns Neck, Salem County*, 1971 S.L.D. 372; *Board of Education of the Borough of Dunellen v. Mayor and Council of the Borough of Dunellen, Middlesex County*, 1974 S.L.D. 64.

In the instant matter, the Commissioner finds that the hearing examiner's recommendation regarding the Board's surplus is reasonable and supportive of Council's determination pursuant to its statutory obligation. *N.J.S.A. 18A:22-37* This holding will not impair the Board's ability to maintain a thorough and efficient system of schools in its district.

After consideration of the hearing examiner's report and the exceptions filed thereto, the Commissioner adopts the hearing examiner's report, without exception, and concurs fully with his recommendations. No additional tax levy is necessary; therefore, the Board is directed to use its unappropriated balance, as required, to fund those current expenditures it deems necessary for the 1974-75 school year. Specifically, the Board is directed to fund the restored sum of \$54,826 from its unappropriated balances.

COMMISSIONER OF EDUCATION

December 2, 1974

**In the Matter of the Tenure Hearing of Russell A. Fairfax,  
School District of the Village of Ridgewood, Bergen County.**

COMMISSIONER OF EDUCATION

**DECISION**

For the Complainant Board of Education, Greenwood, Weiss and Shain  
(Stephen G. Weiss, Esq., of Counsel)

For the Respondent, Passaic County Legal Aid Society (Fred C. Kuhlwillm,  
Esq., of Counsel)

The Ridgewood Board of Education, hereinafter "Board," has certified two charges against respondent, a tenured janitorial employee of the Board, which state that respondent appeared for work on February 15, 1974, in a drunken state, necessitating his removal from the premises, and that from September 1969 through February 1974 he conducted himself at numerous times in a manner unbecoming a tenured janitorial employee. The Board believes that such charges, if true in fact, warrant dismissal or reduction in salary of respondent.

Respondent denies that he reported for work in a state of inebriation on February 15, 1974, or that such offenses as otherwise complained of are of such moment as to justify either suspension or reduction of salary.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner on June 6, 1974, in the Morris County Extension Service Building, Morris Plains. The report of the hearing examiner follows:

**CHARGE NO. 1**

\*\*\*\* Russell A. Fairfax, a tenured custodial employee in the Ridgewood School System, did on or about February 15, 1974, imbibe alcoholic beverages so that he was in a drunken state while on duty as a custodian and which necessitated his removal from the school premises because of

his inability to perform assigned responsibilities as a custodian, said conduct being unbecoming a tenured custodial employee.”

Details of respondent’s alleged inebriation on his regular 3:00 to 11:00 p.m. shift were related by agents of the Board at the hearing. The principal testified that the head janitor had informed him that respondent was drunk and had asked him to speak to respondent. (Tr. 12) The principal stated that he found respondent standing in the corridor and asked him certain questions which evoked only giggling and incoherent replies. (Tr. 13, 14) He further testified that respondent staggered (Tr. 14) and exuded the odor of alcohol. (Tr. 15) Additionally, the principal testified that teachers and pupils are commonly in the building until 5:00 p.m. on days when school is in session. (Tr. 16)

The supervisor of custodians testified that he noticed the odor of alcohol emanating from respondent (Tr. 23), and that he appeared heavy-lidded. Similarly, the Acting Superintendent testified that he concluded that respondent had been drinking when he noticed the heavy odor of alcohol. (Tr. 29) Thereupon, he gave verbal notice to respondent that he was suspended, directed him not to report for work until further notice, and sent him home.

On February 20, 1974, the Board’s director of personnel forwarded to respondent the following letter:

“\*\*\* On Friday afternoon, February 15, 1974 Dr. Frederick J. Byrnes, Acting Superintendent of Schools, suspended you from work, subject to official action by the Board of Education. Dr. Byrnes took this action because it was apparent to him and other supervisors present that you were under the influence of alcohol and unable to perform your assigned responsibilities at the Ridge School.

“According to our records, you have reported for work in a similar condition on at least one other occasion and a warning was given to you at that time. This unbecoming conduct will not be tolerated any longer.

“Also, there are a number of instances reported where you have been habitually late for work without valid reason given and absent from work without notifying your supervisor as required by policy. Recently, Mr. Walsh has reported specific instances of poor work performance\*\*\*.

“We are recommending that the Board of Education formally suspend you without pay and that written charges of our complaints shall be preferred against you in order to determine whether your conduct warrants dismissal. A hearing of these charges will be scheduled according to law.\*\*\*” (P-7)

With respect to Charge No. 1, respondent testified that on the afternoon of February 15, 1974, he had been at home working on his car with a friend and had consumed, during a period of two hours, about six cans of beer prior to reporting for work. (Tr. 36) He denied that he was affected or impaired thereby and testified as follows:



“Q How many cans of beer would you have to drink to have an effect on you regarding your ability to perform your normal duties?

“A I would say I don’t have a limit.” (Tr. 48)

Respondent further testified that he had thereafter received a check for vacation pay due him and the letter notifying him of his suspension. (Tr. 45)

The hearing examiner, after considering the testimony and documentary evidence, finds respondent did report for work on February 15, 1974 in a state of intoxication which severely impaired his ability to perform his regular assignment, and as a result thereof, was suspended by the Acting Superintendent. The hearing examiner also finds that respondent was previously warned at least once by his supervisor that he should not report to work under the influence of alcohol. (P-2) There is no finding that respondent acted in a belligerent or bellicose manner while under the influence of alcohol.

#### CHARGE NO. 2

“\*\*\* Russell A. Fairfax, a tenured custodial employee in the Ridgewood School System, did between September 1969 and February 1974, conduct himself in such a manner, including appearing for work while under the influence of alcohol, failing to perform assigned tasks, permitting the presence on school premises of unauthorized persons, arriving late for work, and other acts, as to plainly demonstrate conduct unbecoming a tenured custodial employee.”

In support of the above charge, the Board introduced into evidence, from its files, a series of ten intra-school memoranda making reference to the work performance of respondent from September 22, 1969 through February 1974. Certain of these memoranda make reference to inefficiencies (P-9), tardiness (P-1, 2, 8), an extended period of absence when respondent failed to notify the school following the loss of the tips of two fingers in an accident (P-3, 4), resistance on the part of respondent to accept reassignment from Ridgewood High School to another school (P-5, 10), and allowing three teenagers into an elementary school contrary to school policy. (P-6) The hearing examiner, after a careful examination of the documents and testimony pertaining thereto, finds that the matters thus far described, concerning Charge No. 2, are substantially true, but of minor significance, and have occurred over the lengthy period of twelve years. He therefore recommends that the Commissioner consider this finding within such a context.

Of greater significance, in view of Charge No. 1, and the findings resulting therefrom, is the letter to respondent, dated September 22, 1969 from the administrative assistant in charge of buildings and grounds which reads as follows:

“\*\*\* We are more concerned with the reported indication of the use of alcohol at the time you did report for work. We trust that this was an isolated instance, not a pattern or habit, and that better judgment will be employed when reporting to work.\*\*\*” (P-1)

Of similar significance is a supporting intra-school memorandum of the administrative assistant in charge of buildings and grounds, dated August 21, 1970, which reads:

“\*\*\* On Friday, August 21, 1970, \*\*\* [I was advised] that Russell Fairfax had arrived at work at around 3 p.m. (2 hours late) and it appeared that he had been drinking.\*\*\*It was apparent that he was under the influence of alcohol, and he did admit to having several beers prior to coming to work. His responses and speech were somewhat erratic, contradictory, and ranged from meek submissiveness to borderline belligerence. \*\*\*We reminded him that this was the second time a conference was held with him and any repetition in the future would result in termination of his employment.\*\*\*” (P-2)

With respect to Charge No. 2, the hearing examiner finds that the charge is proven to be substantially true, but that the several events complained of by the Board were obviously insufficient of themselves to result in the preferment of charges by the Board against respondent pursuant to *N.J.S.A. 18A:6-10 et seq.* However, the complaints set forth in Charge No. 2, having occurred over a twelve-year period, were properly set forth in conjunction with the events of February 15, 1974, as contained in Charge No. 1.

The hearing examiner, having found that Charges Nos. 1 and 2 are proven to be true in fact, leaves to the Commissioner to determine what penalty may properly be exacted as a result thereof.

The hearing examiner observes that respondent was suspended without pay from February 15, 1974 until March 11, 1974, the date the Board certified charges against respondent. The Commissioner previously considered a similar matter *In the Matter of the Tenure Hearing of Joseph McDougall, School District of the Borough of Northvale, Bergen County 1974 S.L.D. 170* wherein it is said:

“\*\*\* It is clear that a local board of education may suspend a tenured employee with or without pay *once charges are certified to the Commissioner. N.J.S.A. 18A:6-14* \*\*\*[L]ocal boards may not modify the precise requirements of *N.J.S.A. 18A:6-14*. (Emphasis supplied.)  
(at pp. 179-180)

The Commissioner spoke in similar fashion *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County, 1971 S.L.D. 566*, as follows:

“\*\*\* A local board of education has authority to suspend a tenured employee, without pay, only upon the certification of a formal charge to the Commissioner of Education. \*\*\*Respondent’s suspension without pay prior to the certification of the charge\*\*\*was improper\*\*\*.” (at p. 573)

It is clear that the suspension of respondent without pay from February

15, 1974 through March 11, 1974, was ordered by the Acting Superintendent. However, neither he nor the Board were empowered to suspend respondent *without pay* until the Board acted to certify charges against respondent. The hearing examiner recommends that the Commissioner find that respondent's pay was withheld without statutory authority from February 15, 1974 through March 11, 1974, and order that respondent's pay be restored for that period of time.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the responses thereto filed by the parties in accord with *N.J.A.C. 6:24-1.16*.

The Commissioner concurs with the findings set forth in the hearing examiner's report and adopts them in entirety as his own.

The allegations enumerated in Charge No. 2 are found to be true. The most serious of these incidents are the two which indicate that respondent reported for work at least once during September 1969 in a condition which resulted in a written reprimand concerning his use of alcohol (P-1), and that on August 21, 1970, he reported for work under the influence of alcohol, which again resulted in a written reprimand. (P-2)

Charge No. 1 is true. On February 15, 1974, respondent was on duty under the influence of alcohol, and his condition necessitated his removal from the schoolhouse because he was unable to perform his assigned responsibilities.

Respondent's testimony, that he possesses an unlimited capacity to consume beer without any display of inebriation or lessening of his ability to perform his assigned duties is clearly contradicted by the evidence in the record. Obviously, it is respondent's conviction, that he may imbibe to the extent reported and still capably perform his duties, which is the root cause of his problem. Given such a conviction, it is apparent that he has not always restricted his indulgence in order to report to his school duties in a thoroughly sober condition.

The total of these three instances of inebriate behavior by respondent constitutes a grave offense.

The Commissioner has previously described the importance of the responsibilities carried by a school janitor. *In the Matter of the Tenure Hearing of Joseph McDougall, School District of the Borough of Northvale, Bergen County, 1974 S.L.D. 170*, decided January 28, 1974 The Commissioner's comments in *McDougall, supra*, are exactly pertinent to the instant matter and bear repeating as follows:

\*\*\* A school janitor occupies a position of trust and responsibility

necessitating high standards of dependability and morality. His functions far exceed opening and closing the schoolhouse and keeping it clean and tidy. The safety and welfare of the children may depend upon the proper discharge of his duties. He must always be in a fit condition to properly tend the heating plant and other potentially dangerous equipment.

“The janitor in a public school plays an important role in the educational program in addition to maintaining the schoolhouse in a safe, clean, and efficient manner. He has a special kind of relationship to the children for whom he performs his services, and who look to him as an example of a helper and solver of many problems. He, like the teacher and other personnel who regularly come in contact with pupils, must be of exemplary conduct. If his conduct does not set a standard for children to emulate, then he fails to discharge an important aspect of his responsibilities.

“The janitor also comes into regular contact with members of the school staff who are women, and he is expected to comport himself in a manner which will reflect dependability and inspire confidence.”\*\*\*”

(at pp. 178-179)

In this case, respondent’s reporting to duty under the influence of alcohol is conduct which falls far short of an acceptable standard of conduct for a janitor in a public school.

In previous instances, the Commissioner has imposed the penalty of dismissal on a janitor found guilty of being intoxicated and using rough language. *McDougall, supra*; *In the Matter of the Tenure Hearing of Joseph McDonald*, 1963 S.L.D. 213 The Commissioner has also dismissed janitorial employees for insubordination, disregarding orders, and failure to comply with instructions and perform assigned duties. *In the Matter of the Tenure Hearing of Adam Rogalinski*, 1967 S.L.D. 110; *In the Matter of the Tenure Hearing of Joseph Fortuna*, 1967 S.L.D. 150; *In the Matter of the Tenure Hearing of Theresa Cobb*, 1966 S.L.D. 197; *In the Matter of the Tenure Hearing of Joseph McDougall, supra*

In the instant matter, the Commissioner holds that the conduct of respondent has been so gross as to warrant the forfeiture of his tenure status and his employment with the Board of Education. Accordingly, the Commissioner orders respondent’s dismissal as of the date of this decision.

The Commissioner finds that respondent’s suspension without pay, by the Acting Superintendent, from February 15, 1974 through March 11, 1974, the date the Board formally certified the charges, was *ultra vires* for the reasons set forth by the hearing examiner. The Board alone had the statutory authority to suspend respondent without pay, when it certified the tenure charges to the Commissioner. *In the Matter of the Tenure Hearing of Joseph McDougall, supra*; *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County*, 1971 S.L.D. 566, affirmed State Board of Education, 1973 S.L.D. 773, affirmed New Jersey Superior Court, Appellate Division, Docket A-1680-72, November 28, 1973.

Accordingly, the Board of Education of the Village of Ridgewood is hereby ordered to pay Russell A. Fairfax the full amount of his salary from February 15, 1974, the date of his suspension without pay, through March 11, 1974, the date of the Board's certification of the tenure charges. This sum shall not be reduced by any other benefits which may have accrued to respondent.

COMMISSIONER OF EDUCATION

December 2, 1974

**Rose Marie and Ralph Decapua,**

*Petitioners,*

*v.*

**Board of Education of the Town of Belleville, Essex County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**ORDER**

For the Petitioners, Newark Legal Services (Philip Steinfeld, Esq., of Counsel)

For the Respondent, Lewis B. Rothbart, Esq.

It appearing that Rose Marie and Ralph Decapua, hereinafter "petitioners," having filed charges on August 9, 1973, against the Board of Education of the Town of Belleville, hereinafter "Board," alleging improper tuition charges assessed them by the Board; and it appearing that respondent requested and was granted several extensions of time in which to file an Answer; and it appearing that a general denial of the Petition of Appeal was filed on December 18, 1973; and it appearing that a formal Answer was requested by letter of January 2, 1974 from the office of the Division of Controversies and Disputes; and it appearing that a formal Answer has not been filed as required by *N.J.A.C. 6:24-1.3*; and it appearing that this matter was in the process of settlement between the litigants according to letters dated March 11, 1974, and June 4, 1974; and it appearing that counsel were notified by letter of November 1, 1974, that this matter must be prosecuted by November 15, 1974; and it appearing that no further communication has been received from the litigants; and it further appearing that every opportunity has been afforded petitioners and respondent for more than fifteen months; now therefore

IT IS ORDERED on this 2nd day of December 1974, that the Petition of Appeal in this matter be dismissed with prejudice.

COMMISSIONER OF EDUCATION

**Gerald F. Blessing,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Palisades Park and  
Frank Pollotta, Bergen County,**

*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Patrick J. Tansey, Esq.

For the Respondent Pollotta, Fierro, Fierro & Mariniello (Joseph R. Mariniello, Esq., of Counsel)

For the Respondent Board, Paul W. Ross, Esq.

This matter is before the Commissioner of Education as the result of an action taken by the Palisades Park Board of Education, hereinafter "Board," at its regular meeting on February 15, 1973. Petitioner, a member of the Board, alleges that the Board violated its own rules by filling a membership vacancy during the same meeting at which it received and accepted a resignation which created that vacancy. The Board, whose membership has significantly changed since the date of the meeting in question herein, joins petitioner in requesting the Commissioner to declare the appointment void and to affirm the validity of the Board's rule it allegedly violated. Respondent Pollotta, although no longer a member of the Board, denies the allegations set forth herein, and requests the Commissioner to affirm the validity of the Board's action by which he had been appointed a member.

The parties have agreed to submit this matter to the Commissioner for adjudication on the pleadings, exhibits, stipulations, and Briefs.

The salient facts regarding this dispute are these: The Board consists of nine elected members and is constituted pursuant to the provisions of *N.J.S.A. 18A:12-11*. On February 13, 1973, the Board conducted its annual school election, at which election Petitioner Blessing was elected to Board membership by the voters of the Borough of Palisades Park. Subsequent thereto, the annual reorganization meeting of the Board was set for February 20, 1973. It is at this meeting that those members recently elected are sworn into office pursuant to *N.J.S.A. 18A:12-2.1*, and the terms of those who are not to continue as members of the Board officially expire.

In the meantime, however, the Board had its regularly-scheduled meeting set for February 15, 1973, two days after the annual school election and five days before the newly-elected members were to be seated. During this regular Board meeting, one of its members, Dominic Gentile, whose term of office was not due for expiration, submitted to the Board his resignation from office which



was to be effective immediately. According to the Board's minutes (R-3), the proffered resignation was accepted by the Board. Immediately thereafter, a motion was made and seconded to appoint Respondent Pollotta to fill the vacancy thus created. Before a vote was taken on the motion to appoint, another motion was immediately made and seconded to table the motion to appoint. The motion to table was defeated; the original motion to appoint was adopted by a recorded roll call vote of six to two. (R-3) Thereafter, Respondent Pollotta was administered the oath of office and officially seated as a member of the Board.

The motion to table the appointment of Respondent Pollotta was grounded upon the allegation that such action would violate the Board's policy (R-4) regarding the filling of vacancies which occur during an unexpired term, hereinafter "policy 107.5." Subsequent to the defeat of the motion to table, a request was made by two Board members for a legal opinion from counsel, who was present at this meeting (R-3), as to the application of policy 107.5 to the motion to appoint. The President of the Board denied the request and, as previously stated, a majority of the Board voted to appoint Respondent Pollotta to complete the unexpired term.

The Board's policy 107.5, which is stipulated by the parties to have been in effect on February 15, 1973, is reproduced as follows:

"107.5 Unexpired Term

"Vacancies in the membership of the Board shall be filled at the next annual school election for the unexpired term only. The Board may fill a vacancy until the next election by appointment, provided nominations for such appointment not be accepted sooner than the next regularly scheduled meeting of the Board following the meeting in which the vacancy is publicly declared. No appointment shall be made at a special meeting. A majority of the quorum present at a regular meeting shall be required for such appointment."

Petitioner asserts that the Board's action controverted herein, whereby it accepted a resignation and filled the vacancy on the same evening, violates the provisions of the above policy and, accordingly, should be set aside. (Petitioner's Brief, at p. 7) Furthermore, petitioner argues that the President of the Board afforded no advance notice that the resignation was to have been submitted that evening, and that three of the Board members who voted in the affirmative to appoint Respondent Pollotta were attending their last regular meeting as members of the Board because they had been defeated for reelection on February 13, 1973. (Petitioner's Brief, at pp. 2-3)

Petitioner contends that those in the community who were interested in serving on the Board should have been given proper opportunity to express their interest. Petitioner asserts that the Board should have given the public advance notice regarding the impending resignation or, once the resignation was accepted on February 15, 1973, the Board should have postponed the actual selection of an appointee to a later date. In this regard, petitioner relies upon *Cullum v. Board of Education of the Township of North Bergen*, 15 N.J. 285 (1954)



wherein the Court set aside the appointment of a superintendent of schools by three members of a five-member appointed board of education. Petitioner also relies upon *Grogan v. DeSapio*, 15 N.J. Super. 604 (Law Div. 1951) and *Ernest W. Mandeville v. Board of Education of the Township of Middletown, Monmouth County*, 1938 S.L.D. 62 (1934).

Respondent Pollotta avers that his appointment by the Board to fill the vacancy was made in good faith because the members of the Board believed that the public interest demanded the immediate filling of the vacancy by a qualified person.

Respondent Pollotta contends that the statute, N.J.S.A. 18A:12-15, leaves the decision when to fill a vacancy to the judgment of the Board. Furthermore, he avers that the Board's policy in question here (R-4), was not followed in the past and, accordingly, should not be considered controlling. Specifically, he asserts that a similar circumstance confronted this Board in 1970, when a member resigned and an appointment was made on the same evening to fill the vacancy, even though the Board's policy (R-4) was in effect. (R-1, R-2)

An affidavit filed by the Business Administrator states that approximately seventy-six items of the Board's total policy are not presently followed and in some cases were never followed. In a report dated April 16, 1973 (R-6), submitted to the Board by the Business Administrator, those specific policies of the Board requiring revision or deletion for various reasons are set forth. One of the policies recommended for deletion is policy 107.5 (R-4), *ante*.

The Board now argues that, since the action of the predecessor Board was in violation of the Board's own policy, the appointment should be declared void. The Board asserts that policy 107.5 (R-4) is valid, was in effect on February 15, 1973, and should have been adhered to. The Board relies on *Greenway v. Board of Education of the City of Camden*, 129 N.J.L. 46 (Sup. Ct. 1942), affirmed 129 N.J.L. 461 (E. & A. 1943).

The Board contends that each Board member has the duty to investigate any prospective appointee to the Board and avers that policy 107.5 (R-4) is designed to serve that purpose. In the instant matter, the Board argues that the members who voted for tabling the motion to appoint Respondent Pollotta did not waive policy 107.5. (R-4) The Board does state that it may be possible for a board to waive or suspend one of its rules to accomplish a valid purpose but only when a board unanimously votes to do so.

In support of its position the Board also relies upon *Cullum, supra*, and *Grogan, supra*. While taking notice of the Commissioner's determination in *Polonsky v. Board of Education of the Borough of Red Bank*, 1967 S.L.D. 93, the Board argues that that matter is not applicable to the matter herein.

The Commissioner observes that N.J.S.A. 18A:12-15 provides as follows:

"Vacancies in the membership of the board shall be filled as follows:

"a. By the county superintendent, if the vacancy is caused by the

failure to elect a member, or by the removal of a member because of lack of qualifications, or results from a recount or contested election, or is not filled within 65 days following its occurrence,

“b. By the county superintendent, to a number sufficient to make up a quorum of the board if, by reason of vacancies, a quorum is lacking, or

“c. By the board in all other cases.

“Each member so appointed shall serve until the Monday following the next annual election unless he is appointed to fill a vacancy occurring within the 60 days immediately preceding such election to fill a term extending beyond such election, in which case he shall serve until the Monday following the second annual election next succeeding the occurrence of the vacancy, and any vacancy for the remainder of the term shall be filled at the annual election or the second annual election next succeeding the occurrence of the vacancy as the case may be.”

Local boards of education have authority to make, amend, and repeal rules for its own government. *N.J.S.A.* 18A:11-1 provides that:

“The board shall—

“a. Adopt an official seal;

“b. Enforce the rules of the state board;

“c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes\*\*\*; and

“d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.”

That the Board adopted policy 107.5 (R-4), pursuant to *N.J.S.A.* 18A:11-1, is clear. The sole issue to be decided is whether the appointment to membership which it made on February 15, 1973, should be set aside because the Board failed to follow its own policy.

The Commissioner has reviewed the applicable case law and can find no authority that would require a board of education to be absolutely bound by its own policies. *Greenway, supra* To the contrary, it has been consistently held that a local board of education is not bound by its policies and rules when no vested rights are involved. *Polonsky, supra; Noonan and Arnot v. Paterson City Board of Education*, 1938 S.L.D. 331 (1925), affirmed State Board of Education,

1938 *S.L.D.* 336 (1925); *Silvestris v. Bayonne Board of Education*, 1959-60 *S.L.D.* 184 Membership on a local board of education does not carry with it a vested right or interest; it is a privilege bestowed upon few persons to whom no rewards are promised.

While the Commissioner will not comment on the wisdom of the Board's determination to appoint Respondent Pollotta on February 15, 1973, five days prior to the seating of the new members, he is constrained to observe that the Board's action controverted herein is legal and valid.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 2, 1974

**In the Matter of the Tenure Hearing of Elizabeth B. Gresham,  
School District of the Township of Middletown, Monmouth County.**

COMMISSIONER OF EDUCATION

**DECISION**

For the Complainant Board of Education, Norton and Kalac (Peter P. Kalac, Esq., of Counsel)

For the Respondent, James E. Eastmond, Esq.

The Board of Education of the Township of Middletown, hereinafter "Board," filed a series of charges with the Commissioner of Education on May 16, 1972 against respondent, a tenured teaching staff member in its employ pursuant to the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.* Subsequently, respondent filed an Answer to the charges and advanced a Motion to Dismiss them. Oral argument on the Motion was conducted on August 3, 1972 by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton.

A decision by the Commissioner with respect to the Motion was not required since, subsequent to the oral argument, the parties reached an agreement that respondent would be returned to an alternative position as an employee of the Board, and the charges were proposed to be abandoned. Respondent was in fact so returned. The charges were not pressed by the Board.

At this juncture, the Petition clearly is not viable with respect to the charges certified by the Board against respondent; however, it is viable with respect to the agreement of the parties which caused the charges to be abandoned. Respondent avers that the Board has not fulfilled all of its obligations to her pursuant to the terms of the agreement, or according to law. The Board avers that such obligations have been fulfilled.

A hearing concerned with these specific allegations was conducted on August 27, 1974 at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner is as follows:

Respondent's service as a tenured teacher in the Board's employ evidently was continuous and without major interruption for illness through June 1971. It is represented, however, that in September 1971, she suffered from "some disability" which prevented her from resuming her regular teaching duties whereupon she was told "\*\*\*to report to the assistant superintendent's office when she was capable or felt she was capable of returning.\*\*\*" (Tr. 26)

Thereafter, in November 1971, respondent indicated she was ready to return to work, but the Board suspended her "with pay" instead, and required her to submit to a physical examination by either a physician of her own choice or the Board's physician. (Tr. 26) Respondent did submit to an examination by a physician of the Board's choice.

The report of the physician was received in January 1972, and it indicated, according to the Board, that she was "incapable of performing" her duties as a teacher. (Tr. 12) At that time, however, respondent's status as a teacher on suspension with pay was terminated, and she was again considered to be on sick leave. She continued to be compensated as a teacher on sick leave until May 4, 1972 at which time, according to the Board, her sick leave was "exhausted." (Tr. 12) The Board nevertheless continued her on sick leave status through May 15, 1972. (Tr. 30)

Thereafter, on May 16, 1972, the Board suspended respondent "without pay" and certified charges against her to the Commissioner. As was previously stated, an Answer to the charges and a Motion to Dismiss were then filed by respondent and an oral argument on the Motion was conducted.

A decision by the Commissioner on this Motion was not required since on August 14, 1972, the Board resolved by majority vote that respondent was to be "\*\*\*reinstated at the salary of \$10,000 per year with an appropriate reduction of her work day.\*\*\*" (P-1) This resolution is recited in its entirety as follows:

"WHEREAS, Elizabeth B. Gresham was suspended without pay on May 16, 1972 and formal charges were certified to the Commissioner of Education on May 16, 1972, and

"WHEREAS, an answer to said charges had been timely filed, and

"WHEREAS, following the joining of issues a motion was filed to dismiss said charges, and

"WHEREAS, said motion was argued before the Commissioner of Education on Wednesday, August 3, 1972, and

"WHEREAS, the Commissioner of Education reserved decision on the motion with the request that the parties make another attempt to

amicably adjust this matter, and

“WHEREAS, Elizabeth B. Gresham has agreed to return to employment on a shorter work day basis with a commensurate reduction in salary,

“NOW THEREFORE BE IT RESOLVED that the said Elizabeth B. Gresham be reinstated at the salary of \$10,000.00 per year with an appropriate reduction of her work day.

“Motion carried on roll call vote. Eight (8) members present, one (1) member absent. Eight (8) votes ‘yes.’ ”

Subsequently, in September 1972, respondent did report for duty as an employee of the Board pursuant to the stated terms of the resolution (P-1) and continued without interruption in such employment until January 1974, when she retired. (Tr. 40) The Board did not retroactively compensate respondent for the time period May 15 through June 30, 1972, when respondent’s status had been that of a tenured teacher suspended without pay pursuant to *N.J.S.A. 18A:6-14*. Respondent argues that she was, and is, entitled to such compensation and avows she was able on May 15, 1972 to resume the performance of her duties as a teacher. The Board sets forth a directly contrary view.

Thus the sole issue at this juncture is whether or not respondent is entitled to retroactive compensation for the period beginning May 15, 1972 through June 30, 1972 in accordance with the Board’s resolution to reinstate her. (P-1)

Respondent argues that such compensation is due her pursuant to the statutory mandate of *N.J.S.A. 18A:6-14* which is recited in its entirety as follows:

“Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. *Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension.* Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension.”

*(Emphasis ours.)*

Respondent avows that pursuant to the above statute, she was entitled, as a part of the compromise agreement, to be made whole from the date of her suspension by the Board without pay. This date was May 15, 1972. Respondent argues that it was "\*\*\*\*the entire matter, which had to be compromised, and the entire matter covered a period from May of 1972\*\*\* until she was finally returned to the classroom.\*\*\*" (Tr. 22) Reinstatement, in respondent's view, refers not to September 1, 1972, but reinstatement as of the date of the suspension. (Tr. 23)

The Board argues that respondent was not capable of resuming her duties on May 15, 1972 and, since her sick leave had been exhausted, no further compensation was due her. Further, the Board argues that the decision herein should be bounded by the "four corners" of the Board's resolution (P-1), and that such resolution makes no mention of "back pay." (Tr. 31) The Board states that respondent "\*\*\*\*was incapable of returning to the classroom and should not have been paid because it would have been illegal for the Board to pay for services not rendered and for services that Mrs. Gresham was incapable of rendering from every indication in the file\*\*\*." (Tr. 32) The Board also avers that respondent had never, at the time, come forward with evidence to the contrary.

Subsequent to the passage of the Board's resolution (P-1) to reinstate respondent, her counsel promptly indicated his opinion that a condition of the settlement was restoration "\*\*\*\*without loss of pay.\*\*\*" (P-3) It is also clear that charges against respondent were abandoned by the Board at the time it adopted its resolution to reinstate her. (P-1) (See P-3.)

In summary, the principal questions posed for determination by the Commissioner are whether or not:

- (a) Respondent is entitled as a matter of law to the retroactive payment of salary from the date of May 15, 1972 through June 30, 1972, because in August 1972, the Board reinstated her as an employee and abandoned the charges it had formerly certified; and
- (b) If such entitlement exists as a matter of law, the entitlement is required to be conditioned by evidence of fitness to teach.

The parties have waived their entitlement to receipt of the report of the hearing examiner. (Tr. 41)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and has considered the issues posed for determination. The Board's argument is, in essence, that the six-week period of respondent's suspension without pay should be excised from consideration either because respondent accepted the clearly-stated terms of the Board's resolution (P-1) which did not include an agreement to make respondent whole retroactively, or, if an entitlement to such



retroactive pay does exist, respondent is not eligible for it since she was ill at the time and her sick leave had been exhausted.

The Commissioner cannot agree with the Board's contention. To the contrary, the Commissioner holds that on or about May 4, 1972, the Board had two choices with respect to the sick leave status of respondent. The Board could have (1) by an exercise of "individual consideration" (*N.J.S.A. 18A:30-7*) extended the sick leave benefits of respondent, or (2) denied an extension of such benefits and declined to pay respondent for services not rendered. The Board never exercised this latter option, and the Commissioner holds it may not be exercised in retrospect now, since on or about May 15, 1972, respondent's status was abruptly altered to one of a teaching staff member who was suspended from her employment without pay.

Thus, the statute *N.J.S.A. 18A:6-14* was triggered, and its requirements became applicable with respect to the future treatment of respondent. It follows then that, when the Board withdrew, or in effect dismissed, the charges against respondent, she was entitled to be "\*\*\*reinstated immediately with full pay from the first day of her suspension." *N.J.S.A. 18A:6-14* The Commissioner so holds. The statute's clear prescription is not tempered by conditional phrases or exceptions. During all of the period May 15 through June 30, 1972, respondent's status was that of a tenure teaching staff member on suspension, not that of a teacher on sick leave with or without pay.

Accordingly, the Commissioner directs the Board to afford respondent all of the emoluments which are due her for the period May 15 through June 30, 1972, subject only to mitigation of her salary entitlement by earnings from other employment.

COMMISSIONER OF EDUCATION

December 2, 1974

"E.K." and "M.K.," parents and guardians *ad litem* of  
"G.K.," a minor,

*Petitioners,*

*v.*

Board of Education of the Township of Woodbridge, Middlesex County,

*Respondent.*

COMMISSIONER OF EDUCATION

#### DECISION

Attorney for Petitioners, Richard C. Swarbrick, Esq.

Attorney for Respondent, Hutt, Berkow & Hollander (Stewart M. Hutt, Esq., of Counsel)



Petitioners, parents of a pupil, "G.K.," enrolled in the Woodbridge Township School System during the 1972-73 and 1973-74 school years aver that he has been incorrectly classified as an emotionally disturbed child, and that the educational program provided for him has been inappropriate. They request a reclassification and reassignment to a regular school program and environment. The Board of Education of the Township of Woodbridge, hereinafter "Board," maintains that it has complied in all respects with the statutes concerned with handicapped children (*N.J.S.A.* 18A:46) and that the educational program provided for G.K. is appropriate to his needs.

A hearing in this matter was conducted on April 16, 1974 at the office of the Middlesex County Superintendent of Schools, New Brunswick, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The hearing of April 16, 1974, was a limited one in scope. Three documents, including a compiled report submitted by the Board, were received in evidence and two witnesses testified. Only one witness, Petitioner E.K., testified in support of the basic claims set forth in the Petition of Appeal.

She testified that she had moved to Woodbridge in 1972 but that a school placement for G.K. was delayed for two months by school officials. Thereafter, she testified, these school officials placed him in a special education class where he felt degraded and which she judged was inappropriate for him. She said that while he was in the special class other pupils teased him and that his nervous condition worsened.

She testified, additionally, that G.K. had not been examined independently by qualified persons in the Woodbridge School District, but that the Board had relied on prior evaluations conducted in the Perth Amboy School District. She contended that these evaluations were prejudiced against G.K., and that he has to be assigned with other children in order to learn how to live with them.

A representative of the Board's Child Study Team also testified. This witness testified that during the 1973-74 school year G.K. had been placed in two regular classes and in a remedial reading program and afforded a period of supplemental instruction. This educational program comprised one half of a regular school day, and she testified that the assignment resulted from the judgment of the Board's Child Study Team. (Tr. 2)

However, the attendance of G.K. in this program evidently terminated on October 9, 1973, and the following letter was addressed to Petitioner E.K. on October 15, 1973 by the Board's Associate Director of Pupil Personnel Services:

"It has been brought to my attention that [G.K.] has not been attending Woodbridge Junior High School since October 9, 1973.

"I am writing to strongly recommend that you send [G.K.] to school so that he can continue his education at this time. It is my understanding that

[G.K.] was progressing satisfactorily in school prior to October 9.” (R-1)

The hearing examiner finds that the record (R-2), submitted by the Board with respect to the classification of G.K., constitutes evidence that the Board's Child Study Team has classified G.K. as an emotionally disturbed child, and that such classification was made pursuant to law. *N.J.S.A. 18A:46-1 et seq.* The record contains a lengthy chronological recital of the Board's efforts to devise a program for G.K.: a neurological report, a psychological report, an educational evaluation, a social worker's report, and a report of a review team from the State Department of Education. This last report, dated June 1, 1973, has this summary of findings:

“1. Procedures for classification were in accordance with Title 18A:46, New Jersey Statutes.

“2. The classification of ‘Emotionally Disturbed’ with a secondary classification of ‘Neurologically Impaired’ is appropriate, based on the evidence contained in the evaluation by the Woodbridge Township School District.

“3. The educational program recommended for the boy is appropriate, based on the evidence contained in the evaluation.” (R-2)

The report recommends that G.K. continue in the educational program prescribed for him, and that appropriate adjustments be made when conditions warrant them.

There was no evidence presented at the hearing which would negate the validity of such findings and recommendations.

Accordingly, the hearing examiner finds the Petition of Appeal to be without merit, and he recommends that it be dismissed. However, he also recommends that the Board be directed to review all data pertinent to the evaluation of G.K. and to schedule such reexaminations as it deems appropriate in order that the education of G.K. may proceed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto which were filed by petitioners. Such exceptions dispute the principal findings, *ante*, with respect to the validity of the evaluation and classification of G.K. by the Board's Child Study Team. In petitioners' view, G.K. was incorrectly classified by the Team and placed thereafter in an inappropriate educational program. In support of this position, petitioners place reliance upon excerpts gleaned from various reports comprising the pupil's total record and on elements of testimony at the hearing, *ante*.

The Commissioner determines that such excerpts provide no grounds for a finding in favor of petitioners and against the classification made by the Child

Study Team. The elements for consideration by a child study team are seldom uniformly indicative of only one appropriate classification and placement, but of many. The team's ensuing judgment is grounded on multiple factors. When such judgment is properly exercised, the Commissioner will not, and may not, substitute his own discretion for that of the qualified child study team. As the Commissioner said *In the Matter of "D," by her parent v. Board of Education of the Borough of Scotch Plains-Fanwood and Fred LaBerge, Superintendent of Schools, Union County*, 1971 S.L.D. 509:

"Personnel of such child study teams are specifically empowered to make just such judgments as that made herein. Admittedly, it is a difficult task, but as the Commissioner observed in *The Parents of K.K. v. Board of Education of the Town of Westfield, Union County*, decided by the Commissioner June 1, 1971: [1971 S.L.D. 234, 239]

\*\*\*\* the State Board of Education has required each district to employ highly-qualified personnel representing many disciplines. The certification standards for these team members are high. When, as in this instance, such a team makes a judgment it is qualified and mandated to make \*\*\* *that judgment will not be determined to be faulty* or incorrect by the Commissioner, *absent* a clear showing of procedural fault or an arbitrary exercise of discretion without proper diagnostic information.' (*Emphasis supplied.*) \*\*\*\*" (at p. 511)

The Commissioner finds no such "fault" or an "arbitrary exercise of discretion" in the instant matter.

The Commissioner recommends that the Board and the Child Study Team periodically review all data pertinent to the evaluation of G.K. and his placement in an appropriate educational program and schedule any further evaluation studies deemed necessary to determine whether the dual processes of education and maturation require a reclassification.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

December 2, 1974

Marie T. Babbitt, Richard G. Babbitt, individually, and  
David J. Babbitt, infant, by his guardian *ad litem*, Marie T. Babbitt,

*Petitioners,*

*v.*

Paul Moran, Principal, and Board of Education of the Borough of  
Wood-Ridge, Bergen County,

*Respondents.*

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioners, Bloom, Biener & Neal (Kenith D. Bloom, Esq., of  
Counsel)

For the Respondents, Francis X. Rieger, Esq.

Petitioners' son, hereinafter "D.B.," was a twelfth grade pupil enrolled in Wood-Ridge High School when, on October 9, 1973, he and four other pupils were suspended by the principal for five days for leaving the school premises for approximately two hours while school was in session. Petitioners charge that this suspension was arbitrary and unduly severe. They pray for an order from the Commissioner of Education restraining the Board of Education of the Borough of Wood-Ridge, hereinafter "Board," from placing any record of the incident on the school record of D.B. or otherwise punishing him. The Board denies that the suspension was arbitrary or excessively harsh.

The testimony elicited at a hearing before a hearing examiner at the office of the Bergen County Superintendent of Schools on June 3, 1974, discloses the following factual information:

On October 9, 1973, it was announced over the Wood-Ridge High School public address system that the twelfth grade, or senior class, had exceeded all previous sales records in the annual magazine drive. Certain twelfth grade pupils were of the opinion that they should be granted one-half day off from school to celebrate this new class record. However, the student council president and the principal convinced most of them to return to their classes after a brief meeting in the school corridor.

The principal at approximately 11:58 a.m., had observed four pupils walking away from the building and ordered an attendance check which revealed that D.B. and three other twelfth grade boys were not in their classes. Telephone calls were made to the pupils' homes. While the principal was speaking with D.B.'s mother at approximately 1:58 p.m., the four boys returned to the school. Both D.B. and his mother were told by the principal at that time that he would be suspended for five days for truancy. (Tr. 15) The other three pupils were likewise suspended for five days.

D.B. had served only one day of his suspension when he was ordered

reinstated to school by an injunction issued by the New Jersey Superior Court, Chancery Division, pending a hearing of the matter before the Commissioner.

Thereafter, the Board confirmed and supported as reasonable and just the principal's suspension of D.B. for five days. (Tr. 10, 63) The principal testified at the hearing before the hearing examiner that:

“\*\*\* In this particular case, we also looked at it from the point of view of the possibility of a walk-out. Obviously it was being discussed; for four people to walk out has the effect of providing at least the incentive to others, and high school students are no different from the general population. They will follow where others lead which caused us to look at this with a little extra seriousness.\*\*\*” (Tr. 22-23)

The school's policy on truancy and illegal absence as set forth in the Wood-Ridge High School Student Handbook and distributed to all pupils is as follows:

“Truancy is a violation of a school law. The penalty for such an offense is suspension. Repeated truancy will result in reporting the case to the Children's Court.” (R-1, unp)

And,

“Any absence other than\*\*\*[a legal absence] is not excused and the student will receive no credit for the work missed. Teachers are directed to give zeros for the days when such absences \*\*\* [occur]. Pupils may not make up any tests missed.\*\*\*” (R-1, unp)

The Board further asserts that the suspension was ordered for “good cause” within the authority conferred upon principals and boards of education by *N.J.S.A. 18A:37-1 et seq.* (Tr. 37)

Petitioners, on the other hand, argue that D.B. could not have been truant within the intentment of *N.J.S.A. 18A:38-27* which reads as follows:

“Any child between the ages of six and 16 years who shall repeatedly be absent from school, and any child of such age found away from school during school hours whose parent\*\*\*is unable to cause him to attend school\*\*\*shall be deemed to be a juvenile delinquent and shall be proceeded against as such.”

Petitioners further assert that D.B. was not repeatedly absent from school, so was not truant as defined by statute, case law, or by Board policy, and that the Board or its principal had no authority to suspend him for five days.

Additionally, petitioners contend that the penalty of receiving zeros for five days adds a further unjustified penalty upon an already excessively harsh punishment. Finally, petitioners avow that D.B. was not afforded due process when he was suspended.

The hearing examiner finds that D.B. was not denied the right to state his side of the matter at the time he was suspended by the principal. (Tr. 46) Additional testimony by D.B. confirmed that neither he nor his parents requested a hearing on the matter of his suspension before the principal or the Board. (Tr. 52) Nor is a hearing before the Board required in short-term suspensions such as these. *John Haddad v. Board of Education of the Township of Cranford et al., Union County*, 1968 S.L.D. 98 These findings lead to the conclusion that D.B. was not denied the right of due process as set forth in *R.R. v. Board of Education of the Shore Regional High School District, Monmouth County*, 109 N.J. Super. 337 (Chan. Div. 1970). The hearing examiner recommends that the Commissioner so determine.

With regard to whether D.B. was in fact truant the hearing examiner finds that N.J.S.A. 18A:38-27 contains no forthright comprehensive definition of truancy but rather sets forth the conditions under which a pupil may be proceeded against as a juvenile delinquent. *Webster's Third New International Dictionary* defines a truant as

“\*\*\* one who stays away from business or shirks duty; esp: one who stays out of school without permission\*\*\*.”

The hearing examiner notes that D.B. testified regarding his leaving the school on December 9, 1973, as follows:

\*\*\*

“Q. You knew it was your obligation to remain in school during that period?

“A. Yes. Like I said, there was talk of all the seniors to leave, and we all gathered in front of the school and we were just the first four to leave.”\*\*\*” (Tr. 49-50)

The hearing examiner also finds that D.B. was fully aware that he was breaking the school regulations regarding attendance when he left the school premises and was for a brief period truant, within the commonly understood meaning of the word.

In any event, the letter of the principal suspending D.B. set forth his reason for the suspension without reliance upon the word “truant” as follows:

“[D.B.] has been suspended from school for leaving the building without authorization. The suspension will be for Wednesday, October 10 through Tuesday, October 16, 1973.”\*\*\*” (P-1)

The Board's policy states that:

“In the case of a pupil's willful and persistent violation of the school [policy], or disrespect for authority, the Principal may suspend such pupil.”\*\*\*” (R-2)

The hearing examiner leaves to the Commissioner to determine within the

context of circumstances hereinbefore set forth, whether the suspension of D.B. for five days was a proper and legal act by the principal and the Board consistent with D.B.'s violation of the Board's attendance policies.

In regard to petitioner's complaint that the assignment of zeros for the period of suspension was unduly severe, the hearing examiner finds no evidence that the grade of D.B. was adversely affected by such assignment of zeros during the one day of suspension he actually served and that no relief is required. The larger question which is raised is whether the school policy, *ante*, requiring zeros as a penalty for unexcused absences is proper. The hearing examiner finds that the instant matter is controlled by *Dawn Minorics v. Board of Education of the Town of Phillipsburg et al.*, 1972 S.L.D. 86 wherein the Commissioner said:

“\*\*\* [T]he mark of zero tends to weight the term grade received and to weigh the record down, and since such weighting occurs only when students are truant or are on suspension from the privilege of school attendance, the practice must be viewed as one of the kind the Commissioner cautioned against in *Wermuth*; a practice that serves ‘disciplinary purposes.’ As such, the Commissioner holds that the practice is improper and should be terminated at the earliest practicable time.”\*\*\*  
(at p. 90)

The Commissioner has spoken in similar fashion in *Gustave M. Wermuth et al. v. Julius C. Bernstein, Principal of Livingston High School, and Board of Education of the Township of Livingston, Essex County*, 1965 S.L.D. 121 as follows:

“\*\*\* The use of marks and grades as deterrents or as punishment is likewise usually ineffective in producing the desired results and is educationally not defensible. Whatever system of marks and grades a school may devise will have serious inherent limitations at best, and it must not be further handicapped by attempting to serve disciplinary purposes also.”\*\*\*

“This enunciation of a philosophy with respect to suspension and marks should not be interpreted as an erosion of either the authority of the school staff or of the desirability of maintaining good order\*\*\*. Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct. Such results are attained, to the Commissioner's knowledge, by the great majority of school staffs through use of a variety of techniques adapted to the particular pupil and problem without having to resort to frequent suspensions and grade penalties.”\*\*\* (at pp. 128-129)

The hearing examiner recommends that the Commissioner order the Board to revise its policy on illegal absences (unexcused) in the *Student Handbook*, *ante*, to conform to the dicta set forth by the Commissioner in *Wermuth*, *supra*; *Minorics*, *supra*; and *John Haddad*, *supra*.



The hearing examiner finds no need for the Commissioner to deal with that portion of petitioners' prayer for relief which sought an order that no record of the suspension be placed on the school record of D.B. This finding is based upon the uncontested testimony of the school principal wherein he said:

“\*\*\* We give that information to no one; it's not part of any permanent record for any student. There is nothing on [D.B.'s] permanent records which indicates a suspension other than the fact that it's an absence but it's without reason.\*\*\*” (Tr. 21-22)

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, the hearing examiner's report, and the exceptions thereto filed pursuant to *N.J.A.C. 6:24-1.16*.

The Commissioner adopts the findings of the hearing examiner as his own.

The Commissioner observes the following statement in the exceptions filed by the Board:

“\*\*\* in no instance has a student ever been suspended and given an adverse grade which the student was not permitted to make up by completing the assignments deemed necessary by the teacher of each of the student's courses.\*\*\*” (at p. 4)

The Commissioner, assuming *arguendo* that this is so, opines that such a practice is in keeping with the directives set forth in *Minorics, supra*; *Wermuth, supra*; and *Haddad, supra*. He directs the Board to revise its policy regarding pupil suspensions and other absences to include the essence of its above statement as part of such policy.

The Commissioner determines that, given the circumstances of the instant matter, the principal's act of suspending D.B. and the Board's act affirming the suspension for a period of five days were legal and proper acts within the Board's discretionary authority. It is a well recognized principle of law that:

“\*\*\* When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. \*\*\*” (*Thomas v. Board of Education of the Township of Morris*, 89 *N.J. Super.* 327, 332 (*App. Div.* 1965))

The Commissioner finds no evidence of arbitrary or capricious action on the part of the principal or the Board. Nor was the controverted suspension accompanied by unduly severe requirements or punishment. Absent such a finding, the Commissioner knows of no relief which may properly be granted to

petitioners. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 2, 1974

**John Gish,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Paramus, Bergen County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Norman L. Cantor, Esq.

For the Respondent, Winne & Banta (Joseph A. Rizzi, Esq., of Counsel;  
Robert M. Jacobs, Esq., on the Brief)

Petitioner, a teacher with a tenure status employed by the Board of Education of the Borough of Paramus, hereinafter "Board," alleges that the Board's action taken on August 28, 1973, pursuant to *N.J.S.A. 18A:16-2 et seq.*, ordering petitioner to submit to a psychiatric examination, was and is violative of petitioner's rights under the First Amendment of the United States Constitution, was unreasonably based upon insufficient evidence, and was procedurally defective.

The Board answers that its action is reasonable and proper in all respects, does not violate any of petitioner's rights, and further denies each of petitioner's allegations.

Petitioner requests that the Commissioner of Education reverse the Board's action ordering petitioner to submit to a psychiatric examination on the grounds that such order violates petitioner's constitutional rights, the Board's procedure was fatally defective, and its order is unreasonable in that it is not based upon sufficient evidence to support its determination.

At a conference held January 16, 1974, the parties stipulated a number of items of documentary evidence. Petitioner submitted a Motion for Summary Judgment, and a tentative date of January 30, 1974, was set down for oral argument on the Motion. Oral argument was held April 15, 1974, and Briefs were filed by the parties. The entire record in this matter, including the transcript of the oral argument, is now before the Commissioner for determination.

It is necessary to point out that, subsequent to petitioner's filing of the instant Petition of Appeal, the Board certified tenure charges against Petitioner Gish to the Commissioner, pursuant to *N.J.S.A. 18A:6-10 et seq.* The purported actions of petitioner which form the basis of the tenure charges are essentially similar to the reasons stated by the Board for its requiring that petitioner submit to a psychiatric examination. The Board's tenure charges additionally include the charge that John Gish failed to comply with the Board's August 28, 1973 order to submit to a psychiatric examination pursuant to *N.J.S.A. 18A:16-2 et seq.* The conference of counsel *In the Matter of the Tenure Hearing of John Gish, School District of the Borough of Paramus, Bergen County*, was held concurrently with the conference in the instant matter on January 16, 1974, because of the related nature of these two cases. Petitioner Gish is represented by other counsel in the tenure case wherein he is the respondent. In the tenure case, Gish filed a Motion for Summary Judgment, and it was agreed by the parties that oral argument on that Motion would be heard following the oral argument on the Motion in the instant matter. This procedure was followed, and oral argument on John Gish's Motion for Summary Judgment in the tenure case was held July 22, 1974. The Commissioner's determination *In the Matter of the Tenure Hearing of John Gish, School District of the Borough of Paramus, 1974 S.L.D. 1168*, decided on the same day as the instant matter, will be discussed, *post*.

The following relevant material facts are undisputed and illustrate the genesis of the matter herein controverted before the Commissioner:

Petitioner Gish has been employed by the Board as a teacher in Paramus High School since 1965. On or about June 14, 1972, Petitioner Gish assumed the office of president of the Gay Activist Alliance of New Jersey, hereinafter "Gay Alliance," an organization dedicated to the cause of the "Gay Liberation Movement." According to petitioner, the Gay Alliance is an organization dedicated to the elimination of discrimination against gay persons, including homosexuals. Petitioner's position as president of the Gay Alliance was publicly announced and covered by national and local news media.

The Board adopted a resolution on July 10, 1972, directing petitioner to undergo a psychiatric examination. That resolution reads as follows:

"WHEREAS, the Board has authorized the Superintendent and Board Attorney to consult with Dr. Richard Roukema, the Board's consulting psychiatrist, as to his opinion as to whether the overt and public behavior of John Gish, during the period of June 14, 1972 through the present, indicates a strong possibility of potential psychological harm to students of the Paramus School District as the result of their continued association with Mr. Gish; and

"WHEREAS, Dr. Richard Roukema has indicated his opinion that such overt and public behavior on the part of John Gish does indicate a strong possibility of potential harm to the students of the Paramus School District as the result of their continued association with him; and

“WHEREAS, based upon the investigation made by the Superintendent and the Board Attorney and the opinion of Dr. Roukema, the actions of John Gish, in the judgment of the Board, constitute evidence of deviation from normal mental health;

“RESOLVED that John Gish be required to undergo a psychiatric examination by Dr. Richard Roukema pursuant to the provisions of N.J.S.A. 18A:16-2 and 3.”  
(Exhibit R-1)

On August 10, 1972, petitioner filed suit challenging the constitutionality of N.J.S.A. 18A:16-2, and the New Jersey Superior Court, Chancery Division, issued a temporary restraining order against implementation of the statute. The opinion of the Court in *James V. Kochman and John N. Gish, Jr. et al. v. Keansburg Board of Education and Paramus Board of Education et al.*, 124 N.J. Super. 203 (Chan. Div. 1973) will be considered, *post*.

The Board informed petitioner by letter dated August 25, 1972, that for the 1972-73 academic year he was being transferred to the Board's administrative offices from his teaching position in the high school. This action was taken by the Board in accordance with its position set forth in the resolution adopted July 10, 1972.

On May 31, 1973, the opinion of Judge Lane, J.S.C., was rendered in *Kochman v. Keansburg*, *supra*, holding that the statute N.J.S.A. 18A:16-2 is constitutional.

By letter dated June 7, 1973, addressed to petitioner by the Superintendent of Schools, petitioner was given a copy of the Board's July 10, 1972 resolution and a statement of reasons why the Board was requiring him to undergo a psychiatric examination. This letter is reproduced in its entirety as follows:

“Please be advised that, pursuant to N.J.S.A. 18A:16-2 and 18A:16-3, a copy of which is attached hereto, the Board of Education adopted, at its regular meeting held on July 10, 1972, a Resolution requiring you to undergo a psychiatric examination. A copy of said Resolution is attached hereto.

“The reasons for the requiring of such an examination are as follows: Your behavior during the period of June 14, 1972 to July 10, 1972, including but not limited to your assumption of the Presidency of the Gay Activist Alliance of New Jersey on June 14, 1972, your statements to the Record published in its June 15, 1972 edition, that ‘I’m doing this so that educators can start educating the public about human differences and alternative life styles . . . This action shouldn’t hurt the teaching profession’s image. Instead it will bring the profession closer to the realm of reality . . . Most gay teachers are known to be gay by their students and Board of Education. Just as long as nothing is said the system tolerates them. However, I’m fed up with lying to them;’ your sponsorship of the formation of a Gay Teachers Caucus at the annual convention of the

National Education Association, held on June 26, 1972 in Atlantic City, New Jersey; your causing to be published in the New York Times on July 2, 1972 an article entitled 'Gay Teachers: Looking for Recognition;' your causing to be published in the Record on July 7, 1972 an article entitled 'Out of the Classroom Closet, Gay Teacher Speaks Up;' your causing to be published in the Newark Evening News on June 28, 1972 an article entitled 'Gay Survey Suggested;' and your causing to be published in the Record on June 29, 1972 an article entitled 'Homosexual Asks Poll' raised, in the discretion of the Board of Education, and in the opinion of Dr. Roukema, the Board of Education's consulting psychiatrist, a significant possibility of harmful, significant deviation from mental health which would affect your ability to teach, discipline or associate with the children subject to your control, and which would have the tendency to result in a strong possibility of potential psychological harm to children as a result of their continued association with you.

"Based on the foregoing, the Board re-affirms its resolution of July 10th and hereby directs that you submit to a psychiatric examination pursuant to *N.J.S.A. 18A:16-2*. You are hereby advised that you have a right to request a hearing before the Board of Education concerning the Resolution described above and the statement of reasons above. You are also hereby advised that, pursuant to *N.J.S.A. 18A:16-3*, you have a right to have the examination made by a physician of your own choosing, approved by the Board of Education, in which case said examination shall be made at your expense.

"If you do not wish to choose your own physician and do not wish to request a hearing from the Board of Education, please contact me at your earliest convenience to arrange for the scheduling of a psychiatric examination by a Board appointed physician. Please advise me promptly of your intentions."  
(Exhibit R-2)

The Board adopted a second resolution on June 28, 1973, concerning Petitioner Gish. This resolution reads as follows:

"WHEREAS, the Board, by Resolution dated July 10, 1972, resolved, based upon the investigation made by the Superintendent and the Board Attorney and the opinion of Dr. Roukema, the Board's consulting psychiatrist, that John Gish be required to undergo a psychiatric examination pursuant to the provisions of *NJSA 18A:16-2* and 3; and

"WHEREAS, it is the opinion of the Board that it is in the best interests of John Gish that such examination be conducted by a psychiatrist totally independent of the overt and public behavior of John Gish during the period from June 14, 1972 to July 10, 1972, which behavior resulted in the aforementioned Resolution;

"RESOLVED that so much of the Resolution of the Board dated July 10, 1972, which authorized Dr. Richard Roukema to conduct the psychiatric examination of John Gish, be, and the same hereby is, rescinded; and

“FURTHER RESOLVED that said examination of John Gish be conducted by Dr. Edward Lowell.” (Exhibit R-7)

By letter dated August 9, 1973, addressed to Petitioner Gish from the Assistant Superintendent of Schools, petitioner was given additional reasons why the Board was requiring him to undergo a psychiatric examination. This letter reads as follows:

“In accordance with the procedures outlined in a directive dated February 2, 1972 from the Assistant Commissioner of Education to all County Superintendent of Schools, and in accordance with the directives contained in the opinion of The Honorable Merritt Lane in the case of Kochman et al v. Keansberg (sic) Board of Education, et al dated May 31, 1973, both of which require that a statement of reason or reasons be given a teacher in connection with any request for a psychiatric examination, the Board of Education wishes to inform you that in addition to those reasons set forth in a letter dated June 7, 1973 from Paul A. Shelly, Superintendent of Schools, to you, the following represent additional reasons for requiring you to undergo a psychiatric examination pursuant to N.J.S.A. 18A:16-2 and 3 and pursuant to resolutions of the Board of Education adopted on July 10, 1972 and June 28, 1973: Your behavior during the period of July 10, 1972 to the present, including but not limited to your course of conduct in permitting students and graduates of Paramus High School to visit with you during working hours in your office, contrary to the directives of your immediate supervisor, Assistant Superintendent of Schools Galinsky; your course of conduct in using the phone and facilities of your office to promote the cause of the Gay Liberation Movement, including conversations during May of 1973, overheard by Superintendent of Schools Paul A. Shelly in which you attempted to organize a ‘Hold Hands Demonstration,’ sponsored by the Gay Activist Alliance of New Jersey, on the George Washington Bridge on May 6, 1973, and in which you advised an individual concerning the placement of a child in a camp for homosexual children; your organization of and participation in the ‘Hold Hands Demonstration’ on the George Washington Bridge on May 6, 1973; your unauthorized distribution of a flyer at a dinner meeting of the members of System Training for Educational Participation (STEP), which flyer suggested, among other things, that STEP set up mechanisms to create motivation for the understanding of sexism and foster growth in terms of sexual awareness and alternatives, and your speech at said meeting, at which you stated ‘you know my position and I strongly urge that you pass a motion supporting my cause;’ your causing to be published on behalf of the Gay Activist Alliance of New Jersey as publicity promoting the cause of the Gay Liberation Movement, a flyer reprint of an article originally published in the Record on June 15, 1972, which article dealt with your participation in a Gay Teachers’ Caucus at the National Education Association in Atlantic City; and your suggestion to Assistant Superintendent of Schools Galinsky that ‘it wouldn’t be a bad idea if there was a high school ‘Gay Club’;’ and your course of conduct in engaging in speaking engagements to promote the cause of the Gay Liberation Movement at, among other



schools, Middlebury College and Rutgers University.” (Exhibit R-3)

The Board met privately with Petitioner Gish on August 9, 1973 at which time petitioner was given the letter dated August 9, 1973, containing the additional statement of reasons. (R-3) Petitioner was represented by counsel at this meeting. The transcript of the August 9, 1973 session discloses that the Board had met that same evening in private session and authorized the letter containing the additional statement of reasons. (Tr. I-12) The Board also informed petitioner and his counsel that it would set another date for review of the additional reasons. It was mutually agreed that the Board would meet again on August 22, 1973 with petitioner and his counsel. (Tr. I-11)

At the August 9, 1973 meeting, counsel for petitioner argued that the Board's consulting psychiatrist, Dr. Roukema, must be available for cross-examination. (Tr. I-14-15) The Board declined to produce the psychiatrist. It appears that a statement of hypothetical facts had been presented to Dr. Roukema, and he had based his opinion on such facts. (Tr. I-20-21) When asked whether petitioner disputed the facts set forth in the hypothetical statement, petitioner's counsel replied that petitioner disputed that he had caused certain newspaper articles to be published. (Tr. I-21) Petitioner did not dispute the statements in the Superintendent's letter (R-2) or the accuracy of the newspaper articles. (Tr. I-21) The record of the August 9, 1973 meeting discloses that petitioner's counsel presented a legal argument to the effect that the Board's reasons did not provide a basis for subjecting petitioner to a psychiatric examination. Also, counsel argued that petitioner's public advocacy of an unpopular cause is protected by his right to freedom of speech and freedom of association. (Tr. I-13-30)

Prior to the Board's August 22, 1973 meeting with petitioner, the Board presented a statement of hypothetical facts to another psychiatrist, Dr. Edward H. Lowell, which was dated August 14, 1973.

This statement of hypothetical facts is quoted *in toto* as follows:

“An English teacher of Paramus High School, John Gish, who was born on April 1, 1937 in Peekskill, New York, attended the Fair Lawn Public Schools (K through 12), received a BA Degree from Seton Hall University, served in the United States Army Security Agency from August 1956 to June 1959, has been in the employ of the Paramus Board of Education since September of 1965, has, during that period, received excellent evaluations as an English teacher, has during that period, not been involved in any derelictions of duty in his capacity as a teacher; but who, as of Wednesday, June 14, 1972, was elected as President of the Gay Activist Alliance of New Jersey and announced at a meeting attended by teacher representatives of the various schools in the Paramus School District that the news of his appointment would be made public as of Thursday, June 15, 1972; who was quoted by The Record, a newspaper of countrywide circulation, in its June 15, 1972 edition, as stating ‘I’m doing this so that educators can start educating the public about human differences and alternative life styles \*\*\*,’ ‘This action shouldn’t hurt the teaching



profession's image. Instead it will bring the profession closer to the realm of reality.'; 'Most gay teachers are known to be gay or are assumed to be gay by their students and Boards of Education. Just as long as nothing is said, the system tolerates them. However, I'm fed up with lying to them.'; and who The Record reported as stating that the major aim of the Gay Teacher's (sic) Caucus to be held at the National Education Association Convention beginning June 26, 1972 in Atlantic City was to have homosexuals included in any reference to ethnic minority groups in a new National Education Association constitution to be ratified at the convention; and who caused there to be published in the New York Times on July 2, 1972 an article entitled 'Gay Teachers: Looking for Recognition,' an article in The Record on July 7, 1972 entitled 'Out of the Classroom Closet, Gay Teacher Speaks Up,' an article in the Newark Evening News on June 28, 1972 entitled 'Gay Survey Suggested,' and an article in the Record on June 19, 1972 entitled 'Homosexual Asks Poll;' who (during the 1972-1973 school year) was assigned to the administrative offices of the District and was informed that he was not to have contact with students and whose duties during that school year did not require contact with students; who (during the 1972-1973 school year) engaged in a course of conduct permitting students and graduates of Paramus High School to visit with him during working hours in his office, contrary to the directives of his immediate supervisor, Assistant Superintendent of Schools Galinsky; who (during the 1972-1973 school year) engaged in a course of conduct using the phone and facilities in his office to promote the cause of the Gay Liberation Movement, including phone conversations during May of 1973, overheard by Superintendent of Schools Paul A. Shelly, in which he worked at organizing a 'Hold Hands Demonstration,' sponsored by the Gay Activist Alliance of New Jersey, on the George Washington Bridge on May 6, 1973, and in which he advised an individual concerning the placement of a child with effeminate tendencies in an appropriate camp; who organized and participated in the 'Hold Hands Demonstration' on the George Washington Bridge on May 6, 1973; who (during the 1972-1973 school year) distributed, without authority, a flyer at a dinner meeting of the members of System Training for Educational Participation (STEP), which flyer suggested, among other things, that STEP set up mechanisms to create motivation for the understanding of sexism and foster growth in terms of sexual awareness and alternatives, and who gave a speech at said meeting, at which he stated 'You know my position and I strongly urge that you pass a motion supporting my cause;' who caused to be published on behalf of the Gay Activist Alliance of New Jersey, as publicity promoting the cause of the Gay Liberation Movement, a flyer reprint of an article originally published in The Record on June 15, 1972, which article dealt with his participation in a Gay Teacher Caucus at the National Education Association Convention in Atlantic City; and who (during the 1972-1973 school year) suggested to Assistant Superintendent of Schools Galinsky that 'it wouldn't be a bad idea if there was a high school 'Gay Club';' and who (during the 1972-1973 school year) engaged in a course of conduct in engaging in speaking engagements to promote the cause of the Gay Liberation Movement at, among other schools, Middlebury College and Rutgers University; and who, on July 25, 1973, at an arbitration

hearing, admitted stating to a reporter for The Record, on or about July 10, 1972: 'I am a gay person. That is a person who has full bodily and psychological integrity'; who at said hearing confirmed what he had said to a reporter for The Record on or about July 10, 1972 namely that gay people include homosexuals, bisexuals and heterosexuals; who at said hearing elaborated on the meaning of the definition of a gay person, stating in effect that a gay person is a person who believes in total freedom of the use of one's body on a consensual basis in homosexual, bisexual and/or heterosexual relationships." (Exhibit R-4)

This foregoing statement of hypothetical facts is essentially a composite of the Board's letters containing its statements of reasons, dated June 7, 1973 (R-2) and August 9, 1973. (R-3)

After reviewing the above statement of hypothetical facts, Dr. Lowell wrote the following letter, dated August 16, 1973, to the Superintendent of Schools:

"I have carefully examined the Statement of Hypothetical Facts, attached hereto, which you presented to me in a meeting in my office on August 15, 1973, which meeting was also attended by Joseph A. Rizzi, Esq., attorney for the Board of Education.

"Based upon an analysis of those hypothetical facts, and assuming the essential truth of those facts, I can state, with a reasonable degree of medical certainty, that the subject, John Gish, does show evidence of deviation from normal mental health." (Exhibit R-5)

At the private meeting of the Board with petitioner on August 22, 1973, the Board presented to petitioner's counsel the statement of hypothetical facts dated August 14, 1973 (R-4), which had been presented to the second psychiatrist, and also presented the letter reply from Dr. Lowell dated August 16, 1973. (R-5) Petitioner's counsel argued again that both psychiatrists must be produced by the Board for cross-examination since their respective opinions were being relied upon by the Board in its determination that petitioner submit to an examination. Petitioner's counsel also argued that the qualifications and credentials of the psychiatrists should be the subject of questioning, and petitioner should be afforded opportunity to present his own expert witnesses in response. (Tr. II-24) Petitioner stated that the bare conclusions given by the Board's psychiatrists do not state the type of pathology indicated by the statement of hypothetical facts or the type of harm which might result from the alleged mental defect. (Tr. II-24)

Petitioner's counsel reviewed the seven allegations in the Board's statement of reasons dated August 9, 1973 (R-3) and stated that four of the seven relate to petitioner's efforts to advocate a cause in which he believes, by speech, writing or association. (Tr. II-25-26) Petitioner's counsel argued that two other allegations, in addition to the four, are concerned with alleged infractions of rules or orders which, if true, might be the basis for a reprimand or other disciplinary action.

The Board corrected the statement in its letter dated August 9, 1973 (R-3), regarding "the placement of a child in a camp for homosexual children." According to the Board, the statement should read as set forth in the statement of hypothetical facts dated August 14, 1973 (R-4), which refers to the "\*\*\*placement of a child with effeminate tendencies in an appropriate camp \*\*\*." Petitioner produced a letter dated August 21, 1973, addressed to him by a rabbi with whom the telephone conversation concerning the placement of a child was held. This letter, which is entered in evidence (P-4), is supportive of petitioner.

In regard to the allegation that petitioner had stated to the Assistant Superintendent that "\*\*\*\* it wouldn't be a bad idea if there was a high school 'Gay Club'\*\*\*\*," petitioner stated at the August 22, 1973 meeting that this comment had been made in jest by the Assistant Superintendent, and in repartee petitioner had jokingly replied "\*\*\*\* 'Hey, I never thought of it but it might not be a bad idea.'\*\*\*\*" (Tr. II-34) According to petitioner, he had no intention to organize a Gay Club in the high school. (Tr. II-34) The Board did not refute petitioner's version of this conversation; therefore, it must be concluded that the facts are as petitioner related them.

Following this second meeting of the Board with petitioner, the Superintendent sent a letter under date of August 28, 1973 to petitioner which directed him to undergo a psychiatric examination. This letter reads as follows:

"Please be advised that, based upon your conduct during the period from June 14, 1972 to August 9, 1973, which conduct was set forth in the Statement of Reasons dated June 7, 1973 and August 9, 1973, copies of which were furnished to you and to counsel on your behalf, and based upon the opinion of Dr. Richard Roukema, paraphrased in the Resolution of the Board of Education dated July 10, 1972, and based upon the opinion of Dr. Edward H. Lowell, contained in his letter dated August 16, 1973, a copy of which was furnished to counsel on your behalf, and based upon a consideration of the evidence presented by counsel on your behalf at hearings before the Board of Education on August 9, 1973 and August 22, 1973, the Board of Education has determined that your conduct during said period evidences a harmful, significant deviation from normal mental health affecting your ability to teach, discipline and associate with students of the Paramus Public Schools, and, accordingly, hereby orders you to undergo a psychiatric examination, pursuant to the terms of NJSA 18A:16-2 and 18A:16-3. Would you kindly contact the undersigned immediately so that we may arrange for the scheduling of the psychiatric examination." (Exhibit R-6)

Thereafter, the instant Petition of Appeal, dated September 4, 1973, was filed with the Commissioner on September 7, 1973.

In his Petition of Appeal and Brief, petitioner sets forth a three-pronged attack upon the Board's action requiring him to undergo a psychiatric examination. The Commissioner will review each of petitioner's arguments. In the first instance, petitioner argues that the Board's action impermissibly

infringes upon his First Amendment rights of free speech and free association. Throughout his argument, petitioner characterizes his actions, which are described in the two statements of reasons (R-2, R-3) as political activities. It is petitioner's view that he assumed the presidency of the Gay Alliance, which wages a political struggle against discrimination directed against gay persons, and on behalf of that organization he engaged in lawful demonstrations, made statements and speeches, and sought to advance the political cause he espouses. All of these activities, says petitioner, are protected by the First Amendment to the United States Constitution. (Petitioner's Brief, at p. 6) In support of this argument, petitioner cites numerous cases decided by the United States Supreme Court, Court of Appeals, and District Court as follows: *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L. Ed. 2d 570 (1972); *Healy v. James*, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Russo v. Central School District No. 1*, 469 F. 2d 263 (2nd Cir. 1972), cert. den. 93 S. Ct. 1899 (1973); *James v. Board of Education*, 461 F. 2d 566 (2nd Cir. 1972); *Pred v. Board of Public Education*, 415 F. 2d 851 (5th Cir. 1969); *Burnside v. Byars*, 363 F. 2d 744 (5th Cir. 1966); and *Hanover v. Northrup*, 325 F. Supp. 170 (D. Conn. 1970).

In the judgment of the Commissioner, it is not necessary to review each of the above-cited cases, which are well known and deal with First Amendment rights. However, several points must be mentioned. In *Healy v. James*, *supra*, Mr. Justice Powell stated the following:

“\*\*\* At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. ‘It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969). Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied ‘in light of the special characteristics of the \*\*\*environment’ in the particular case. *Ibid.* And, where state-operated educational institutions are involved, this Court has long recognized ‘the need for affirming the comprehensive authority of the State and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’ *Id.*, at 507, 89 S. Ct. at 737.” (408 U.S. at 180, 92 S. Ct. at 2345-2346)

In his concurring opinion in *Healy v. James*, *supra*, Mr. Justice Rehnquist pointed out the distinction between the government acting as the administrator of a school and the government acting as a sovereign to enforce its criminal laws. In each capacity the government has different constitutional limitations. Mr. Justice Rehnquist stated that:

“\*\*\* Prior cases dealing with First Amendment rights are not fungible goods, and I think the doctrine of these cases suggests two important distinctions. The government as employer or school administrator may

impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens. And there can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each.\*\*\*”  
(408 U.S. at 203, 92 S. Ct. at 2357)

Mr. Justice Rehnquist quoted the Court in *Pickering v. Board of Education*, *supra*, wherein it was stated that:

“\*\*\* The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.\*\*\*”  
(391 U.S. at 568, 88 S. Ct. at 1734)

As an example of a New Jersey case where the principles stated in *Pickering*, *supra*, were argued and distinguished, see *Pietrunti v. Board of Education of Brick Township*, 128 N.J. Super. 149 (App. Div. 1974), *cert. denied*, 65 N.J. 573 (1974).

In the instant matter, the Board’s argument presumes that petitioner’s actions are not solely political activities which are entitled to First Amendment protection. The Board states that as laymen of common intelligence and reason it collectively judges petitioner’s actions as showing evidence of harmful, significant deviation from normal mental health affecting petitioner’s ability to teach, discipline or associate with the pupils subject to petitioner’s control. Therefore, the Board asserts, petitioner has no inherent First Amendment protection to refuse to undergo a psychiatric examination as provided by N.J.S.A. 18A:16-2.

The Commissioner, having considered the arguments set forth by both parties on the issue raised by petitioner, bases his determination on the following interpretation of law.

As was previously stated, the constitutionality of the statute, N.J.S.A. 18A:16-2, was challenged by petitioner immediately following the Board’s adoption of the July 10, 1972 resolution (R-1) ordering petitioner to undergo a psychiatric examination, and the Court held the statute constitutional. *Kochman and Gish et al. v. Keansburg Board of Education and Paramus Board of Education et al.*, *supra*

In his opinion, Judge Lane construed the term “deviation from normal \*\*\* mental health,” as used in N.J.S.A. 18A:16-2 to mean:

“\*\*\* harmful, significant deviation from normal mental health affecting the teacher’s ability to teach, discipline or associate with children of the age of the children subject to the teacher’s control in the school district.\*\*\*”  
(124 N.J. Super. at 212)



Judge Lane explained the purpose of the statute in the following terms:

“\*\*\* The legislature has delegated to boards of education the authority to determine whether a teacher is fit to teach in general terms. These general terms were held in *Laba v. Newark Board of Education, supra*, 23 N.J. 364, to provide sufficient standards for application. In N.J.S.A. 18A:16-2 the legislature has delegated to boards of education the power to request a teacher who shows evidence of harmful, significant deviation from normal mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to the teacher's control in the school district to submit to a psychiatric examination. As this court has construed the statute, it has delineated in as narrow terms as possible another area of unfitness which a teacher may evidence by his behavior. The legislature has, however, recognized that although a board of education may observe signs of what it considers a harmful, significant deviation, it does not have the expertise to question the teacher on the matter itself but must rely on the expertise of a psychiatrist. The grant of power to a board of education to require such an examination is viewed merely as an extension of the board's authority to require a teacher to answer questions at a hearing on general unfitness, held proper in *Laba v. Newark Board of Education, supra*, 23 N.J. 364. The legislature is concerned with protecting school children from the influence of unfit teachers. Protection of school children from teachers who have shown evidence of harmful, significant deviation from normal mental health is without question not only a valid legislative concern but one classifiable as a compelling state interest. This being so, the fact that the statute may intrude upon a teacher's rights of association, expression and privacy does not render it unconstitutional. As interpreted by this court, the statute contains sufficient standards to guide the board's action and also offers individual teachers a sufficient indication of what behavior may result in board action. \*\*\*”

(124 N.J. Super. at 212-213)

Following the rendering of Judge Lane's opinion in *Kochman v. Keansburg, supra*, on May 31, 1973, the Board took the subsequent actions, *ante*, and states now that it took care to comply with the Court's opinion. The Board asserts that it proceeded reasonably, cautiously, and prudently before it finally determined to order petitioner to undergo a psychiatric examination. (Tr. III-22, 34) The Board further states that it presented statements of hypothetical facts to psychiatrists and sought their opinions as to these hypothetical facts, merely to test its own independent judgment that petitioner's conduct was such that an examination was in order. In the Board's view, the response of the psychiatrist assisted the Board by adding some objective medical advice which did buttress the Board's lay judgment that petitioner's actions met the definition of deviation from normal mental health as defined in *Kochman*.

Since the actions of Petitioner Gish, as described in the Board's statements of reasons (R-2, R-3) are also the subject of tenure charges, the Commissioner is constrained at this juncture, from either characterizing such actions or discussing the merits of the charges which arise from such actions. The narrow consideration is simply whether the Board's action in this case should be

sustained or set aside, based upon the stated facts and the governing law. The Commissioner has carefully reviewed the arguments addressed to this precise issue and finds and determines that the Board's action directing petitioner to undergo a psychiatric examination does not, under the circumstances of this case, constitute either an abuse of discretion or a violation of petitioner's constitutional rights. The Board's judgment is one which could logically be made by reasonable and fair-minded men who have evaluated petitioner's behavior and who are concerned with petitioner's fitness to be a teacher in intimate contact with numbers of impressionable, adolescent pupils. *Kochman v. Keansburg, supra*; *N.J.S.A.* 18A:16-2 The Board's determination was made with full knowledge of the definition of the term "deviation from normal \*\*\* mental health" made by the Court, and the Board acted with careful deliberation. The Commissioner cannot agree that petitioner's actions as previously described must be considered as purely political and thus cloaked with the protection of the First Amendment.

The second issue raised by petitioner in this matter is whether petitioner's rights to due process were violated by the Board, particularly as the result of the procedures which were followed when the Board, on two occasions, gave petitioner the right to be heard.

Petitioner asserts that the Board's failure to present the two psychiatrists for cross-examination at the meetings held August 9, 1973, and August 22, 1973, impermissibly infringed upon his right to due process. Petitioner avers that the two psychiatrists were adverse witnesses because each had rendered an opinion based upon a statement of hypothetical facts. Petitioner argues that the Sixth Amendment to the U.S. Constitution, made obligatory upon the States by the Fourteenth Amendment, explicitly declares that the right of an accused to confront the witnesses against him is fundamental, citing *Dutton v. Evans*, 400 U.S. 74, 9 S. Ct. 210, 27 L. Ed. 2d 213 (1970) and *State v. King*, 59 N.J. 525, 284 A. 2d 350 (1970). Petitioner further argues that the fundamental right of procedural due process requires that in civil, as well as criminal, proceedings there must be confrontation and cross-examination of adverse witnesses, relying upon *Goldberg v. Kelly*, 297 U.S. 254, 90 S. Ct. 1011, 23 L. Ed. 2d 287 (1970). Petitioner also cites the following cases to buttress his position: *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104, 83 S. Ct. 1175, 1180-1181, 10 L. Ed. 2d 224 (1963), a case involving denial of admission to the New York State Bar; *Greene v. Mc Elroy*, 360 U.S. 474, 496-497, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377 (1959), a case involving revocation of a government contractor's employee's security clearance; *Davis v. Davis*, 103 N.J. Super. 284 (App. Div. 1968), 247 A. 2d 139, a case wherein a wife sued for child support; *Kelly v. Sterr*, 119 N.J. Super. 272 (App. Div. 1972), 291 A. 2d 148, a disciplinary proceeding against a State policeman involving suspension without pay; and *Tibbs v. Board of Education, Township of Franklin*, 114 N.J. Super. 287 (App. Div. 1971), 284 A. 2d 179, aff'd 59 N.J. 506 (1971), 284 A. 2d 179, a case involving an expulsion hearing for a high school pupil by a local board of education.

In *Goldberg v. Kelly, supra*, the United States Supreme Court determined that welfare recipients in New York City could not be terminated from the



receipt of benefits without a hearing at which they could confront and cross-examine witnesses relied on by the department of welfare. The Court cited its previous ruling in *Greene v. McElroy, supra*, that due process requires an opportunity to confront and cross-examine adverse witnesses as follows:

“\*\*\* Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment \*\*\*. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, \*\*\* but also in all types of cases where administrative \*\*\* actions were under scrutiny.” (360 U.S. 474, 496-497, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377 (1959))

The Commissioner takes this as clear law which the New Jersey Supreme Court has applied to hearings before a local board of education for the expulsion of pupils. See *Tibbs v. Board of Education of Franklin Township, supra*.

In the instant matter, there are specific circumstances which must be closely examined. In the first instance, there appears to be no substantial dispute over the relevant, material facts as regards Petitioner Gish’s actions, statements, or speeches which form the basis of the Board’s reasons. Petitioner does contest that he caused certain newspaper articles to be printed. This point is not particularly relevant at this stage of the proceedings. Petitioner does not deny the accuracy of the content of the newspaper articles, insofar as they quote or recite his statements. The Board does not dispute petitioner’s version of his conversation with the Assistant Superintendent regarding a “Gay Club,” *ante*, and, as was previously stated, the Commissioner accepts petitioner’s version of the conversation. The Commissioner can find no other dispute concerning the facts in the record before him.

Next, the Commissioner must consider the nature of the hearing which must be provided to petitioner, or any employee, as part of the necessary procedures for implementation of N.J.S.A. 18A:16-2 *et seq.* In *Kochman v. Keansburg, supra*, the Court quoted a directive dated February 2, 1972 from the Assistant Commissioner of Education to all County Superintendents which states:

“\*\*\* ‘N.J.S.A. 18A:16-2 permits a board of education to require individual psychiatric or physical examination of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical (communicable disease) or mental health.

“It is important that boards be advised, when necessary, that this statute is construed to mean that any individual of whom such an examination is required should be given the reason or reasons therefor by the board and also the right to be heard by the board before the statute is applied.’ \*\*\*”  
(124 *N.J. Super.* at 213)

In reviewing the statement, the Court stated the following:

“\*\*\* Before a teacher is ordered to submit to a psychiatric examination, he is entitled to a statement of the reasons for such examination, \*\*\* and to a hearing, if requested \*\*\*. The procedure prescribed in the directive if followed would provide adequate due process to teachers. However, the directive is precatory and not mandatory in its terms. The requirement of a statement of reasons and a hearing, if requested, is constitutionally mandated.\*\*\*”  
(124 *N.J. Super.* at 213)

Following the statement of reasons and a hearing, a teacher or other board employee has the right to appeal to the Commissioner from an order for a psychiatric examination, and thereafter to appeal from an adverse decision by the Commissioner to the State Board of Education under *N.J.S.A.* 18A:6-27.

Given these procedures, the Court stated the following:

“\*\*\* With such procedural safeguards the application of *N.J.S.A.* 18A:16-2 will not violate due process.\*\*\*” (124 *N.J. Super.* at 214)

In the Commissioner’s judgment, when reasons are provided by a local board of education and a hearing is scheduled, certain procedures must be followed. Adequate written notice of the hearing must be provided to insure the individual sufficient time to prepare his presentation. In addition to the written statement of reasons, the ideal procedure would be to have the reasons verbally explained to the employee prior to his appearance before the board. The individual is entitled to be represented by counsel or a person of his own choice before the board, and must be permitted to present witnesses on his behalf. If written statements or affidavits of witnesses are relied upon by the board in making its independent determination, the individual is entitled to receive copies of such signed statements upon request, and prior to the hearing. Such a hearing must be private because the hearing itself is actually preliminary. The appearance by the teacher is expressly to dissuade the board from requiring him/her to undergo a psychiatric examination. It is logical to assume that, once a board has furnished reasons to a teaching staff member or other employee, and upon request is giving the individual an opportunity to be heard, the board has already made a tentative determination that a psychiatric examination is necessary. But the individual could conceivably change such a determination by convincing the members of the board that they had made an incorrect judgment. Should this result, the entire matter would end at that point. For this important reason an individual is entitled to privacy and confidentiality during such a proceeding.

The Commissioner does not believe that this preliminary hearing by a local board of education should contain all of the formal panoply of a full adversary

hearing. It has been pointed out that, when an individual challenges a board's determination for a psychiatric examination on whatever grounds, by filing a formal petition of appeal with the Commissioner, the proceedings then become fully adversary with all the elements of due process. Following the filing of a Petition and Answer, a pre-hearing conference is held. The issues are defined and procedures are determined. If a fact-finding hearing is necessary, witnesses may be subpoenaed to testify and are submitted to cross-examination. The final determination of the Commissioner may be appealed by either party to the State Board of Education. *N.J.S.A. 18A:6-27*

Given the extensive adversary procedures with full due process which automatically come into play before the Commissioner, it does not appear logical to the Commissioner that the identical procedures should be necessary or even advantageous to either party at the preliminary stage of a hearing before the board. It must be borne in mind that this entire preliminary procedure is an administrative one conducted and controlled by boards of five, seven, or nine lay citizens ordinarily unfamiliar with detailed legal procedures.

The procedure whereby a teaching staff member is entitled to an appearance before a local board of education prior to certain action by such board is not unfamiliar. In the case of *Charles Coniglio v. Board of Education of the Township of Teaneck, Bergen County*, 1973 S.L.D. 449, the Commissioner reviewed numerous cases which involved the withholding of salary increments. In *Coniglio, supra*, the Commissioner pointed out his previous determination in *J. Michael Fitzpatrick v. Board of Education of the Borough of Montvale, Bergen County*, 1969 S.L.D. 4, wherein he stated the following:

“\*\*\* The Commissioner cannot support respondent's action in this case. Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous.\*\*\*” (at p. 7)

In the judgment of the Commissioner, the above holding in *Fitzpatrick, supra*, remains a reasonable requirement, even though the Commissioner's previous holding, in several cases, that local boards must adopt a salary policy in order to withhold increments, has been overturned by *Westwood Education Association v. Board of Education of Westwood Regional School District*,

Docket #A-261-73, New Jersey Superior Court, Appellate Division, decided June 21, 1974. See also *Mary C. Donaldson v. Board of Education of the City of North Wildwood, Capt May County*, 65 N.J. 236 (1974).

Assuming *arguendo* that an employee has undergone a psychiatric examination and the results are considered by the board as sufficient to make him ineligible for further service until proof of recovery, satisfactory to the board, is furnished, as required by *N.J.S.A. 18A:16-4*, the individual may appeal that board determination to the Commissioner, and again a full adversary proceeding would result. Given all of the reasons stated above, the Commissioner believes that the hearing requirements hereinbefore enumerated will provide fair play and adequate due process under *N.J.S.A. 18A:16-2*.

In the matter herein controverted, the Commissioner finds and so holds that the Board's procedures did provide adequate due process safeguards for petitioner. The Board did make its own judgment that petitioner should undergo a psychiatric examination, and although it did secure a reaction from two psychiatrists which probably reassured the Board members of the correctness of their own judgment, the Board did not wholly rely upon the psychiatrists' responses to the hypothetical statement of facts as the basis for its judgment, as the chronology of events shows. Nor are the facts upon which the Board's determination was made in dispute. Under these circumstances, there appears to be no significant defect from the fact that the psychiatrists did not testify in person nor submit to cross-examination.

The Commissioner will next consider petitioner's argument that the decision reached by the Board was unsupported by adequate evidence. Petitioner claims that the Board relied upon the conclusory individual medical statements by two psychiatrists, and that the persons making the statements were not available for cross-examination. According to petitioner, the statements do not attempt to explain in what way the political activities of petitioner demonstrate significant deviation from normal mental health, do not explain what actions in particular demonstrate such deviation, nor explain the nature of the deviation and describe the way such deviation might harm school children. Petitioner asserts that the Board presented no evidence to support its bare allegations.

As the Court pointed out in *Kochman v. Keansburg*, *supra*, the Legislature has delegated to local boards of education the authority to determine whether a teacher is fit to teach in general terms and, under *N.J.S.A. 18A:16-2*, the power to request a teacher who shows evidence of harmful significant deviation from normal mental health to submit to a psychiatric examination. The Court further stated the following, which was previously quoted, but bears repeating:

“\*\*\* The legislature has, however, recognized that although a board of education may observe signs of what it considers a harmful, significant deviation, it does not have the expertise to question the teacher on the matter itself but must rely on the expertise of a psychiatrist.\*\*\*”  
(124 N.J. Super. at 212)

At this point in petitioner's case, no psychiatric examination has been

conducted, and the Board is precisely at the point described above in the words of the Court. Given certain actions by petitioner, the Board has judged these actions as signs of what it considers a harmful, significant deviation. In *Kochman, supra*, the Court further stated that:

“\*\*\* The legislature is concerned with protecting school children from the influence of unfit teachers. Protection of school children from teachers who have shown evidence of harmful, significant deviation from normal mental health is without question not only a valid legislative concern but one classifiable as a compelling state interest.\*\*\*” (124 *N.J. Super.* at 212)

As the Commissioner has hereinbefore stated, he finds and holds that the Board’s judgment is reasonable, given all the circumstances of the instant matter.

The Board opposes petitioner’s Motion for Summary Judgment in this matter, and requests the Commissioner to proceed to a plenary hearing. The purpose of such a hearing is to determine the facts. In the Commissioner’s judgment the facts are essentially undisputed as previously stated, and therefore the Commissioner can find no necessity for a fact-finding hearing at this juncture. If the facts were in dispute, the Commissioner would immediately proceed to a full hearing in this matter, but this clearly is not the situation as disclosed by the record before him.

Accordingly, for the reasons stated, petitioner’s Motion for Summary Judgment is denied. The Commissioner orders petitioner to submit to a psychiatric examination in accordance with *N.J.S.A.* 18A:16-2, and 3, and the Board’s directive dated August 28, 1973. (R-6)

On this same date, the Commissioner has issued an Order, *In the Matter of the Tenure Hearing of John Gish, School District of the Borough of Paramus, Bergen County*, setting aside, without prejudice, the tenure charges certified to the Commissioner by the Board. That Order reinstates petitioner to his position of employment, with full back salary, pending a final determination of petitioner’s status after the psychiatric examination has been completed and the results reported to and reviewed by the Board.

COMMISSIONER OF EDUCATION

December 2, 1974

Pending before State Board of Education

**In the Matter of the Tenure Hearing of John Gish, School District  
of the Borough of Paramus, Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Complainant Board of Education, Joseph A. Rizzi, Esq.

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

Respondent is a teacher who has acquired a tenure status under the provisions of *N.J.S.A.* 18A:28-5 in the School District of the Borough of Paramus, Bergen County. The complainant Board of Education, hereinafter "Board," received certain charges of conduct unbecoming a teacher against respondent which were made by the Superintendent of Schools. The Board determined that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and thereupon certified said charges to the Commissioner of Education on September 17, 1973 by a majority vote of the full membership of the Board.

Respondent filed an Answer to the charges concurrently with a Motion for Summary Judgment.

The specific charges against respondent in this case, which describe certain actions and statements by him, are essentially identical to a statement of reasons which was submitted to Gish by the Board in letters under dates of June 7, 1973, and August 9, 1973, as grounds for requiring him to undergo a psychiatric examination pursuant to *N.J.S.A.* 18A:16-2 *et seq.*, which was ordered by the Board on August 28, 1973. Gish filed a Petition of Appeal with the Commissioner, dated September 4, 1973, which was received on September 7, 1973, alleging that the Board's action was violative of his rights under the First Amendment of the United States Constitution was unreasonably based upon insufficient evidence, and was procedurally defective in that it denied him certain due process rights. See *John Gish v. Board of Education of the Borough of Paramus, Bergen County*, 1974 S.L.D.1150 (decided December 2, 1974). A pre-hearing conference was held concurrently in both matters on January 16, 1974. In *Gish v. Paramus, supra*, Gish filed a Motion for Summary Judgment which was opposed by the Board. Gish is represented by other counsel in that matter. At the conference, it was agreed by the parties that the Motion in *Gish v. Paramus, supra*, would be heard prior to the Motion in the instant matter. Accordingly, oral argument was held April 16, 1974 in *Gish v. Paramus*, and both parties subsequently filed Briefs. Thereafter, oral argument on the Motion in this tenure case was held July 22, 1974. The entire record in this matter, including the transcript of the oral argument, is now before the Commissioner for determination.

The Commissioner's decision in *Gish v. Paramus, supra*, rendered this same date, denies his Motion for Summary Judgment and directs Gish to submit to a



psychiatric examination pursuant to *N.J.S.A. 18A:16-2 et seq.*

The Commissioner takes notice that Gish's Petition of Appeal of the Board's directive to undergo a psychiatric examination was dated September 4, 1973, and was received on September 7, 1973. Undeniably, Gish had the right to appeal to the Commissioner from the Board's directive, as was conceded in *James V. Kochman and John N. Gish, Jr., et al. v. Keansburg Board of Education and Paramus Board of Education et al.*, 124 N.J. Super. 203 (Chan. Div. 1973), which case tested the constitutionality of *N.J.S.A. 18A:16-2*. The Board's certification of its statement of reasons from *Gish v. Paramus, supra*, as formal charges in this tenure case was accomplished at a meeting held September 17, 1973, which followed Gish's appeal to the Commissioner.

Given this state of affairs, the Commissioner finds no need to reach the arguments set forth by Respondent Gish in support of his Motion for Summary Judgment in this matter, but reaches a determination on other grounds.

In the judgment of the Commissioner, at this juncture the Board may not be permitted to prosecute tenure charges against respondent which are essentially the same as its stated reasons for requiring him to undergo a psychiatric examination pursuant to *N.J.S.A. 18A:16-2 et seq.* Fair play requires that the procedure of such examination, previously directed by the Board and ordered this day by the Commissioner in *Gish v. Paramus, supra*, must take precedence and must be concluded, and the Commissioner so holds. The Commissioner takes notice that one charge against Respondent Gish, in addition to those which arise from the Board's statement of reasons, is that he failed to comply with the Board's directive of August 28, 1973 to submit to a psychiatric examination. Given Gish's right to appeal the Board's directive which he did on September 4, 1973, the Board can hardly certify his failure to comply as a tenure charge on September 17, 1973. Therefore, this charge is dismissed by the Commissioner.

Accordingly, for the reasons stated, the Commissioner determines that the remaining tenure charges herein certified by the Board against Respondent Gish are hereby set aside, without prejudice, pending the completion of the procedures of the psychiatric examination and a review of the results of such examination by the Board, in accordance with *N.J.S.A. 18A:16-2 et seq.* The Commissioner hereby orders the Board of Education of the Borough of Paramus to immediately reinstate Respondent Gish to his last held position before his suspension without pay on September 18, 1973, and to pay him all withheld salary, mitigated by any earnings by respondent during the period of such suspension, at the next regular pay period of the Board.

The Motion for Summary Judgment by respondent is denied.

COMMISSIONER OF EDUCATION

December 2, 1974



**Elizabeth Stiles and Grace Ferraioli,**

*Petitioners,*

*v.*

**Board of Education of the Borough of Ringwood, Passaic County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Saul R. Alexander, Esq.

For the Respondent, August W. Fischer, Esq.

Petitioners, both of whom enjoy a tenure status as school nurses employed by the Borough of Ringwood Board of Education, hereinafter "Board," allege that the Board illegally violated their tenure rights by setting their salaries for the 1973-74 academic year at a rate lower than that which they individually received for the 1972-73 academic year. Petitioners pray that the Board be ordered to compensate them the difference and henceforth establish their yearly salaries according to law. The Board denies the allegations set forth herein and requests dismissal of the Petition.

On January 8, 1974, petitioners moved for Summary Judgment in their favor on the pleadings, exhibits attached thereto, and their Memorandum of Law subsequently filed. Thereafter, on March 11, 1974, a conference of counsel was conducted between the parties and the representative of the Commissioner of Education duly assigned to this matter. It was agreed at that conference that no factual matters are in dispute, although two issues of law were framed. It was further agreed that by April 10, 1974, the parties would be granted leave to file affidavits and/or counter-affidavits. Furthermore, it was agreed that the parties would file respective Memoranda of Law by May 1, 1974.

On April 29, 1974, the Board filed an affidavit (R-2) of the Board Secretary with a copy of a letter (R-1) the Board Secretary had sent to the President of the Ringwood Education Association, hereinafter "Association," of which petitioners are members. On May 6, 1974, petitioners filed their Memorandum of Law. By letter dated May 22, 1974, the Board was granted an extension of time by the Commissioner's representative from May 1, 1974 to May 28, 1974 to either contact the Commissioner's office to show cause why further proceedings would be necessary in this matter or, in the alternative, to file its Memorandum of Law.

On May 24, 1974, the Board advised the Commissioner's representative that no further proceedings would be necessary in the matter, and that it would require an additional two weeks to file its answering Memorandum of Law. Subsequently, no communication having been received from the Board, the matter was referred to the Commissioner for determination on petitioners' Motion for Summary Judgment based on the pleadings, exhibits attached

thereto, their Memorandum of Law, and the Board's affidavit (R-2) and exhibit (R-1) attached thereto.

From a review of the record before him, the Commissioner observes that the issue herein is based upon (1) the application of *N.J.S.A. 18A:29-4.2*; (2) the Commissioner's interpretation of that law as set forth in *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County*, 1972 S.L.D. 577 and *Julia Ann Sipos et al. v. Board of Education of the Borough of Manville, Somerset County*, 1973 S.L.D. 434; and (3) the provisions of the Tenure Employees Hearing Law, *N.J.S.A. 18A:6-10 et seq.*

Firstly, *N.J.S.A. 18A:29-4.2* which became effective July 1, 1972 (passed by the Legislature and signed by the Governor as Assembly Bill No. 623, Chapter 64, Laws of 1972, supplementing Title 18A, Education) provides, in its entirety, as follows:

"Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

In determining the legislative intent of the above statute, the Commissioner held in *Lenahan, supra*, as follows:

"\*\*\* the Commissioner determines that the legislative intent of the Act [*N.J.S.A. 18A:29-4.2*] is as follows: a school nurse holding a standard school nurse certificate *and a bachelor's degree, or an academic degree higher than a bachelor's*, shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any other teaching staff member. A school nurse who holds a standard school nurse certificate, but who does not hold a bachelor's degree, is to be compensated according to the non-degree teachers' salary guide in effect in each respective district. If a non-degree teachers' salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor's degree. \*\*\*" (*Emphasis in text.*) (at pp. 581-582)

The Tenure Employees Hearing Law, *N.J.S.A. 18A:6-10*, provides, in pertinent part, as follows:

"No person shall be dismissed or reduced in compensation,

"(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state \*\*\*"

“except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.  
\*\*\*”

The record discloses that the Board had adopted a teachers' salary guide (P-1) for the 1972-73 school year which provided five separate salary scales: (1) Non-Degree, (2) Bachelor's Degree, (3) Bachelor's Degree plus thirty credits, (4) Master's Degree, and (5) Master's Degree plus thirty credits. Prior to July 1, 1972, the effective date of *N.J.S.A. 18A:29-4.2*, the Board Secretary, in her affidavit (R-2), stated that petitioners had been compensated according to the rates established within the non-degree salary scale. This was so because both petitioners hold the appropriate Standard School Nurse certificate, but neither petitioner possesses a bachelor's degree.

It is alleged by petitioners in the second and third count of their Appeal and admitted in the Board's Answer that, for the 1972-73 academic year and subsequent to passage of *N.J.S.A. 18A:29-4.2*, they were compensated according to the rates set forth in the bachelor's degree scale of the Board's adopted salary guide. (P-1) Accordingly, Petitioner Ferraioli was compensated according to the fifth step of that scale, or \$10,100, for the 1972-73 school year. Petitioner Stiles was compensated according to the sixth step of the bachelor's degree scale, or \$10,500, for the 1972-73 school year.

The Board Secretary states in her affidavit (R-2) that an agreement existed between the Board and the Association for the 1972-73 academic year “\*\*\* based upon the unclear status of the newly-enacted statute [*N.J.S.A. 18A:29-4.2*] that the non-degree nurses [petitioners herein] would be placed on the bachelor's degree guide but that their salary would be readjusted the following year [1973-74] if it was, in fact, determined that the law permitted a non-degree guide to be adopted.\*\*\*” (Board Secretary's Affidavit, at p. 2) In support of this position, the Board Secretary attached a copy of a letter (R-1) she had submitted to the President of the Association, dated September 14, 1972, which stated:

“The Ringwood Board of Education at its meeting in August adopted the enclosed salary guide for the 1972-73 school year with the following clause:

“The Board will place fully certificated non-degree nurses on the B.A. guide on the condition that their classification will be changed to the non-degree guide next school year, if legally permissible (sic), based upon a classification (sic) [clarification] of 1972 Laws of New Jersey Chapter 64 [now *N.J.S.A. 18A:29-4.2*]. Provisionally certificated nurses will be placed upon the non-degree guide.”

In their Memorandum of Law, petitioners reject the statement by the Board Secretary that the above-referenced clause was agreed to by the Association. (Petitioners' Memorandum of Law, at p. 1)

In any event, it is clear from the record that the Board, at a special meeting conducted during August 1973, determined that petitioners, because they did not possess bachelor's degrees, would henceforth be compensated according to their appropriate steps on the non-degree guide. Accordingly, for 1973-74 Petitioner Ferraioli was compensated at the rate set forth for the sixth step on the non-degree scale of the Board's 1973-74 salary guide (P-2), or the amount of \$8,475. Petitioner Stiles was compensated during 1973-74 at the rate of \$8,800, the amount set forth at the seventh step of the non-degree scale of the Board's salary guide. (P-2) Petitioners aver they should have been continued on the bachelor's degree scale for 1973-74 which would have provided Petitioner Ferraioli with a salary of \$11,000, the sixth step of the bachelor's degree scale, and would have provided Petitioner Stiles with a salary of \$11,450, the seventh step of the bachelor's degree scale.

Based upon this set of facts, petitioners conclude that the Board improperly and illegally violated their tenure rights, *N.J.S.A. 18A:6-10 et seq.*, by establishing their 1973-74 salaries at levels lower than those they received for 1972-73.

One of the two legal issues which was framed at the conference of counsel will now be addressed:

Has the Board violated the provisions of *N.J.S.A. 18A:29-4.2* or *N.J.S.A. 18A:28-5* (or *N.J.S.A. 18A:6-10*) regarding the establishment of petitioners' salaries for the 1973-74 school year by their placement on the non-degree salary scale, thereby effectuating a reduction in salary.

It is not disputed that Petitioner Stiles' salary of \$10,500 for the 1972-73 school year was reduced to \$8,800 for the 1973-74 school year nor is it disputed that Petitioner Ferraioli's salary of \$10,100 for the 1972-73 school year was reduced to \$8,475 for the 1973-74 school year. The Board avers in its eighth answering point that it is not now estopped from *correcting* the salaries of petitioners. The Board justifies its action on the grounds that it improperly compensated petitioners for 1972-73 through a mistake of law. The Board's action fixing petitioners' salaries for 1972-73 occurred sometime prior to September 14, 1972, which is the date of the letter (R-1) sent to the President of the Association by the Board Secretary. The interpretation of *N.J.S.A. 18A:29-4.2* by the Commissioner in *Lenahan, supra*, was issued November 15, 1972.

The Commissioner has dealt with the issue of a Board reducing a tenured employee's salary on the grounds that it previously acted under mistake of law. In *James Docherty v. Board of Education of the Borough of West Paterson, Passaic County*, 1967 *S.L.D.* 297, the Commissioner, relying upon the earlier case of *Harris v. Board of Education of Pemberton Township, Burlington County*, 1939-49 *S.L.D.* 164 (1938), reaffirmed the principle enunciated in

*Harris, supra*, which states:

“\*\*\* ‘A board of education may rescind at any meeting a resolution which it passed during the course of the meeting and, accordingly, persons do not acquire rights until the final action has been taken on such resolution prior to adjournment.’\*\*\*

‘If a teacher is under tenure, a board of education is authorized to increase her pay, but cannot reduce it except under the procedure set forth in the tenure statute \*\*\*.’\*\*\*”  
(at pp. 299-300)

In *Docherty, supra*, the Board attempted to reduce his salary several months after it granted him an increase for a master’s degree equivalency. Subsequently, the Board determined Docherty did not have a master’s degree equivalency as defined by its salary policy and attempted to reestablish his salary at the lower rate. The Commissioner held:

“\*\*\* If there had been ‘a mistake,’ it was not of his [Docherty’s] making, and he cannot, as a teacher under tenure, be deprived of a right he has acquired by the final action taken by respondent [West Paterson Board of Education] in fixing his salary [at the higher level]. \*\*\* [The] \*\*\* letter to petitioner, notifying him that his salary was reduced from \$10,000 to \$9,200, is without legal efficacy. \*\*\*”  
(at p. 300)

In *Robert Anson et al. v. Board of Education of the City of Bridgeton, Cumberland County*, 1972 S.L.D. 638, the Commissioner held that when a board establishes a teacher’s salary, it cannot at a later date reduce that amount because of a previous error. More specifically, the Commissioner stated:

“\*\*\* If there had been a mistake in the placement of petitioners on the salary guide, it was not of their making and they cannot, as teachers under tenure, be deprived of a right they had acquired by the action of the Board in fixing their salaries\*\*\*.”  
(at p. 640)

(See also *Albert DeRenzo v. Board of Education of the City of Passaic, Passaic County*, 1973 S.L.D. 236.)

In the instant matter, the Board alleges that the intent of *N.J.S.A. 18A:29-4.2* was unclear. Assuming *arguendo* that this was true, the Board could have continued petitioners on the same non-degree salary scale upon which they had been compensated in prior years. (R-1) Petitioners would have been required to carry the burden of proof that the Board’s interpretation of that statute was improper. Instead, by setting salaries for 1972-73 at the rate of \$10,100 for Petitioner Ferraioli and \$10,500 for Petitioner Stiles the Board committed itself forevermore, absent tenure charges as set forth in *N.J.S.A. 18A:6-10 et seq.*, to compensate both petitioners at salaries no less than the salaries paid them for 1972-73.

Accordingly, the Commissioner finds that petitioners’ salaries for 1973-74 were established improperly by the Board to the extent that petitioners’ salaries

for that year reflect a reduction in salary from their 1972-73 salary levels, which reduction may only be imposed pursuant to the provisions of the Tenure Employees Hearing Law.

This determination, however, does not require the Board to continue to compensate petitioners according to the provisions of its bachelor's degree scale as set forth in its salary policy, unless it so chooses. *Lenahan, supra*

The Legislature has vested boards of education with the authority to adopt salary policies for its teaching staff members. *N.J.S.A. 18A:29-4.1* Further, boards of education have the authority to recognize various training levels of its teaching staff members by adopting several salary scales within its salary policy. *N.J.S.A. 18A:29-7* In the instant matter, petitioners do not possess baccalaureate degrees and, accordingly, are not, by virtue of their training, entitled to be compensated according to the Board's bachelor's degree scale of its salary policy. (P-1, P-2) Accordingly, the Board may hold petitioners at their present respective salaries until their years of experience entitle each of them, respectively, to receive the next increment on the non-degree salary scale.

For the reasons set forth above, the Commissioner directs the Board of Education of the Borough of Ringwood to compensate Petitioner Stiles for the 1973-74 academic year in the amount no less than the difference between \$8,800 and \$10,500, and to compensate Petitioner Ferraioli for 1973-74 in the amount no less than the difference between \$8,475 and \$10,100.

COMMISSIONER OF EDUCATION

December 3, 1974

**In the Matter of the Tenure Hearing of Michael A. Pitch,  
Superintendent of Schools, Board of Education of South Bound Brook,  
Somerset County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioner, Rosenhouse, Cutler & Zuckerman (Nathan Rosenhouse, Esq., of Counsel)

For the Respondent, McCarter & English (Steven Hoskins, Esq., of Counsel)

This matter having been brought before the Commissioner of Education (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes) by Steven A. Hoskins, Esq., counsel for respondent on a Notice of Motion to Dismiss charges one and two of the three tenure charges certified by the Board of Education of the Borough of South Bound Brook, hereinafter "Board"; Nathan Rosenhouse, Esq., counsel for the Board; and

The arguments of counsel as set forth in Briefs in support of and against the aforesaid Motion having been considered; and

The testimony of witnesses at the first three days of hearings, May 22, 23 and 24, 1974, having been considered; and

The Commissioner having carefully balanced the arguments with respect to the dismissal of charges one and two of the three tenure charges certified by the Board against petitioner; and

The Commissioner having concluded that the evidence thus far presented warrants the further consideration of such testimony and evidence as may properly be set forth in respondent's defense to what appears to be a *prima facie* case; and

The Commissioner having reached the conclusion that the Motion to Dismiss is therefore premature and contrary to the necessary procedure in arriving at a justiciable decision herein; therefore

IT IS ORDERED that respondent's Motion to Dismiss charges one and two is denied; and

IT IS ORDERED that the matter proceed to final determination as expeditiously as possible.

Entered this 20th day of June, 1974.

COMMISSIONER OF EDUCATION



**In the Matter of the Tenure Hearing of Michael A. Pitch,  
School District of the Borough of South Bound Brook, Somerset County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Rosenhouse, Cutler and Zuckerman (Nathan Rosenhouse, Esq., of Counsel)

For the Respondent, McCarter and English (Steven Hoskins, Esq., of Counsel)

The South Bound Brook Board of Education, hereinafter "Board," has certified three charges pursuant to *N.J.S.A. 18A:6-10 et seq.* against respondent, its Superintendent of Schools who has acquired a tenure status in the school district.

A hearing in this matter was conducted on May 22, 23, 24, 1974, and on June 26, 27, 1974 by a hearing examiner appointed by the Commissioner of Education in the offices of the Hunterdon County Superintendent of Schools, Flemington. Memoranda were filed by counsel prior to the hearing and later with regard to respondent's Motion to Dismiss Charges One and Two. In an interlocutory decision, the Motion to Dismiss was denied by the Commissioner on the grounds that a *prima facie* case had been presented with respect to the two charges.

The report of the hearing examiner follows, and it sets forth first those facts which are undisputed herein.

Respondent was employed by the Board as a teacher-principal on August 1, 1968, and was appointed Superintendent of Schools on August 28, 1969. He continued in that position until he was suspended without pay by resolution of the Board which authorized the certification of two charges. This resolution was dated December 12, 1973. A third charge against respondent was certified by the Board on February 13, 1974. Respondent denies each charge and any wrongdoing connected therewith.

Respondent graduated from Seton Hall University with a Bachelor's Degree in June 1956. Thereafter, until 1960, he pursued postgraduate courses in elementary education at Seton Hall to qualify for a teaching certificate. During the period 1960 through 1963 he completed the required academic studies at New Jersey State Teachers College (now Kean College) at Newark and was awarded the degree of Master of Arts in Education. From June 1963 through June 1969 respondent completed additional academic study and acquired nine credits in public school administration and supervision at the same institution.

The three charges are herewith set forth, *seriatim*, together with the respective positions of the parties, the summary of pertinent testimony and

documentary evidence, and the findings of the hearing examiner with respect to each charge.

#### CHARGE NO. 1

“\*\*\* The Board of Education of South Bound Brook hereby charges Michael A. Pitch, Superintendent of Schools, with unbecoming conduct pursuant to N.J.R.S. 18A:6-10, in that he misrepresented his credentials and academic credits for salary purposes\*\*\*”

The Board maintains that respondent represented, at the time of his employment as Superintendent, that he possessed a Master's Degree plus thirty graduate credits and that his salary for the 1970-71 school year and the subsequent years was based upon that representation. In support thereof the Board cites its minutes of April 8, 1970 which contain a resolution to

“\*\*\* offer a contract to Michael A. Pitch, Superintendent of Schools, for the 1970-71 school year at a salary of \$18,125.00 based on a 1.45 ratio of the 14th step plus Masters Degree plus thirty credits \*\*\*.” (P-3)

A similar resolution was adopted on April 7, 1971, which offered a contract to respondent for the 1971-72 school year

“\*\*\* at a salary of \$21,000.00 upon presentation of an official transcript showing a Master's degree plus thirty (30) credits above a Master's degree in Educational Courses \*\*\*.” (P-4)

The Board minutes of October 22, 1973 indicate that:

“\*\*\* President Weisbecker requested Michael A. Pitch, Superintendent, to conform to previous requests by this Board, to turn over proof of his Academic records to justify the basis for his salary level at a Master's Degree plus thirty graduate credits above a Master's Degree in Educational Courses. Mr. Pitch gave all members of the Board copies of some records under a cover letter dated October 19, 1973.

“\*\*\* President Weisbecker stated the records turned over by Mr. Pitch were not official as they were only copies and did not contain the seal of the College or University represented.\*\*\*” (P-8)

Additionally, the Board sets forth a letter dated November 13, 1973 from the Registrar of Seton Hall which states:

“\*\*\* This is to verify that the courses taken by Michael A. Pitch as Post Graduate work were on the Undergraduate level.” (P-24)

The Board contends that respondent at no time furnished it the official transcripts which had been requested on numerous occasions and that in salary determinations and other matters it was misled by respondent's misrepresentation of his academic credentials. The Board further states that only at the

request of respondent himself could such credentials be procured and evaluated by the Board, and that from 1969 until 1973 respondent had failed to comply with its requests for official transcripts.

Respondent contends that he holds a Master's Degree plus thirty additional credits from Newark State College which were taken as postgraduate credits in education following the awarding of his Bachelor of Science Degree in Business Administration by Seton Hall University. He maintains that he therefore held sufficient credits to justify a placement on the Board's salary guide which requires no corollary conditions other than meeting the MA + 30 requirement. He further alleges that the Board has no other conditions or limitations which apply other than that which appears in the salary guide itself. Respondent argues that the thirty postgraduate credits in education, *ante*, qualify him for placement on the MA + 30 guide within the interpretation of the Commissioner in *Robert J. Cusack v. Board of Education of the Borough of West Paterson, Passaic County*, 1970 S.L.D. 144. Therein it was said:

“\*\*\* There is nothing in the statute [N.J.S.A. 18A:29-6] to support respondent's contention that the required 30 hours of additional graduate work, in the definition of 'Six years of training' must be completed during a span of time *after* the master's degree has been formally awarded.\*\*\*”  
(*Emphasis in text.*) (at p. 147)

Respondent argues that only in the 1970-71 year was his salary fixed applying a ratio to the fourteenth step of the MA + 30 guide and that in all other years his salary as Superintendent was a fixed figure resulting from negotiations.

The hearing examiner believes that *Cusack, supra*, is not dispositive of Charge No. 1. It is clearly distinguishable from the instant matter in that, in *Cusack*, petitioner had what were clearly recognizable graduate level credits which the Commissioner correctly determined were applicable to the sixth year salary guide although they were taken prior to the award of the Master's Degree. Herein, the dispute centers about whether courses bearing course numbers below one hundred and classified by the University itself as undergraduate level courses and completed prior to the award of the Master's Degree were misrepresented by respondent to the Board. The charge is solely that respondent “misrepresented his credentials and academic credits for salary purposes.” Nor does the hearing examiner believe that the other cases cited in respondent's Brief are controlling in the instant matter. He recommends that the Commissioner so determine.

The hearing examiner finds that respondent was on several occasions from 1969 through 1973 requested by members of the Board and by the Board Secretary to supply transcripts of his credits to the Board. (Tr. II-26, 135, 137, 149) (Tr. IV-101) Respondent testified that prior to the 1971-72 school year, when his salary was made conditional upon presenting a transcript, he had placed in the Board Secretary's mailbox a photocopy of his transcript. The Board Secretary denies having ever received a copy of the transcript. (Tr. IV-101).

In any event, the hearing examiner finds that a photocopy of a transcript

without the seal of the institution and held by respondent would not be a proper official transcript to furnish an employer. Respondent testified that he first made request to the college to send the Board an official transcript following the October 19, 1973 meeting of the Board when the Board rejected as unofficial the photocopies of transcripts that he presented at that meeting. (Tr. V-4-8) The hearing examiner finds no mitigating circumstances occasioning a delay of four years in complying with the Board's reasonable request. However, there is no evidence that the photocopies, *ante*, were in any way tampered with or falsified.

The hearing examiner finds that respondent at various times informed the Board and others that he possessed a Master's Degree plus thirty graduate credits. (Tr. II-18, 26, 46, 48, 131, 139, 157) (P-5) When questioned at the hearing as to his understanding of the meaning of a Master's Degree plus thirty graduate credits, respondent stated:

“\*\*\* a Master's plus 30 \*\*\* meant to me that you had a Master's degree, and any courses above a Bachelor's could be attached to your plus 30.\*\*\*”  
(Tr. IV-92)

When asked what was meant by graduate credits, respondent said:

“\*\*\* Postgraduate. Any credits—any credits that are obtained after graduation.\*\*\*”  
(Tr. V-55)

Asked whether such an interpretation had been adopted by others, respondent replied:

“\*\*\* I don't think so. I don't know of anyone who has that—any district who has that. \*\*\*”  
(Tr. V-72)

Testimony of a former teacher-negotiator of the Robert Morris Education Association was that in negotiation sessions for the 1970-71 school year, all of which were attended by respondent,

“\*\*\* it was understood that the credits referred to in the guides must be graduate credits. \*\*\*”  
(Tr. II-98)

An interim negotiation proposal (P-12) lends credence to this testimony in that one column of the proposal bears the heading “M.A. + 30 Grad. Credits.” The teacher-negotiator stated:

“\*\*\* For some reason, that I fail to understand now, the word ‘graduate’ does not appear in any agreement, and I think that was merely an oversight \*\*\* but I know that when we reported back to the Association \*\*\* we worked on the assumption that they would be graduate level courses.\*\*\*”  
(Tr. II-111-112)

This testimony was corroborated by that of another teacher-negotiator. (Tr. II-115-116, 118)

The hearing examiner concludes that the Board and the Association were not careful to spell out in the adopted salary schedule or in the Board's policy statements the precise meaning of MA + 30. (P-2) The hearing examiner finds, however, that it was the intent of the Board and the negotiators of the Robert Morris Education Association that MA + 30 should be interpreted to mean a Master's Degree plus thirty graduate level credits. It is further found that respondent knew, or should have known, that this understanding existed since he was present at all negotiating sessions.

It is without question that the Board relied upon respondent's representation of his academic credentials when it established his 1970-71 salary by applying a ratio to the fourteenth level of the MA + 30 guide. Although in future years such a ratio was not used to determine salary, it is clear that the Board also predicated its salary agreements in latter years upon such an understanding in that it required in its minutes authorizing respondent's 1971-72 salary the presentation of an official transcript. (P-4) It is further clear that the Board relied upon respondent's representation of his academic credentials in evaluating his fitness for the position of Superintendent.

The hearing examiner finds that as of the date of the certification of charges respondent possessed a Master's Degree, plus nine graduate level credits, and thirty undergraduate level credits which were taken for teacher certification purposes as postgraduate courses prior to the time respondent began work on his Master's Degree.

The hearing examiner knows of no alchemy which can transform thirty undergraduate level credits into graduate credits. Nor does he find any merit in respondent's contention that all postgraduate courses are graduate courses.

In view of the above findings and conclusions the hearing examiner determines that respondent did misrepresent to the Board his academic credentials and did further obfuscate the matter by an untimely delay of four years in furnishing the Board with an often-requested official transcript of his academic credits. In no sense, however, is the above finding to be interpreted to mean that respondent was not properly certificated for the work he performed for the Board.

Respondent sought to invoke the doctrine of laches at the hearing. However, the hearing examiner finds that any delay in the Board's determination of its present position with regard to respondent's placement on the salary guide was occasioned by respondent's inordinate delay of four years in providing the Board with an official transcript of his academic credits. Accordingly, the hearing examiner recommends that for this reason alone the Commissioner find the doctrine of laches to be inapplicable.

In summary, for the reasons stated, *ante*, the hearing examiner finds that Charge No. 1 is proven to be true in fact.

#### CHARGE NO. 2

\*\*\*\* The Board of Education of South Bound Brook hereby charges

Michael A. Pitch, Superintendent of Schools, with unbecoming conduct pursuant to *N.J.R.S.* 18A:6-10, in that he misused his office telephone so as to expend considerable money and time, properly used to conduct school business and educational affairs, on personal business \*\*\*”

The Board states that respondent was on several occasions instructed that the school telephone was not to be used for personal calls by anyone and that he disregarded in an insubordinate manner the Board’s instructions.

Respondent contends that it was not until the summer of 1973 that he was directed to stop making personal calls and that he did comply then with the Board’s request. He further argues that such a charge is one of inefficiency and that the charge should be dismissed for failure to comply with the ninety-day notice required by *N.J.S.A.* 18A:6-12. Respondent moved to dismiss Charge No. 2 for this reason at the hearing. (Tr. I-23) He further argues that such acts as alleged, if true, would be insufficient to support dismissal of a tenured employee.

Audit reports of the Board’s accounts for the 1971-72 and 1972-73 school years show an over-expenditure in each of these years in excess of \$1,000 for telephone and telegraph charges. (P-17) (P-18) The Board sought to curb this over-expenditure by having the Superintendent instruct the faculty not to use the telephone for personal calls. (Tr. IV-63) With respect to the Board’s instructions respondent testified as follows:

“\*\*\* [D]id you understand that the board’s directions were to apply to, number one, yourself specifically?

“No, the board never, at that time, discussed my calls.\*\*\*” (Tr. IV-64)

Respondent did, however, discuss the matter at a faculty meeting in May 1973. In this regard he testified as follows:

“\*\*\* Q. You ended up that speech, which went on and on about the use of the telephone by the staff and the question of emergencies and this being a Board order and we have to hold down on the telephone expense, and that goes for me too. You did say that, didn’t you?

“A. Yes, I did.

“Q. That goes for me too?

“A. Yes.\*\*\*” (Tr. V-129)

\*\*\*

“Q. \*\*\* you didn’t practice what you preached, did you?

“A. Well, I think as Head Administrator, I have to try to say things at times that are going to motivate people to adhere to them a little closer.\*\*\*” (Tr. V-131)

\*\*\*

“Q. Wasn’t that insincere?

“A. Somebody has to do these things occasionally. (Tr. V-132)

\*\*\*

“Q. What is the effect on morale when, after you make a statement like that \*\*\* you are found out\*\*\*.”

“A. \*\*\* I think most people and most teachers in general would not feel upset if the Superintendent or the Principal of the school used the phone for personal reasons. \*\*\* I don’t think we would have a morale problem.\*\*\*” (Tr. V-133)

When the Board’s analysis of telephone usage disclosed continued extensive usage of certain numbers, the Board directed respondent in October 1973 to curtail his personal calls on the school telephone. The Board President testified that thereafter a marked decrease was noted in the frequency of calls to certain telephone exchange numbers. (Tr. I-170)

The hearing examiner concludes from an analysis of the extensive documentary evidence and oral testimony that during the seven-month period from June through December 1973, the maximum amount of charges for the controverted calls that could be attributable to respondent was approximately \$78.00. (Tr. III-52)

Certain of these charges could well have been and probably were incurred by other persons using the school telephone. However, respondent admits to having made many of the calls. Some were made to respondent’s mother. Others were placed to the office of the Northwest Sector of New Jersey March of Dimes office by respondent who held a volunteer office as chairman of that organization. Some calls were placed to respondent’s personal attorney. Still others, including a number of lengthy calls, were made to or received from a close female friend of respondent. The total time expended in such telephone conversations in the period June-December 1973 was tabulated by the Board Secretary at approximately forty hours (Tr. III-135) and was based on data submitted by the New Jersey Bell Telephone Company. (P-20-22) The greater number of the calls were made during hours when school was in session.

While the controverted calls were probably not all made or received by respondent, nor all totally unrelated to school business, nor of great significance in terms of total charges or total time consumed, they must be viewed within the context of the previous directives of the Board to respondent. Likewise, they should be viewed within the restrictions which respondent placed upon himself by his own words at the faculty meeting, *ante*.

The hearing examiner, after consideration of the documentation and testimony herein, finds that with the exception of the telephone calls to the



March of Dimes office, wherein respondent was performing a valuable civic service that is often expected of school administrators, Charge No. 2 is substantially proven to be true in fact. With respect to this charge, respondent neither followed the Board's directives nor the restrictions which he imposed upon himself, until directly confronted with evidence by the Board.

The hearing examiner does not agree that respondent's disregard for the Board's directives may properly be termed inefficiency. Therefore, he recommends that the Commissioner deny respondent's Motion to Dismiss Charge No. 2.

In summary, Charge No. 2 is found by the hearing examiner to be substantially true in fact.

### CHARGE NO. 3

“\*\*\* The Board of Education of South Bound Brook hereby charges Michael A. Pitch, Superintendent of Schools, with unbecoming conduct pursuant to N.J.R.S. 18A:6-10, in that on or about April 19, 1973, he threatened \*\*\* [B.P.], a non-tenure teacher, with reprisals in the event she exercised her right to make a grievance under the agreement between the Board of Education of South Bound Brook and the Robert Morris Education Association, Inc.\*\*\*.”

Respondent categorically denies this charge, and asserts that even if it were true it would not constitute such professional misconduct as to justify the dismissal of a Superintendent of Schools.

B.P. was a pre-kindergarten teacher for the Board during the 1972-73 school year. She was not offered reemployment for the 1973-74 school year, whereupon she initiated a grievance pursuant to the negotiated agreement between the Board and the Education Association. This grievance resulted in an arbitration award. (P-1) This award resulted in a concurrence by the Board and B.P. It specified that she was to be allowed to resign and that the Board would make fair and equitable recommendation to prospective employers. Additionally, the award specified that the Board would afford her opportunity to make application and be considered for future employment by the Board without prejudice.

B.P. testified at the hearing that in March of 1973 at a meeting with the Superintendent he had answered her query as to whether she would be employed as a Title I teacher in 1973-74 by saying that:

“\*\*\* He was working on it. It wasn't a guarantee, but irregardless I would be teaching somewhere in the System for the coming year \*\*\*.” (Tr. I-45)

Another teacher, R.M., who was present at this meeting corroborated this testimony. (Tr. I-30)

However, in April 1973, the Board, which acted upon the recommenda-

tion of its school administrators, notified B.P. that her contract would not be renewed for 1973-74. This occasioned the grievance filed by B.P., *ante*, and the protests of numerous parents.

R.M. testified regarding the Superintendent's statement to him regarding the protests and the grievance, *ante*, as follows:

“\*\*\* Mr. Pitch told me at that time that I should tell my friends \*\*\* that they ought to lay off of this appeal \*\*\* because if they pushed it any further, that he would personally see that they would be blackballed in Education and never work in the State of New Jersey again.\*\*\*” (Tr. I-31)

There were no others present who heard this alleged threat made.

B.P. testified that respondent, at the time he notified her of the Board's decision not to rehire her, said:

“\*\*\* [I]t's unfortunate things like this have to happen, but they do, and if you are a good girl about the whole thing, I will give you the highest recommendation possible; but, if you are not, I will see that you \*\*\* won't be able to get a job in the State.\*\*\*” (Tr. I-48)

It is this alleged statement that constitutes the threat referred to in the Board's Charge No. 3. No other person testified at the hearing regarding this alleged threat, but B.S., a parent of a child in B.P.'s class, testified that she and three other women had been at a meeting with respondent to protest B.P.'s non-reemployment when he stated that:

“\*\*\* [H]e would give her a very good recommendation if we would not pursue this [petition], \*\*\* but otherwise he would not give her a good recommendation and it would be very hard for her to find a job.\*\*\*” (Tr. I-84-85)

and

“\*\*\* [T]hen he made a comment like, anything that he might have said that we might repeat, he would deny, \*\*\* and I don't see how he could deny anything he said in front of four women.\*\*\*” (Tr. I-86)

She further testified that at a number of meetings of parents and certain teachers, in a private home, B.P. and R.M. had related the information in the statements herein previously quoted. (Tr. I-82, 87-88)

It was further revealed at the hearing that, at a public meeting of the Board in June 1973, B.P. and R.M. and certain members of the public spoke in protest regarding the manner in which the question of B.P.'s reemployment was handled. However, B.P. testified that she had not advised the Board at that time or at any time prior to the arbitration proceeding of respondent's alleged threat to her, *ante*. (Tr. I-69, 71) She further testified that R.M. had not informed the

Board at that meeting that respondent had made the threat to “blackball” her, *ante.* (Tr. I-72) This testimony was corroborated by the parent, B.S. (Tr. I-82)

The Board President testified that such alleged threats as are herein controverted were not made known by B.P. or R.M. to the Board while in session or to members of the Board privately prior to the arbitration proceeding in January 1974. (Tr. I-112-113)

Respondent denies having promised B.P. employment or having made such threats, *ante.* (Tr. IV-44) He states that his remarks, one of which was made in jest, to B.P., R.M., and the four women, *ante.*, were misconstrued. (Tr. IV-8, 42, 44, 176, 177, 178) In this regard he testified as follows:

\*\*\*

“Q. Did you specifically say that you were going to give B.P. a bad recommendation?

“A. No, I never did say that.

“Q. Well, did you say you might give her a bad recommendation if the parents pursued whatever course of action they felt it necessary to pursue?

“A. No, I didn’t use this. I wasn’t threatening, I didn’t use it in a threatening kind of sense. I think I said it would be difficult for me to recommend, write a recommendation, if this evolved into a big thing.\*\*\*”  
(Tr. IV-44)

The hearing examiner has carefully weighed the extensive testimony concerning the alleged threats. The weight of the evidence lends to the logical conclusion that an improper statement which could easily be construed as a threat was made by respondent in at least one instance. (Tr. I-84-85) The exact words of the statement are not known, but the clear meaning of the statement is sufficiently corroborated by the witnesses who testified regarding Charge No. 3 to convince the hearing examiner of its impropriety. However, the hearing examiner, having observed the demeanor of respondent and his testimony at the hearing regarding this charge (Tr. IV-44, 175, 176, 178), is unable to conclude that it was respondent’s intent to threaten B.P. with reprisal in the event that she filed a grievance or made the matter an issue before the Board. Nor is there evidence that he did act in reprisal against her.

In any event, respondent’s unpropitious words were such as to appear to others as a thinly-veiled threat. The hearing examiner recommends to the Commissioner that he find them improper. The hearing examiner leaves to the Commissioner to determine whether such a limited finding as that set forth herein with respect to Charge No. 3 represents unbecoming conduct by respondent.

Having found Charges Nos. 1 and 2 to be true in fact and recognizing the limited finding in respect to Charge No. 3, the hearing examiner leaves to the

Commissioner to determine whether the thrust of such findings is indicative of unbecoming conduct as alleged by the Board, and what penalty, if any, may properly be ordered herein.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and has considered the objections, exceptions and replies to the report which have been proffered by respective counsel. At this juncture, the Commissioner rejects respondent's Motion to Dismiss Charges Nos. 1 and 2 and determines, instead, that he accepts the findings of the hearing examiner with respect to these two charges and holds them for his own.

The Commissioner concludes that respondent, as the Board's highest administrative officer, knew or should have known that the salary criterion "Master's plus 30 credits" required that the specified credits were to be only graduate credits in the commonly understood meaning of the term. A contention to the contrary strains credulity since there had been professional discussion of the subject (Tr. II-98, 111-112), and those who have acquired master's degrees are commonly aware of the designations which colleges have employed for decades with respect to the graduate level of academic work. The Commissioner determines that respondent's assertion in this regard was a misrepresentation of fact which cannot be condoned and may be characterized as conduct unbecoming a school administrator, or any other teaching staff member.

The Commissioner further concludes, with respect to Charge No. 2, that respondent's own testimony is sufficient proof of the truth of the charge. He had been instructed by the Board to insure that the school's telephones were not misused. He had specifically instructed the faculty in this regard. (Tr. V-129) In admitted, but self-excused insincerity he had neglected to apply the standards he expected of others to himself. (Tr. V-132) Such evidence, the Commissioner holds, may also be characterized as unbecoming conduct.

Thus, the Commissioner concludes that respondent has, with respect to two of the charges proffered against him, been guilty of conduct unbecoming a school administrator. However, the Commissioner also concludes that the limited finding with respect to Charge No. 3 provides no firm basis for a similar conclusion and, accordingly, this charge is dismissed.

It remains, then, to determine what penalty, if any, should be assessed against respondent for the conduct exhibited herein. In this regard the Commissioner determines that dismissal is warranted. The citizens of this State, and of respondent's community, are entitled to expect a high order of professional conduct from those employees to whom young children, pupils of immature years, are entrusted. See *In the Matter of the Tenure Hearing of Thomas Williams, School District of Pascack Valley Regional High School District, Bergen County*, 1974 S.L.D. 820.

The Commissioner has frequently spoken of the import of personal example that is incumbent upon all New Jersey public school teachers and is constrained to repeat his previous statement *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County*, 1972 S.L.D. 302 wherein he said:

“\*\*\* [T]eachers are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.\*\*\*” (at p. 321)

Similarly, it was said *In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County*, 1974 S.L.D. 97 that:

“\*\*\* Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully \*\*\* violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.\*\*\*” (at pp. 98-99)

And, as the State Board of Education said in *George R. Good v. Board of Education of the Township of Union, Union County*, 1938 S.L.D. 354 (1935):

“[The board of education] may reasonably require of one holding the important position of principal of its high school conduct in conformity with commonly accepted ethical standards. He is, in a measure, a guide and pattern for the adolescent boys and girls under his charge. He should teach by example as well as by precept. The inculcation of those qualities and attributes which we call ‘character’ is a responsibility of our schools.” (1938 S.L.D. at p. 359)

The Commissioner holds that the development of “character” is no less essential now than it was in 1935, and that such development is impaired, if not rendered impossible, when those entrusted with great responsibility are guilty of such abuse as demonstrated herein.

Accordingly, the Commissioner determines that dismissal of respondent is warranted. Such dismissal is therefore ordered retroactive to the date of

respondent's suspension by the Board.

COMMISSIONER OF EDUCATION

December 10, 1974

Pending before State Board of Education

**Long Branch Education Association, Inc.,**

*Petitioners,*

*v.*

**Board of Education of the City of Long Branch, Monmouth County,**

*Respondent.*

COMMISSIONER OF EDUCATION

DECISION ON MOTION

For the Petitioners, Chamlin and Schottland (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Giordano, Halleran & McOmber (Richard D. McOmber, Esq., of Counsel)

Petitioners are a group of teaching staff members incorporated as the Long Branch Education Association, Inc., hereinafter "Association," who allege that the Board of Education of the City of Long Branch, hereinafter "Board," improperly and illegally violated a policy concerning supervision of pupils in lunchrooms and on playgrounds, which policy was included in an agreement reached between the parties as the result of negotiations. Specifically, petitioners allege that a memorandum, Management Directive No. 1, 1972-73, issued to teaching staff members by the Superintendent at the direction of the Board, constitutes a breach of contract for which petitioners are entitled to remuneration for additional required duties of pupil supervision.

This matter is before the Commissioner as the result of a judgment rendered by Judge Lane, Superior Court of New Jersey, Chancery Division, on April 2, 1973, advising the Commissioner that the Court requests the determination of the dispute by him as promptly as conveniently possible.

Originally, this matter was opened to the Court by the Board upon Verified Complaint and Order to Show Cause seeking, *inter alia*, an Order enjoining the Association from violating the provisions of the Board's Management Directive No. 1, 1972-73. The Association filed a Counterclaim and Notice of Motion seeking, *inter alia*, an Order dissolving the Temporary Restraining Order previously entered by the Court, and an Order compelling the Board to rescind Management Directive No. 1, 1972-73.

The judgment rendered by the Court dismissed the Association's Counterclaim for failure to exhaust administrative remedies and for lack of jurisdiction by the Court. The Court retained jurisdiction over the Complaint solely for the purpose of maintaining the *status quo*, pending the appeal to the Commissioner as ordered by the Court. The Court continued the restraint against violation of Management Directive No. 1, 1972-73, so long as it remains in force or until the Commissioner has reached a determination concerning the dispute.

Thereafter, the instant matter was submitted to the Commissioner on the same pleadings which had been presented to the Court.

The Association now files a Motion to Dismiss on the grounds that the Commissioner lacks jurisdiction to decide this controversy. Oral argument on the Motion was presented on May 22, 1973 before an authorized representative of the Commissioner at the State Department of Education, Trenton. Both parties subsequently filed Memoranda of Law supplementing their original Briefs.

The record in the instant matter, including the pleadings, Briefs and arguments of the parties, has been carefully reviewed by the Commissioner.

Petitioners' argument, simply stated, is that the issue in this case is solely a question involving breach of contract and if petitioners prevail, the consequent payment to them of money damages by the Board.

The Board argues that the matter of supervision of public school pupils, whether in school lunchrooms, on school playgrounds, or in the classroom, and the Board's policies for such supervision, are particularly items concerning the health, safety and welfare of the pupils entrusted to the Board's charge. The Board avers that Management Directive No. 1, 1972-73, was issued to the teaching staff members of the elementary schools because increased pupil disciplinary problems had resulted from previous plans for pupil supervision. In the Board's view, it merely redefined supervision policy, in that supervision of pupils would be direct, and not indirect. The Board suggests that its action setting the original supervision policy may have been *ultra vires*, by virtue of not providing proper supervision for the health and safety of the pupils.

In the judgment of the Commissioner, the matter controverted herein is not simply a question of breach of contract between the parties. One of the vital duties placed upon each local board of education is the safeguarding of the health, safety and welfare of the pupils enrolled in the public schools under its control. The importance of this duty is equal in weight to the Board's responsibility to provide the best possible instructional program for each pupil. Both of these duties and responsibilities are basic to any board's total plan to provide a thorough and efficient system of public education.

The Commissioner agrees with the determination reached by the Court in its judgment rendered April 2, 1973, regarding his jurisdiction in the instant matter.



Accordingly, petitioners' Motion to Dismiss is hereby denied. Both parties will indicate whether they desire a plenary hearing, in order that this matter may reach a final determination as expeditiously as possible.

COMMISSIONER OF EDUCATION

November 7, 1973

**Long Branch Education Association, Inc.,**

*Petitioner,*

*v.*

**Board of Education of the City of Long Branch, Monmouth County,**

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Chamlin & Schottland (Michael D. Schottland, Esq., of Counsel)

For the Respondent, Giordano, Halleran & McOmber (Richard D. McOmber, Esq., of Counsel)

Petitioner, the Long Branch Education Association, hereinafter "Association," avers that the Board of Education of the City of Long Branch, hereinafter "Board," has improperly and illegally altered a policy agreement with respect to lunchroom supervision. The Association demands judgment to this effect and the award of extra compensation which it alleges is due. The Board denies any action of impropriety or illegality.

A hearing in this matter was conducted on February 13, 1974 at the office of the Monmouth County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

This matter comes before the Commissioner as the result of an Order from the Superior Court, Chancery Division, Judge Merritt Lane, Jr., J.S.C., presiding. The Order was dated April 2, 1973. In effect the Order is a dismissal of the complaints then before the Court, and now before the Commissioner, "\*\*\*for failure of the defendants [the Association] to exhaust their administrative remedies and for lack of jurisdiction\*\*\*." Subsequent to the Order of the Court, the Association and the Board submitted the instant matter to the Commissioner on the same pleadings which had been presented to the Court. However, the Association also filed a Motion to Dismiss before the Commissioner on the grounds that the Commissioner lacked jurisdiction. On November 7, 1973, the

Motion was denied by the Commissioner in a written decision and the plenary hearing followed on February 13, 1974. Therefore, at this juncture the record is complete before the Commissioner. It comprises the record of the plenary hearing, legal memoranda, and a set of facts which are not in contention. They are recited as follows:

Fact A. The agreement between the Association and the Board for the 1970-71 school year (P-2) provided in Article XVIII:

**“ARTICLE XVIII DUTY FREE LUNCH**

“A. Every elementary school teacher shall have a thirty (30) minute duty-free lunch period during each working day.

“B. In addition to the minimum duty-free lunch period prescribed in Paragraph A above, the Board shall employ lay personnel as teachers’ aides in each elementary school to supervise the pupils during their lunch period in both the in-school dining areas and the playground, in order to permit elementary school teachers to have a one hour duty-free lunch period during some working days.

“C. The employment of teachers’ aides as provided for in Paragraph B above, while designed to provide more duty-free lunch time to elementary school teachers, *shall be subject to the direct supervision of said teachers’ aides* by the elementary school teachers in each elementary school. Each elementary school teacher shall be assigned on a rotation basis to directly supervise the teachers’ aides during the pupils’ lunch period at no additional compensation. The Board agrees that in no case shall the ratio of teachers’ aides to supervising teachers be less than two to one in any elementary school and that where, in the Board’s opinion, conditions permit, a greater ratio of teachers’ aides to supervising teachers may be utilized.

“D. All the provisions of this Article are limited in their application solely to the elementary schools in the Long Branch School District.”  
(*Emphasis added.*)

Fact B. The agreement between the Association and the Board for the 1971-73 school years (P-3) provided in Article XVIII:

**“ARTICLE XVIII ELEMENTARY SCHOOL WORKING CONDITIONS**

“A. Every elementary school teacher shall have a duty-free lunch period during each working day equal in length of time to the lunch period allotted to the students. *Provided, however*, that in no event shall the lunch period of any elementary school teacher be less than thirty (30) minutes in length.

“B. In addition to the minimum duty-free lunch period prescribed in Paragraph A above, the Board shall employ lay personnel as teachers’ aides in each elementary school to supervise the pupils during their lunch period

in both the in-school dining areas and the playground, in order to permit elementary school teachers to have a one hour duty-free lunch period during some working days.

“C. The employment of teachers’ aides as provided for in Paragraph B above, while designed to provide more duty-free lunch time to elementary school teachers, shall be subject to the supervision of said teachers’ aides by the elementary school teachers in each elementary school. Each elementary school teacher shall be assigned on a rotation basis to supervise the teachers’ aides during the pupils’ lunch period at no additional compensation. The Board agrees that in no case shall the ratio of teachers’ aides to supervising teachers be less than two-to-one in any elementary school, and that where, in the Board’s opinion, conditions permit, a greater ratio of teachers’ aides to supervising teachers may be utilized.\*\*\*”  
(*Emphasis in text.*)

Fact C. “\*\*\* [P]rior to the 1971-72 school year, elementary teachers on a rotating basis were required to be physically present on the playgrounds and lunchrooms to supervise children.\*\*\*” (Tr. 5)

Fact D. “\*\*\* During the 1971-72 school year teachers’ aides were introduced and the policy was changed. Teachers were not required to be physically present in the lunchroom or playgrounds but rather were required only to be physically present in their buildings on a rotating duty basis; the same was true of inclement weather duty.\*\*\*” (Tr. 6)

Fact E. “\*\*\* In 1972-73 school year, the policy was again changed so that teachers were required, on a rotating basis, to be physically present in the lunchrooms and on the playgrounds and during inclement weather to be in their own rooms.\*\*\*” (Tr. 6)

Fact F. Such policy change during school year 1972-73 was caused by a decision of the Board to change from a two-sitting, two-hour lunchroom schedule to a one-sitting, one-hour schedule (R-2), and by a Management Directive written by the Superintendent of Schools. (P-1) This Directive said in pertinent part:

“1. Commencing with the school year 1972-73, the lunch period for all elementary schools will be one hour, from 12:00 noon to 1:00 P.M.

“This period of one hour shall be divided in half and the school population of each school shall be divided into three groups, namely, groups A, B, and C. \*\*\*

“2. The Board of Education shall employ lay personnel as teachers’ aides in each elementary school to supervise the pupils during their lunch periods in both the in-school dining areas and the playgrounds.\*\*\*

“3. Every elementary school teacher shall have a duty-free lunch period

of thirty (30) minutes every day of the school week.

“Each elementary school teacher shall be assigned on a rotation basis to supervise students as well as teachers’ aides in either the lunch room or the playground during the remaining thirty (30) minutes.

“Teachers shall be so assigned by the building principal according to the guidelines that the ratio of teachers’ aides to supervising teachers be no less than two-to-one in any elementary school. \*\*\*\*”

Fact G. The amount of salary compensation paid to regular teaching staff members for that part of their work days devoted to either direct or indirect supervision of pupils at the lunch hour during school years 1970-71, 1971-72, and 1972-73 was the “\*\*\*\*salary according to the salary guide.\*\*\*\*” (Tr. 51)

Fact H. The dispute, *sub judice*, is confined to the facts, *ante*, with respect to the 1972-73 school year.

This completes the recital of pertinent facts.

Such facts stand, in the Association’s view, as evidence that the Board improperly and illegally breached and abrogated the agreement provision contained in P-3 with respect to supervision of pupils at the noon hour when it required direct rather than indirect supervision of pupils during the 1972-73 school year. The Association avers that the word “direct” before the word “supervision” in the 1970-71 agreement (P-2) was descriptive of the kind of supervision that it was then agreed would be provided in school year 1970-71 but that the word was deleted from the 1971-73 agreement. (P-3) Therefore, the Association argues, the indirect supervision required by the Board in school year 1971-72 was equally appropriate as a requirement in school year 1972-73 and, conversely, a return in 1972-73 by Management Directive (P-1) to the direct pupil supervision of 1970-71 was a breach of the agreement (P-3) between the Association and the Board. Accordingly, the Association avers it is entitled to seek extra compensation at this juncture for those services its members performed which were beyond those required. The claim for such compensation is \$25,340 (calculated at 7,240 teacher units of work at \$3.50 per hour).

The Board maintains that its noon supervision program of 1971-72 was a trial program which did not succeed. It was testified there were more pupils who participated in the hot lunch program that year because of increased federal aid, and there was a resultant rise in the evidence of disruptive behavior. (Tr. 104, 132, 147) Further, the Board avers that the two-period lunch had resulted in less effective use of the cafeteria for classes in music and physical education and that a return to a one-period lunch was of benefit in this regard. (Tr. 105) Additionally, the Board maintains that its requirement for supervision in 1972-73 was commensurate with the agreement it had made with the Association. (P-3) In the Board’s view “\*\*\*\*the word ‘supervision’ means ‘that amount of supervision that the Board of Education deems appropriate to protect the health, welfare and safety of the pupils during the various luncheon

periods.'\*\*\*" (Board's Memorandum of Law before Superior Court, Chancery Division, at p. 5)

The issue in the instant matter may be ascertained from a review of the recited facts, *ante*, and the summary of the arguments of the parties. This issue, for the Commissioner's determination, is whether or not the Board's requirement for direct, on-site supervision of pupils and aides by regularly-employed teaching staff members during the 1972-73 school year was legal or illegal pursuant to its agreement (P-3) and its statutory obligations. If such requirement is ruled to be *ultra vires*, a determination must be made with respect to the Association's claim of an additional salary entitlement.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, the report of the hearing examiner, and the exception thereto filed by petitioner in accordance with *N.J.A.C.* 6:24-1.16.

Petitioner's single exception is that the issue of whether or not the Board's action was legal is not paramount. Instead, petitioner maintains that it is entitled to additional compensation if it is shown that there was, in fact, a change in working conditions for teaching staff members, whether or not the Board had the legal authority to invoke such change.

This controversy must be viewed within the framework of existing school law and sound educational policy.

The organic law of this State mandates the legislative "\*\*\* maintenance and support of a thorough and efficient system of free public schools. \*\*\*." *Art. VIII, sec. IV, par. 1*, New Jersey Constitution. In fulfillment of this requirement the Legislature has provided, *inter alia*, *N.J.S.A.* 18A:10-1 which reads as follows:

"The schools of each school district shall be conducted, by and under the supervision of a board of education, which shall be a body corporate and which shall be constituted and governed, as provided by this title, for a type I, type II or regional school district, as the case may be."

More specifically, *N.J.S.A.* 18A:11-1 provides, in part, that:

"The board shall \*\*\*

"c. Make, amend and repeat rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its

employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes<sup>1</sup>; and

“d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.”

<sup>1</sup>Section 11: 1-1 *et seq.*

The authority of local boards of education to make rules governing the employment of teaching staff members is set forth in *N.J.S.A. 18A:27-4* which reads as follows:

“Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.”

Each local board of education must negotiate terms and conditions of employment with its employees, including teaching staff members. *N.J.S.A. 34:13A-1 et seq.* The lack of clarity and specific definition of the phrase “terms and conditions of employment” has resulted in a process of gradual resolution of the problem on a case by case basis through recourse to the courts of this State. See *Board of Education of the City of Englewood v. Englewood Teachers Association*, 64 *N.J.* 1 (1973); *Burlington County College Faculty Association v. Board of Trustees, Burlington County College*, 64 *N.J.* 10 (1973); *Dunellen Board of Education et al. v. Dunellen Education Association et al.*, 64 *N.J.* 17 (1973); *Westwood Education Association v. Board of Education of the Westwood Regional School District*, Docket A-261-73, Superior Court of New Jersey, Appellate Division, decided June 21, 1974; *Richard Chabak and Plainfield Education Association v. Board of Education of the City of Plainfield and Carl L. Marburger, Commissioner of Education*, Docket A-1505-72, Superior Court of New Jersey, Appellate Division, decided July 29, 1974; *Board of Education of Township of Hillside v. Hillside Education Association*, Docket A-2144-72, Superior Court of New Jersey, Appellate Division, decided July 29, 1974; *Long Beach Island Board of Education v. Long Beach Island Teachers Association et al.*, Docket A-1609-71, Superior Court of New Jersey, Appellate Division, decided July 29, 1974; *Board of Education of the Township of Teaneck v. Teaneck Teachers' Association*, Docket A-910-72, Superior Court of New Jersey, Appellate Division, decided October 9, 1974.

In the matter herein controverted, the Commissioner must first determine whether the Board's action initiating the Management Directive (P-1), regarding pupil supervision for the 1972-73 academic year, was an abuse of its discretion

and an improper application of its policy for such supervision. The facts reported as the result of stipulation and plenary hearing are adopted by the Commissioner in their entirety. A concise review of several paramount facts is in order.

During the 1971-72 academic year the Board's elementary schools, for grades kindergarten through six, had a two-hour lunch period, with the exception of the North Long Branch Elementary School. During this time, elementary school teaching staff members were required to be on duty on a rotating basis, for both playground and lunchroom supervision. The difference between this supervision as compared to prior years was that the teachers on duty remained in a designated place within the schoolhouse while teacher aides actually remained with the children. The teacher aides were under the direct supervision of teachers who were on duty and were required to report problems directly to the teachers. During the years prior to 1970-71, with no teacher aides, the teachers performed the direct supervision of the children. Under both arrangements, the elementary teaching staff members had the same thirty minute, duty-free lunch period, and the same thirty minute duty period on a rotating basis. It was the physical location of the teacher which was changed in the 1972-73 procedure as compared to the 1971-72 plan. One teacher assigned to the Lenna Conrow Elementary School testified that she had this duty at a frequency of one school day out of seven. (Tr. 17) At elementary schools with either smaller or larger numbers of teaching staff members, the frequency of such duty would vary accordingly.

The record discloses that this arrangement was less than satisfactory for several important reasons. The two-hour block of time scheduled for pupil lunch periods, utilizing the multi-purpose rooms at the various elementary schools, had the effect of limiting the availability of these facilities for the teaching of music, physical education, and other instructional activities. A teaching staff member who was president of the Association testified that teachers initiated conferences with the Superintendent and other administrators during the spring months of 1971-72 in order to bring the problem to the attention of the school administrators and endeavor to find appropriate solutions. It was the considered judgment of the teachers that the two-hour lunch period was detracting from the effective use of the multi-purpose rooms for instructional activities. (Tr. 59-60)

The Assistant Superintendent testified that during the 1970-71 academic year the eight elementary schools within the District had a very limited school lunch program, with some pupils bringing bag lunches to school and many going home for lunch. At that time, these elementary schools had no cafeteria equipment with which to conduct a hot lunch program. During 1970-71, the School District received a seventy-five percent grant from the Non-Food Equipment Program of the National School Lunch Program, which enabled the purchase of equipment necessary for the serving of Type A hot lunches to elementary school pupils. (Tr. 95-96)

The hot lunch program was gradually implemented in the eight elementary schools between October and December 1971. According to the Assistant Superintendent, the number of pupils who remained at school for lunch greatly



increased during the 1971-72 academic year, as a result of the institution of the hot lunch program. He testified that the percentage of participating pupils reached well over ninety percent in some of the elementary schools. Many pupils qualified for and received free lunches. (Tr. 100) Because of the newness of the hot lunch program, he testified, the two-hour block of time was utilized. (Tr. 101) The Assistant Superintendent testified that the problem of availability of the multi-purpose rooms was called to his attention by teachers and principals. (Tr. 105) He also testified that the principals of the various elementary schools reported to him that greater numbers of more serious pupil discipline incidents were occurring during the lunch and playground time periods as the result of the great increase in the number of pupils remaining at school for the hot lunch program. (Tr. 103-104)

The minutes of the regular meeting of the Board held August 16, 1972 (R-2), disclose that the Board formally changed the elementary school lunch program from a two-hour schedule to a one-hour schedule, between 12:00 noon and 1:00 p.m.

The Assistant Superintendent testified that, when the elementary teaching staff members directly supervised pupils, the principals of the various schools reported a decline in the number of problems emanating from playground activities and the lunch program. (Tr. 111) Testimony of several elementary school principals and a letter from the principal of the Broadway Elementary School to the former Superintendent, dated January 22, 1973, attached to the Board's pleadings (Exhibit A), corroborate the testimony of the Assistant Superintendent. One teacher from the Lenna Conrow Elementary School testified that she had no problems reported to her by teacher aides while she was on duty during the 1971-72 academic year. (Tr. 28-29)

In the judgment of the Commissioner, the instructions in the Board's Management Directive (P-1) did not constitute an improper application of the Board's pupil supervision policy. The Board, and through it the Superintendent, acted within its discretion in requiring more immediate supervision by teachers of these elementary school children during playground activities, inclement weather, and in the school cafeterias during the lunch period, when the teachers were on duty for these necessary school activities. The Commissioner so holds.

The Board's Management Directive (P-1) must be examined in light of sound educational practices which have evolved from the long experience of public school administration and supervision.

In this State, parents are required to send their children to school. *N.J.S.A. 18A:38-25* The courts of this State and the United States Supreme Court have upheld the principle that compulsory education in New Jersey is a matter of public concern and legislative regulation, and that it should be enforced so long as statutory requirements are reasonable, subject to constitutional limitations. See *Everson v. Board of Education of Ewing Township*, 133 N.J.L. 350 (*E. & A.* 1945), affirmed 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed 711 (1947), rehearing denied 330 U.S. 855, 67 S.Ct. 962, 91 L.Ed. 1297.

As the systems of public schools evolved in this and other States, increasing concern for the physical development, as well as academic achievement, of pupils led to the development of programs of planned play activities for younger pupils and organized formal physical training curricula, and intramural and interscholastic athletics for pupils in secondary grades. Later, at a time when physical education was firmly established as a necessary and salutary part of the program of studies, learning experiences, and activities of the schools, increased attention was focused upon the nutritional needs of children as a vital component of proper physical growth and development and sound health. Historically, public schools had taught principles of hygiene and effective nutrition, but a recognition of the inadequate diets, accompanying physical defects and health problems of large numbers of children from lower socioeconomic backgrounds, prompted teachers, school administrators, local boards of education, supported by parents and authorities in the health sciences, to raise the call for a more direct role for the schools in the remediation of the problem. From this grew the concept of school milk and school lunch problems, financed in large part by federally collected moneys and administered by state departments of education through local boards of education. These programs have grown to a point where both breakfast programs, as well as hot lunch programs, are now widespread. Their effectiveness is attested to by the great numbers of pupil participants who receive nourishing balanced meals every full day that schools are in session.

Such programs do present problems of pupil supervision. Whenever large numbers of pupils, particularly of the ages found in grades one through eight, are grouped in school cafeterias and on playgrounds, the possibility of incidents of disciplinary problems and accidents greatly increases. The fact that supervision of school children during such critical time periods has historically been the responsibility of teachers did not arise either by accident or default. A long history of the teaching and supervising of children in public schools has proven that the teacher, with his/her training, experience and knowledge of children, is the best and most effective person to control such situations. This is the reason why teachers have been relied upon, since the virtual inception of the common school as it was originally known, as the persons best able and most suitable to protect the health, safety and welfare of the tens of thousands of school age children whom parents have entrusted to the care of the public schools. The soundness of this decision and the excellence of the performance by teachers of this duty is clearly attested to by the minimal number of serious consequences which may be marked over a long period of years that teachers have expertly performed this function.

In the instant matter, the teachers have consistently had the duty of pupil supervision, and the change was one of form only.

The second issue, whether the aggrieved teaching staff members are entitled to additional compensation because of the change in the nature of their required supervision must be answered in the negative. The teachers were already required to perform a given amount of pupil supervision, and any change in the form of such supervision cannot be claimed as the basis of an entitlement for additional moneys.

The Commissioner is constrained to comment that teachers are engaged in a professional employment. Their salaries and hours of employment are fixed with due regard to their professional status and are not fixed upon the same basis as day laborers. The worth of a teacher is not now and never has been measured in terms of a specific sum of money per hour. A teacher expects to and does perform a service. As one of the most dominant and influential forces in the lives of the children who are compelled to attend public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job, it is a calling. That the total responsibilities of a teacher encompass on occasion duties which may be viewed as less than dynamic or creative is not denied by those who know the institution and processes of education, but such a complaint does not rise to the level of a legal right.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

December 10, 1974

Pending before State Board of Education

**Woodbridge Township Federation of Teachers Local No. 822, AFL-CIO**

*Petitioner,*

*v.*

**Board of Education of the Township of Woodbridge, Middlesex County,**

*Respondent.*

**Woodbridge Township School Administrators' Association,**

*Petitioner,*

*v.*

**Board of Education of the Township of Woodbridge, Middlesex County,**

*Respondent.*

## **COMMISSIONER OF EDUCATION**

### **DECISION**

For the Petitioners, Sauer, Boyle, Dwyer and Canellis (George W. Canellis, Esq., of Counsel), Woodbridge Township Federation of Teachers, Local No. 822, AFL-CIO; Schneider, Solomon & Aronson (Earl S. Aronson, Esq., of Counsel), Woodbridge Township School Administrators' Association

For the Respondent, Hutt & Berkow (Stewart M. Hutt, Esq., of Counsel)

In this combined case, petitioners, the Woodbridge Township Federation of Teachers, hereinafter "Teachers' Federation," and the Woodbridge Township School Administrators' Association, hereinafter "Administrators' Association," allege that the Board of Education of the Township of Woodbridge ("Board") acted illegally and improperly in adopting a resolution on April 18, 1973, which altered the Board's policy on leave of absence for personal illness, which policy had previously been negotiated with both petitioners, and extending the revision of such policy retroactively to the 1955-56 school year. Petitioners pray for relief in the form of an order of the Commissioner of Education declaring that the resolution of the Board adopted April 18, 1973, is null and void and of no effect, directing the reinstatement of the policy on leave of absence for personal illness as was in effect prior to the adoption of the April 18, 1973 resolution, and granting counsel fees and costs of this action.

The Board answers that the policy regarding leave of absence for personal illness, as negotiated and adopted, was *ultra vires*; the Board is required by operable law, as enunciated by the Commissioner, to alter such policy to comply with the law; and the policy on leave of absence for personal illness adopted by the Board on April 18, 1973, is consistent with the law and is subject to determination solely by the Board and not between the Board and petitioners.

At a conference of the parties held June 7, 1973, it was agreed that these cases would be consolidated and, absent any issue of relevant, material fact,

would be submitted for Summary Judgment by the Commissioner on the pleadings and Briefs.

The facts are these.

The Board, following negotiations, adopted certain policies regarding leave of absence for personal illness for teaching staff members. These policies were to be in effect for the period beginning July 1, 1972 through June 30, 1974. If unchanged, these policies would remain in force beyond the ending date of June 30, 1974, which is the expiration date of the Board's agreement with the Teachers' Federation. The policy in question reads as follows:

"3. Leave without pay deduction, for personal illness in any one school year shall be granted in accordance with the following schedules.

"a. 10 days for personnel with less than 5 years continuous employment.

"b. 25 days for personnel with more than 5 years continuous employment.

"Unused sick leave days in any school year may be used in subsequent years for additional sick leave without pay deduction. The number of accumulated sick days is unlimited, but not more than fifteen days per year may be accumulated.

"Teachers whose accumulative sick leave has been used will be paid the difference between their regular pay and that which is paid to a substitute for each day of absence in excess of the accumulative sick leave to a maximum of twenty (20) school days per school year.

"4. A physician's certificate must be filed following an absence of five or more successive days because of personal illness. In the event that a pattern of absence leads an administrator to believe that there has been an abuse of the sick leave policy, the administrative complaint procedure shall be invoked." (Exhibit PT-1)

It is conceded that the above-quoted policy applies to all members of the Administrators' Association. (Exhibit PT-1)

The Board adopted a resolution (Exhibit R-1) on April 18, 1973, which modified its policy on leave of absence for personal illness. The adoption of this resolution is the root cause of the instant controversy. The resolution in question reads in its entirety as follows:

"WHEREAS, the Woodbridge Township Board of Education's sick leave policies for regularly employed personnel have not been in conformity with Title 18A:30-1 et seq., and the principles enunciated in the case of Anne Ida King v. the Board of Education of the Borough of Woodcliff Lake by the New Jersey Commissioner of Education, and

“WHEREAS, the intent of the Board is to establish for all regularly employed personnel an equal and consistent sick leave policy within the limitations of such statutes, and

“WHEREAS, each bargaining unit recognized by this Board of Education has been notified of the need for such revisions,

“NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Township of Woodbridge that the Board Secretary and other appropriate school officials are hereby authorized and directed to rectify board personnel sick leave records from 1955 to the present in accordance with statutory limitations, and the following guidelines:

- “1. Each person steadily employed by the Board with less than five years’ continuous service is to be allowed one day of accumulative sick leave per month of active employment in each year.
- “2. Each person steadily employed by the Board with more than five years’ continuous service is to be allowed fifteen days accumulative sick leave per year.
- “3. If any such person requires in any school year less than the above specified number of days of sick leave, all days of such sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years except that no person shall be allowed to increase his total accumulation by more than fifteen days in any one year.

“BE IT FURTHER RESOLVED that the Board Secretary notify the District’s employees as soon as practicable as to the correct number of accumulated sick leave days, if any, same are entitled to.” (Exhibit R-1)

The Board states that the negotiated policy on leave of absence for personal illness (Exhibit PT-1) and the method of administration of said policy was illegal and therefore had to be modified. The Board reached this conclusion following its analysis of the decision issued by the Commissioner in the case of *Anne Ida King v. Board of Education of the Borough of Woodcliff Lake, Bergen County*, 1972 S.L.D. 449. In *King*, the Commissioner examined the policy regarding leave of absence for personal illness adopted by the local board of education and held that the policy was violative of the letter and spirit of the statutory provisions which provide authority for such a benefit.

In the instant matter, the Administrators’ Association argues that the Commissioner’s decision in *King*, *supra*, can be distinguished because of a substantial factual difference between the policy found *ultra vires* in *King* and the policy controverted herein. The Teachers’ Federation, however, takes the position that the Commissioner’s determination of the *King* case was incorrect, based upon a misinterpretation of the applicable school laws, *N.J.S.A. 18A:30-1 et seq.*, and therefore the Board erred in relying upon the *King* decision as a

justification for its unilateral modification of the negotiated policy (Exhibit PT-1) on leave of absence for personal illness.

A review of the pertinent statutes is in order.

*N.J.S.A.* 18A:30-2 provides the following minimum sick leave protection:

“All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law \*\*\* shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.”

*N.J.S.A.* 18A:30-3 requires the accumulation of unused sick leave as follows:

“If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.”

*N.J.S.A.* 18A:30-4 bestows the right upon local boards of education to require proof of illness to obtain sick leave as follows:

“In case of sick leave claimed, a board of education may require a physician’s certificate to be filed with the secretary of the board of education in order to obtain sick leave.”

If absence for sickness is prolonged and exceeds both the minimum annual sick leave required by *N.J.S.A.* 18A:30-2 and any unused sick leave days accumulated as required by *N.J.S.A.* 18A:30-3, then the provisions of *N.J.S.A.* 18A:30-6 provide the following:

“When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day’s salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case.\*\*\*”

The Legislature has also made provision for the granting of sick leave above the annual minimum of ten days specified by *N.J.S.A.* 18A:30-2 either by blanket rule or by individual consideration. This authority is granted to local boards of education by *N.J.S.A.* 18A:30-7, which states that:

“Nothing in this chapter shall effect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and



above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.” (Emphasis ours.)

These statutory provisions are *in pari materia*, and it is axiomatic that such enactments are to be construed together “as a unitary and harmonious whole, in order that each may be fully effective.” *Clifton v. Passaic County Board of Taxation*, 28 N.J. 411, 421 (1958) Accord, *Brewer v. Porch*, 53 N.J. 167, 174 (1969); *Porcelli et al. v. Titus et al.*, 108 N.J. Super. 301, 309 (App. Div. 1969).

In this case, the negotiated policy (Exhibit PT-1), subsequently adopted by the Board, provides that each teaching staff member with less than five years of continuous employment would receive ten days of sick leave with full pay in each school year, and those teaching staff members with more than five years of continuous employment would receive twenty-five days of sick leave with full pay each school year. In *King v. Woodcliff Lake Board of Education*, *supra*, the Commissioner reviewed a policy on leave of absence for personal illness which made a somewhat similar differentiation between those teaching staff members with a tenure status as compared to those without a tenure status. The Commissioner held that a policy which bestows a sick leave benefit only upon teachers with a tenure status is improper. *King, supra*, at page 454 The Commissioner’s determination of this point was based upon a review of the legislative history of the applicable statutes. The review of this legislative history bears repeating for the purposes of this case.

The original enactment of P.L. 1942, c. 142 granted certain provisions of sick leave to “\*\*\* teachers, principals and supervising principals \*\*\*.” The title of this act was changed by P.L. 1952, c. 237 to provide sick leave benefits for “\*\*\* teachers, principals, assistant superintendents and superintendents \*\*\*.” A general revision of this law was accomplished by the enactment of P.L. 1954, c. 188, which extended the scope of these sick leave benefits to “\*\*\* certain persons in the public schools of this State.” The statement attached to this legislation enunciated two purposes of this bill, the second being “\*\*\* to extend the coverage of the law to include all persons steadily employed by boards of education.” The language of the specific 1954 statute, N.J.S.A. 18:13-23.8 (now 18A:30-2) clearly provides that the act applies to “all persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law\*\*\*.”

Further amendments and additions were made to this basic act by P.L. 1956, c. 58, permitting the granting of sick leave above the minimum of ten days; P.L. 1958, c. 150, allowing additional sick leave days above the minimum of ten to accumulate, but limiting the annual accumulation of such unused days to fifteen; P.L. 1959, c. 175, providing for leave with pay for injury arising out, and in the course, of the performance of duties, for up to one calendar year; P.L. 1960, c. 53, protecting the accumulated sick leave of employees who continue employment after a regional school district is created; P.L. 1960, c. 54,

providing similar protection for employees of public schools which consolidate; *P.L.* 1961, *c.* 34, permitting local school boards to hire teachers with accumulated sick leave from other school districts within the same county and transfer such leave; and *P.L.* 1967, *c.* 177, broadening the transfer of accumulated sick days for new employees from any other school district within the State.

The Commissioner's conclusion was stated in *King, supra*, as follows:

“\*\*\* Thus the thirty-year history of this legislation discloses a consistent legislative purpose to broaden the scope of beneficiaries, and no instance of restrictive language to permit any limitation of the designated beneficiaries at the discretion of local boards of education. Therefore, the Commissioner finds no authority in the controlling statutes of *N.J.S.A.* 18A:30-1 *et seq.* to permit such a limitation. Sick leave provisions adopted by a local board of education pursuant to the statutes, *ante*, must apply to all persons as defined by *N.J.S.A.* 18A:30-2\*\*\*.” (1972 *S.L.D.* at 455)

This logical conclusion is equally applicable to the sick leave policy adopted by the Board (Exhibit PT-1), following negotiations, in the instant matter. The clear intention of the statutes, *ante*, is that “\*\*\* all persons holding office, position or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure \*\*\*” shall receive identical uniform benefits. Local boards of education do not possess the discretion to negotiate and subsequently adopt sick leave policies which limit benefits to a class of employees, or employees within a class, whether based upon seniority or whatever distinction. The above definition and the legislative history disclose the clear intention that a policy providing sick leave benefits adopted by a local board of education must apply uniformly to all employees.

The single distinction which must be observed arises from the interpretation of the words “all persons \*\*\* who are steadily employed \*\*\* or who are protected by tenure.”\*\*\*” In previous instances, the Commissioner has held that a teaching staff member could acquire a tenure status in a part-time position. See *Josephine De Simone v. Board of Education of Borough of Fairview, Bergen County*, 1966 *S.L.D.* 43. Tenure in a part-time position does not entitle a teaching staff member to rights to a full-time position; thus a tenure status in a part-time position is sharply differentiated from tenure in a full-time position. Those who do acquire a tenure status in a part-time position are steadily employed. The term steadily employed is construed to mean regular, continuous employment for the entire school year, for less hours daily or for fewer days per week than would be required for full-time employment. For example, a teacher of art in an elementary school might be steadily employed for two days per week for the entire academic year, or a music teacher might be steadily employed on a half-day basis for the entire academic year. Such steady employment is contrasted with employment which is occasional or for a brief duration of days or weeks. Under these circumstances the steadily employed teacher would be entitled to a prorated benefit as a principle of equity. A teaching staff member employed for half days for the entire academic year is

entitled to one half the benefit received by those steadily employed on a full-time basis. This principle applies to all those persons as defined by *N.J.S.A. 18A:30-2*.

In the case of *Mabel Marriott v. Board of Education of the Township of Hamilton, Mercer County*, 1949-50 *S.L.D.* 57, the Commissioner pointed out that a teacher was entitled to the annual sick leave benefit of ten days beginning on the very first day of the academic year. Circumstances resulted in the teacher being ill for the first ten days of the year; therefore, she was entitled to those days with full pay, even though she had not taught one single day. This is so because illness is neither a respecter of individuals nor of time of year. The protection afforded must be inclusive from the first day of duty to the last. Given this logical reasoning, it follows that the annual benefit of such leave may not be diminished merely because a teaching staff member or other steadily employed person begins employment at some later date than the beginning of the academic year or school year. If one employee finds it necessary to utilize all sick leave benefits at the onset of the year, the employee who begins in the middle of the year, or at any time within the year, may also need such protection later during the year. For this reason the annual sick leave benefit may not be prorated based upon the initial date of employment. The Commissioner observes that the Legislature did not include any language in *N.J.S.A. 18A:30-2* which could support a conclusion that the minimum benefit of ten school days with full pay as sick leave in any school year is to be prorated on the basis of the beginning employment date. Therefore, policies adopted by local boards of education may not include such limiting provisions.

The Commissioner observes that the modified sick leave policy unilaterally adopted by the Board (Exhibit R-1) makes a distinction between persons employed by the Board for less than five years and for more than five years, as did the original policy. (Exhibit PT-1) On this basis alone the Commissioner holds that both policies are improper.

The second policy (Exhibit R-1) also violates the provisions of *N.J.S.A. 18A:30-2* that all persons steadily employed shall be allowed such leave with full pay for ten school days in any school year. The policy provides in sub-section 1 that those with less than five years of service are to be allowed one day of sick leave per month of active employment. Thus, a beginning employee who experienced serious illness for the first ten days of service would receive one day of sick leave with pay. Thus, the policy is clearly violative of *N.J.S.A. 18A:30-2* which provides ten days of sick leave per year. If a beginning employee had only the minimum provision of ten days per year of sick leave and used none, he would be entitled to those unused ten days plus the ten days for the second year of employment, and this combined twenty days could be used, if necessary, beginning with the first day of the second year of service. These examples show that sub-section 1 of the Board's revised policy (Exhibit R-1) is contrary to the statute, *N.J.S.A. 18A:30-2*.

The Commissioner is constrained to clarify the differences between the terms accumulative and non-accumulative sick leave. As was stated in *King, supra*, the statutes, previously cited, permit a local board of education to

increase the annual sick leave days for employees above the minimum of ten provided by *N.J.S.A.* 18A:30-2. But the statute, *N.J.S.A.* 18A:30-7, clearly prohibits the accumulation of more than fifteen unused sick leave days in any one year. In *King*, the example was used that if local boards of education increased the annual allowable sick leave for all employees from ten to twenty days, and many employees did not use *any* of these twenty days, only fifteen days could be accumulated from that one school year for use in a subsequent school year. The pertinent language of *N.J.S.A.* 18A:30-7 bears repeating as follows:

“Nothing in this chapter shall affect the right of the board of education \*\*\* to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.”

It may be seen from the above wording that a local board of education may fix and determine the number of days which may accumulate between eleven days of sick leave which is one more than the minimum of ten permitted to accumulate by *N.J.S.A.* 18A:30-3, up to the maximum of fifteen specified by *N.J.S.A.* 18A:30-7.

The Commissioner pointed out in *King, supra*, that uniformly acquired, accumulative sick leave must be utilized first, before any additional annual sick leave days above the total of fifteen are used. This determination is based upon the principle that a statute may not be construed to permit its purpose to be defeated by evasion. *Grogan v. de Sapio*, 11 *N.J.* 308, 322 (1953) If local boards of education were to grant, for example, thirty days of sick leave annually, and employees used fifteen which may not be accumulated, then the remaining fifteen could be accumulated. By such arrangements the intendment of both *N.J.S.A.* 18A:30-6, 7 would be evaded by a board policy. The purpose of the statute, *N.J.S.A.* 18A:30-7, is to prevent an improvident policy from being adopted while still protecting the personal interest of the employee who assiduously accumulates the maximum possible sick leave days from year to year. The policy held to be *ultra vires* in *King* made both statutes, *N.J.S.A.* 18A:30-6, 7 meaningless, by permitting a total of seventy-five sick days per year.

The aforementioned statute, *N.J.S.A.* 18A:30-6, permits a local board of education to grant additional sick leave, less substitute's pay, when an employee has used all accumulated sick leave and annual sick leave as the result of illness in any one school year. *Hutchenson v. Board of Education of Totowa, Passaic County*, 1971 *S.L.D.* 512

In the instant matter, the Board's second sick leave policy (Exhibit R-1) was based upon the erroneous assumption that only fifteen days of sick leave could be granted for a school year. The Commissioner does not agree for the reasons hereinbefore stated. A local board of education may grant sick leave in excess of fifteen days on a uniform basis to all employees; however, in the Commissioner's judgment, the accumulated days, including the annual number permitted to accumulate between eleven and fifteen, must be used before the

excess number, which cannot accumulate, may be used. Thus, an additional benefit would be available for prolonged illness, without violating the spirit and intent of the statutes. A benefit in this form also obviates the creation of the undesirable situation whereby employees would each year be granted sick leave which could not accumulate, but which could be used without diminishing the maximum of fifteen which may accumulate.

Having reviewed the facts and the applicable law, the Commissioner finds and determines, for the reasons stated, that the negotiated policy on leave of absence for personal illness (Exhibit PT-1), and the modified policy (Exhibit R-1) are *ultra vires* and are accordingly set aside.

The Board is hereby directed to immediately initiate negotiations with representatives of the various recognized groups of employees to the end that a uniformly applicable sick leave policy be adopted by the Board prior to the close of the current school year. This is required because sick leave is a customary fringe benefit obviously considered in the legislative mind as a term and condition of employment. See *Board of Education of the City of Englewood v. Englewood Teachers Association*, 64 N.J. 1, 7 (1973); N.J.S.A. 34:13A-5.3.

The parties participant in this case are well aware of the great administrative difficulties to be encountered by efforts to retroactively correct the effects of these two improper sick leave policies. In many respects such a re-reckoning would be enormously difficult if not impossible. Accordingly, the Commissioner directs that accumulated sick leave for each employee shall be calculated as it was at the time the Board adopted the second policy (Exhibit R-1) on April 18, 1973. The policy which is adopted as the result of this decision shall be applied retroactively from July 1, 1973 to determine the sick leave days accumulated by each employee for this 1974-75 school year.

COMMISSIONER OF EDUCATION

December 13, 1974

**Shirley A. Martinsek,**

*Petitioner,*

*v.*

**Board of Education of the Eastern Camden Regional School District,  
Camden County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Hartman, Schlesinger, Schlosser & Faxon (Alfred A. Faxon, III, Esq., of Counsel)

For the Respondent, Hyland, Davis & Reberkenny (William C. Davis, Esq., of Counsel)

Petitioner, a school nurse employed by the Board of Education of the Eastern Camden Regional School District, hereinafter "Board," alleges that the Board has discriminated against her and has illegally established her salary for the 1973-74 school year. The Board denies the allegations by petitioner and contends that it established petitioner's salary for the 1973-74 school year in a lawful manner and according to the provisions of its adopted salary guide.

A hearing in this matter was conducted on May 2, 1974 at the office of the Camden County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

Petitioner has been employed by the Board as a school nurse for nine years and enjoys a tenure status. Although she does not possess a bachelor's degree, petitioner does hold a standard school nurse certificate issued by the New Jersey State Board of Examiners. *N.J.S.A.* 18A:6-38, *N.J.A.C.* 6:11-12.8

Since at least the school year 1968-69 through and including the school year 1971-72, the Board had adopted written yearly salary guides (J-7) for its teaching staff members. Each guide contained six individual salary scales which recognized various levels of academic achievement in the following manner: the first scale was for those teachers with a bachelor's degree; the second scale was for those who had a bachelor's degree plus fifteen credits; the third salary scale was for those with a bachelor's degree plus thirty credits; the fourth scale was for those who attained a master's degree; the fifth scale was for those who had a master's degree plus fifteen credits; and the sixth scale was for those who held a master's degree plus thirty credits. During this same period of time, the Superintendent testified that petitioner's salary was fixed by the Board through an unwritten policy which provided that her salary would be \$600 less than it would be had she held a bachelor's degree. (Tr. 27) The Superintendent also testified that petitioner enjoyed the same yearly salary increases as received by



all other professional employees who were compensated according to the rates set forth in the Board's yearly salary guides. (J-7) (Tr. 28) Thus, the effect on petitioner's salary was that her yearly compensation was always \$600 less than it would have been had she had a bachelor's degree or higher educational achievement.

It is clear from the record, by virtue of signed employment agreements between petitioner and the Board and her own testimony (Tr. 24-25), that petitioner fully understood and accepted the manner in which the Board fixed her salary for the 1968-69 (J-1), 1969-70 (J-2), 1970-71 (J-3), and 1971-72 (J-4) school years.

When the Board adopted its 1972-73 salary guide, subsequent to negotiations with the Eastern Camden Regional Education Association, hereinafter "Association," the Board's informal policy in regard to payment of school nurses who did not possess a degree was set forth in writing as follows:

\*\*\*

"Non-degree school nurses shall be paid \$600 less than the amount shown at the appropriate level on the BA Column." (J-7)

Petitioner asserts, however, that the Association, of which she is a member, agreed to the inclusion of that written policy under protest and subject to a determination of its legality. (Tr. 19) The Board, however, denies this assertion and contends that it negotiated the 1972-73 salary guide (J-7) in good faith. (Tr. 52-53) In any case, that policy had been made part of the salary guide for the school years 1972-73 and 1973-74 (J-7) and is part of the salary guide already adopted by the Board for 1974-75 and 1975-76. (R-1; R-2)

Petitioner claims that by virtue of *N.J.S.A. 18A:29-4.2*, the application of that statute by the Commissioner in *Evelyn Lenahan v. Board of Education of the Lakeland Regional High School District, Passaic County*, 1972 *S.L.D.* 577, and prior Board action regarding the establishment of salary for three other non-degree teaching staff members, she rightfully should be compensated by the Board according to the precise amount set forth on the bachelor's degree scale of its 1973-74 salary guide (J-7) without a \$600 reduction.

*N.J.S.A. 18A:29-4.2* provides in its entirety, as follows:

"Any teaching staff member employed as a school nurse and holding a standard school nurse certificate shall be paid according to the provisions of the teachers' salary guide in effect in that school district including the full use of the same experience steps and training levels that apply to teachers."

In *Lenahan, supra*, the Commissioner reasoned:

\*\*\*\*the Commissioner determines that the legislative intent of the Act [*N.J.S.A. 18A:29-4.2*] is as follows: a school nurse holding a standard



school nurse certificate *and a bachelor's degree, or an academic degree higher than a bachelor's*, shall be compensated in the same manner as any other teaching staff member holding a parallel degree or parallel level of training. Placement on the proper step of the salary guide shall be determined in the same manner as placement is determined for any other teaching staff member. A school nurse who holds a standard school nurse certificate, but who does not hold a bachelor's degree, is to be compensated according to the non-degree teachers' salary guide in effect in each respective district. If a non-degree teachers' salary guide does not exist in a district, such a category must be created and its compensation rates determined according to proper negotiating procedures, or the Board may alternatively compensate all school nurses holding the appropriate certificate at the level set for a teaching staff member with a bachelor's degree.\*\*\*\* (Emphasis in text.) (at pp. 581-582)

In regard to petitioner's contention that the Board employed other non-degree personnel and compensated them according to the bachelor's scale of the salary guide, the Superintendent testified that since his tenure as the chief administrative officer of the school district, one person, an industrial arts teacher who was employed only for the 1972-73 school year, did not have a degree but was compensated according to the bachelor's scale of the Board's 1972-73 salary guide. (J-7) (Tr. 29) The Superintendent testified that that person was five credits short of his degree and those credits were "\*\*\*\*not in any significant courses.\*\*\*\*" (Tr. 31) Although that individual had completed his student teaching prior to his employment with the Board, he did not receive his degree until May 1973. (Tr. 31) The industrial arts teacher was paid according to the first-year salary of the bachelor's degree scale because, as the Superintendent testified, "\*\*\*\*It was our opinion\*\*\*\*that [he]\*\*\*\* had fulfilled all of the requirements of the equivalent, at least, of the Bachelor's Degree.\*\*\*\*" (Tr. 31) At no other time since 1967, the Superintendent testified, did the Board employ a non-degree professional person. Furthermore, the Superintendent testified that it is extremely difficult to locate persons with college degrees who have the training necessary to teach pupils the highly technical skills required in vocational studies, in this instance, electricity. (Tr. 32, 35) However, the Superintendent did admit on cross-examination, that for the position filled during the 1972-73 school year by the non-degree industrial arts teacher, he did interview one applicant who had a degree but was found not suitable for the position for other reasons. (Tr. 36)

Prior to 1967, the Superintendent testified, the Board did employ another teaching staff member without a degree and compensated him according to the bachelor's scale of its salary guide in effect at that time. (Tr. 39, 41) That teaching staff member has since obtained his bachelor's degree.

The hearing examiner points out that *N.J.S.A. 18A:29-4.2* became effective July 1, 1972 for the 1972-73 school year. *Lenahan, supra* Prior to that time, boards of education were free to set school nurse salaries pursuant to the provisions of *N.J.S.A. 18A:29-7* and prior case law. *Georgia L. Johnson v. Board of Education of the Township of West Windsor, Mercer County*, 1967 S.L.D.

324, affirmed State Board of Education 1968 *S.L.D.* 262; *Mary Belli v. Board of Education of the City of Clifton, Passaic County*, 1963 *S.L.D.* 95 In *Johnson, supra*, the Commissioner stated:

“\*\*\* The Commissioner is unaware of any law or rule, nor has such been cited to him, which requires a board of education to place a non-degree nurse-attendance officer on the same pay scale as teachers or other employees. He holds, therefore, that respondent [the Board] has the authority to fix a separate salary schedule for petitioner’s employment category as long as it meets the minimum compensations mandated by law. [*N.J.S.A.* 18A:29-7] \*\*\*” (at p. 326)

The *Belli, supra*, matter dealt with salary increments awarded by the Clifton Board of Education to five of six school nurses it employed. The sixth nurse, Petitioner Belli, was denied the salary increment on grounds found by the Commissioner to be arbitrary and discriminatory. The Board was directed to grant Petitioner Belli increments in the same manner provided other school nurses.

Since the passage of *N.J.S.A.* 18A:29-4.2 and the Commissioner’s decisions in *Lenahan, supra*, school nurses, so long as they hold a standard school nurse certificate, may not be treated differently from any other teaching staff member holding a parallel degree *or parallel level of training*.

In the instant matter, the Board argues that since 1967 it employed only one other non-degree professional employee other than petitioner, and then for only the 1972-73 academic year. Further, the Board avers it had to compensate the industrial arts teacher at the bachelor’s scale entry step, even though he held no degree, in order to secure his services in a very difficult position to fill in industrial arts. However, it is also pointed out that a school nurse who holds an appropriate certificate, with or without a degree, is a teaching staff member as defined in *N.J.S.A.* 18A:1-1, whether or not the school nurse does, in fact, teach. *Lenahan, supra* For the Board, in the 1972-73 school year, to compensate one teaching staff member without a degree, the industrial arts teacher, according to the terms of the bachelor’s scale and compensate petitioner, also a teaching staff member without a degree according to the Board’s policy of compensating her \$600 less than she would receive had she had a degree is, in the view of the hearing examiner, arbitrary and discriminatory.

Conversely, if the Board determined that it was necessary to offer a higher salary than that called for on its non-degree teachers’ salary scale, it could have utilized the authority found in *N.J.S.A.* 18A:29-9 which provides:

“Whenever a person shall hereafter accept office, position or employment as a member in any school district of this state, his initial place on the salary schedule shall be at such point as may be agreed upon by the member and the employing board of education.”

The statute of reference provides local boards of education with authority to negotiate the first year’s salary with any teaching staff member within the

range of its appropriate salary scale as determined by the employee's educational achievement. However, once a board compensates a teaching staff member according to a salary scale which recognizes educational achievement not attained by that person, as in this matter when the industrial arts teacher without a degree was compensated for the 1972-73 academic year according to the salary scale for holders of bachelor's degrees, then all teaching staff members similarly situated must be treated in like manner. There is no provision by which a board of education may discriminate in the evaluation of teaching staff credentials as herein.

It is pointed out that petitioner does not specifically contest her 1972-73 salary of \$9,675. (J-5) However, the hearing examiner finds that for the 1972-73 academic year petitioner should have received \$10,275, or the eighth step of the bachelor's salary scale. (J-7) Whether relief for that year will be granted is a determination which must be made by the Commissioner.

Subsequent to the 1972-73 school year, however, there has been no showing that the Board continued the policy of placing non-degree personnel on the bachelor's salary scale. Accordingly, the provision of the written policy in regard to the compensation of teaching staff members who do not possess a degree as set forth in the salary guides for 1973-74 (J-7), 1974-75 (R-1), and 1975-76 (R-2) is found to be proper, as is petitioner's salary of \$10,535 for the 1973-74 academic year.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter including the report of the hearing examiner.

The Commissioner adopts the findings of fact and conclusions set forth in the hearing examiner's report, with the single exception of the finding in regard to petitioner's salary for the 1972-73 academic year.

For 1972-73 the Board negotiated and subsequently adopted a salary policy which included, *inter alia*, that school nurses who did not possess a baccalaureate degree would be paid \$600 less than the amount shown at the corollary step on the scale for those possessing a baccalaureate degree. If written out in seriate steps, this scale could be seen to parallel the companion baccalaureate scale, being in each instance \$600 less, beginning with the first step and continuing through the maximum step.

During the 1972-73 academic year, petitioner was placed on the appropriate eighth step of the non-degree scale of the salary policy. The fact that the Board employed a teacher of industrial arts for the 1972-73 academic year, and agreed to compensate him at a rate equal to the amount provided for by the first step of the salary guide for those holding a baccalaureate degree is of no moment, because the Board is specifically empowered to negotiate the beginning or initial place on the salary schedule. *N.J.S.A.* 18A:29-9

The Board's testimony discloses the difficulty experienced at the time to obtain the services of a capable, certified teacher of industrial arts. The successful candidate, who had essentially completed the requirements for his baccalaureate degree, including practice teaching, but who was several credits short and subsequently received his degree in May 1973, clearly demanded and received no less than an amount which was equal to the first step of the salary guide for those with a baccalaureate degree. The negotiated salary could have been an amount on the non-degree scale in excess of the equivalent of the first step of the scale for those with a bachelor's degree, had both parties so decided. These ingredients constitute the essence of negotiations provided for by *N.J.S.A. 18A:29-9*. The Commissioner holds that, under these circumstances, the Board's action employing the teacher of industrial arts was proper and did not generate a cause of action upon which petitioner could rely for a claim of additional salary.

Accordingly, the Board's salary policies for nurses without a baccalaureate degree for the school years 1972-73 through 1975-76 are proper, as is petitioner's placement upon the non-degree scale of such policies.

There being no relief which the Commissioner can grant in this instance, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 13, 1974

Pending before State Board of Education

**Board of Education of the Scotch Plains-Fanwood Regional School District,**  
*Petitioner,*

*v.*

**Mayor and Council of the Township of Scotch Plains, and Mayor and  
Council of the Borough of Fanwood, Union County,**  
*Respondents.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Johnstone & O'Dwyer (Jeremiah D. O'Dwyer, Esq., of Counsel)

For the Respondent Mayor and Council, Township of Scotch Plains, James J. Walsh, Esq.

For the Respondent Mayor and Council, Borough of Fanwood, Crane, Beglin & Vastola (Edward W. Beglin, Jr., Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from a joint action of the Mayor and Council of the Township of Scotch Plains, hereinafter "Township Council," and the Mayor and Council of the Borough of Fanwood, hereinafter "Borough Council," and also hereinafter collectively "the Councils," certifying to the Union County Board of Taxation a lesser amount of money to be raised by local taxation for the current expenses of the school district for the 1974-75 school year than the amount proposed by the Board in its budget which was rejected by the voters at the annual school election. The facts of the matter were submitted in the form of written testimony, and a hearing was conducted on June 13, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. Additional documentation and testimony were submitted at the hearing, and Briefs were filed by both parties following the hearing. The report of the hearing examiner follows:

At the annual school election held on February 5, 1974, the voters of the school district rejected the Board's proposal to raise by local taxation \$9,975,311 for current expense and \$96,200 for capital outlay. The proposed budget was then delivered to the Councils, pursuant to statute, for determination of the amounts of appropriations for school purposes to be certified to the Union County Board of Taxation. On March 5, 1974, the Councils certified to the Union County Board of Taxation the sums of \$9,006,311 for current expenses and \$96,200 for capital outlay. This amount certified for current expenses represented a reduction of \$969,000 from the Board's proposal. The comparisons are shown in the following table:

	<b>Current Expenses</b>	<b>Capital Outlay</b>	<b>Totals</b>
Board's Proposal	\$9,975,311	\$96,200	\$10,071,511
Council's Certification	<u>9,006,311</u>	<u>96,200</u>	<u>9,102,511</u>
Amount of Reduction	\$ 969,000	\$ -0-	\$ 969,000

The Board contends that the reduction prohibits it from providing a thorough and efficient system of education for the 1974-75 school year. As part of their joint determination, the Councils submitted the suggested items of the budget wherein they believed economies could be effected without harm to the educational program.

A preliminary hearing was held before the Deputy Assistant Commissioner of Education, Division of Controversies and Disputes, on May 13, 1974 at the State Department of Education, Trenton. At that time, Motions were advanced by the Board and the Councils concerning the need for more detailed statements and for additional information. While the Councils' original reduction as certified to the Board of Taxation amounted to \$969,000, the Councils now aver that \$1,289,431 could be taken from the Board's budget without harm to the school system. The disposition of these Motions was as follows:

1. The governing bodies were requested to submit statements suggesting the items totaling \$969,000, the original amount of reduction, in which they believed economies could be effected.
2. In the event that the suggested items exceeded this amount, the Board was directed to respond only to items totaling the original reduction of \$969,000.

The 1974-75 budget of the school district was prepared and advertised using the planned program budget approach (PPBS). Because of the difficulty in relating budgets and expenditures of prior years prepared under the conventional approach with the planned program approach, the Councils requested, and the Board provided, a comparable line item budget which was used by the Councils in making their determination.

The total of their suggested economies is listed in the following table. The line items are in the order and combined in the manner in which they were submitted by the Councils acting at the direction of the Commissioner. The Board responded only to a total reduction of \$969,000. These amounts are also shown in the table.

<b>Account Number</b>	<b>Item</b>	<b>Board's Proposal</b>	<b>Councils' Reduction</b>	<b>Reduction Responded To By Board</b>
J110F	Supt. Off. Sals.	\$ 76,403	\$ 32,400	\$ 20,400
J110I	Bus. Adm. Off. Sals.	56,150	12,798	12,798
J110K	Purch. Off. Sals.	29,314	8,245	8,245

J110N	Adm. Other Sals.	25,964	25,964	-0-
J120B	Legal Fees	25,000	10,000	10,000
J130A	Bd. Members Exp.	9,000	5,000	5,000
J130F	Other Exp. Supt.	8,310	1,500	1,500
J130G	Centr. Res.	1,450	950	950
J130I	Other Exp. Bus. Adm.	12,327	2,300	2,300
J130L	Other Exp. Pers.	7,114	1,200	1,200
J130N	Legal Adver.	1,300	500	500
J211,	Prins., Asst.	629,897	50,000	23,911
212A,B	Prins. Supvrs. Sals.		30,000*	-0-
J213.1	Tchrs. Sals.	5,940,341	374,000	157,622
J213.1A	Subs. Tchrs. Sals.	70,000	15,000	15,000
J213.3	Supp. Instr. Sals.	17,000	3,000	3,000
J214	Pupil Servs.	689,851	225,933	225,933
J215A,C	Cler. Sals. Prin. Off.	353,241	31,618	31,618
J220,	Textbooks, Lib.	194,791	32,473	32,473
230A,B,	Books, Per.			
C	A-V			
J240	Teaching Suppls.	243,127	50,000	50,000
J250B	Travel Exp. Instr.	5,600	2,000	2,000
J250C	Misc. Exp. Instr.	37,814	20,000	20,000
J410A	Health Pers. Sals.	56,907	10,000	-0-
J420C	Health Misc. Exp.	17,810	10,000	10,000
J610A,B,C	Custodial Sals.	723,906	25,000	25,000
J630	Heat	223,250	46,000	46,000
J640	Utilities	216,800	10,000	10,000
J650A	Janitorial Suppls.	33,550	13,550	13,550
J660D	Misc. Cleaning	10,900	2,000	2,000
J710A,B	Maint. Sals.	288,200	15,000	15,000
J720A,B	Contr. Servs. Maint.	44,300	25,000	25,000
J730A,B	Repl. of Equip.	10,596	5,000	5,000
J730C	New Equip., Other	93,000	48,000	48,000
120C	Cont. Servs. Adm.			
J740B	Other Exp. Bldgs.	65,766	30,000	30,000
J810A,	Pens. Fds. Soc.	508,776	50,000	50,000
B,820B	Sec., Emp. Ins.			
J870A,B	Tuition	139,940	50,000	50,000
J1010,	Stud. Body Activs.	126,017	15,000	15,000
1020,	&Sals.			
1030				
	Totals	\$10,990,712	\$1,289,431	\$969,000

\*The hearing examiner has determined that the reduction of \$30,000 listed by the Councils as "District Administration - Asst. Supt." (no line item) is properly credited to J212A and has therefore shown this as a reduction against this account.

The Board has submitted documentary evidence in support of its need for restoration of the \$969,000 by which its budget was reduced by joint action of the Councils and which is the amount in contention.



A significant portion of the economies suggested by the Councils was based upon the elimination or consolidation of existing administrative and supervisory positions. The Councils refer to alleged overstaffing in their statements of suggested reductions, and in their final Reply Brief, in reference to the administrative staffing of the school district, they state, "That it exists is no reason why it must continue to exist." (Councils' Reply Brief, at p. 14)

The Board in its documentation of need alleges that the Councils, in effect, are trying to change the complete organizational pattern of the school district through budget reductions.

The hearing examiner observes that the positions specifically named are not new, but are established positions, which the Board has determined as necessary for the proper government and management of its school system. Such determinations are pursuant to authority granted to the Board by *N.J.S.A. 18A:11-1* which provides, *inter alia*, that:

"The Board shall \*\*\* (c) make, amend and repeal rules \*\*\* for the government and management of the public schools \*\*\* and for the employment \*\*\* of its employees\*\*\*."

It is the conclusion of the hearing examiner that the proposals of the Councils, if permitted to stand, would indeed usurp powers specifically conferred on the Board.

The hearing examiner has carefully reviewed the various budget documents and supporting data and observes that there are many problems attendant to the conversion of a program budget to a conventional line item budget, and that one result is apparent inconsistency. This was particularly true herein since the program budget as submitted was a preliminary budget and contained provisions which were contrary to the Board's written testimony, and such provisions were excluded from the final budget. The findings and recommendations of the hearing examiner with respect to each of the items in dispute are set forth as follows:

*J110F Superintendent's Office, Salaries*

*Reduction \$20,400*

The Board's response herein to the reduction deemed appropriate by the Councils is specifically delineated with respect to two positions, that of an "Administrative Intern" (\$11,000) and an "Executive Secretary" (\$9,400). The Board indicates that the title of Administrative Intern is a new one resulting from a re-classification of the former position of "Executive Assistant to the Superintendent," and that the position of an additional executive secretary is required at this juncture because of an added work requirement. The Board also states that the intern position is a necessary one and, without it, there would be difficulty in meeting the needs with respect to collective negotiations and contract administration.

The Councils aver that there is an "overstaffing" at the central administrative level and that each of these positions may be eliminated.

The hearing examiner has considered such arguments and recommends that the position of administrative intern be funded as necessary and required with respect to the Board's obligations to conduct a thorough and efficient school system pursuant to law. However, the hearing examiner cannot find it necessary, in the context of a referendum defeat and the Councils' determination, to create another position of executive secretary, and he recommends that this reduction be sustained.

Summary: Amount of Reduction	\$20,400
Amount Restored	11,000
Amount Not Restored	9,400

*J110I Office of Business Administration, Salaries* *Reduction \$12,798*

This reduction proposes an elimination of all funds required by the Board for salary increases for existing personnel. (\$4,848) Additionally, the Councils determine that one position of office assistant should be eliminated. (\$7,950)

The Board avers that this latter specific salary does not relate to the salary of either of the present two assistants. It further maintains that all funds for salary increases are required pursuant to the negotiated agreements it has made with its employee groups.

The Councils aver that, absent a detailed itemization of productivity and effectiveness, a continuance of the present staffing pattern is unwarranted.

The hearing examiner finds it necessary to restore \$11,798 herein to fund the Board's obligation for salary increases to which the Board agreed pursuant to Law. (*Chapter 303, Laws of 1968*) However, he recommends that \$1,000 of the reduction, an amount set forth as a salary differential for one position, be sustained.

Summary: Amount of Reduction	\$12,798
Amount Restored	11,798
Amount Not Restored	1,000

*J110K Purchasing Office, Salaries* *Reduction \$8,245*

The reductions deemed appropriate by the Councils would eliminate salary increases for persons employed in the Board purchasing office and eliminate one bookkeeping position. The Board maintains, however, that there are no new positions in the purchasing office and that all the present staff of bookkeepers have been employed since 1966. The Board further avers that in the intervening years the school budget has increased from \$4,659,386 to one which exceeds \$11,000,000 and that the work load has increased proportionately.

The hearing examiner finds, for reasons outlined, *ante*, (J110I) that the reductions herein are inappropriate and are required to be restored in order that the Board may fund those obligations it made pursuant to law.

Summary: Amount of Reduction	\$8,245
Amount Restored	8,245
Amount Not Restored	-0-

*J120B Legal Fees*

*Reduction \$10,000*

The Board reduced its budget for legal services in the 1973-74 school year to \$15,000 from the budgeted amount \$17,500 in 1972-73. However, it indicates it actually expended \$38,974.46 in legal fees in 1972-73 and that its expenditures for school year 1973-74 approximated \$34,000. Therefore, the Board argues, a proposed budget of \$25,000 for such services in 1974-75 is an extremely conservative one.

The Councils aver that the increase of \$10,000 is not warranted although it concedes an increase of \$2,500 could be justified. The Councils also maintain that the Board has not been properly handling this line item and it observes that full-time staff attorneys are often employed by public bodies on a lesser expenditure than that proposed by the Board.

The hearing examiner finds some logic in this latter observation but refers it to the Board for consideration. However, it is clear that the expenditure proposed by the Board herein is a modest estimate of the cost of such services in school year 1974-75 according to the Board's present commitment. Accordingly, he recommends full restoration of the reduction.

Summary: Amount of Reduction	\$10,000
Amount Restored	10,000
Amount Not Restored	-0-

*J130A Board Members, Expenses*

*Reduction \$5,000*

Councils agree that the sum of \$1,500 of a total increase of \$6,500 deemed necessary by the Board in this line item is required for an increase of dues to the New Jersey School Boards Association. However, the Councils aver that no reasons have been given which would justify an increase of an additional \$5,000.

The Board maintains that such an increase is justified for the payment of fees of consultants and auditors required in conjunction with the first year of the operation of a new accounting system. This system is one to which the Board is committed and involves a conversion from traditional budget delineation to a programmatic mode. (The Scotch Plains-Fanwood Regional School District was selected in 1973 as a pilot district in an effort to improve budgeting procedures.)

The hearing examiner finds that the sum deemed appropriate by the Board is required to insure an efficient operative procedure with respect to new budgetary techniques to be employed by the Board in school year 1974-75. Accordingly, he recommends that the full reduction of \$5,000 be restored.

Summary: Amount of Reduction	\$5,000
Amount Restored	5,000
Amount Not Restored	-0-

*J130F Superintendent's Office, Expenses* *Reduction \$1,500*

The reduction with respect to this item is a relatively small one, but the positions of the parties concerning it are extensively documented. The Board proposes a total expenditure of \$8,310. This sum is an increase of \$1,930 over the budgeted amount in school year 1973-74.

The Councils aver that such increases may be held to a maximum of \$430 if cost control procedures are implemented.

The hearing examiner has reviewed the documentation of need and concludes that economies can be effected, particularly with respect to budgeted increases for paper supplies. Accordingly, he recommends that a total of \$1,000 of the reduction deemed appropriate by the Councils be sustained but that a sum of \$500 be restored.

Summary: Amount of Reduction	\$1,500
Amount Restored	500
Amount Not Restored	1,000

*J130G Centralized Research* *Reduction \$950*

The total budget proposed by the Board for this line item is \$1,450 of which sum \$450 is expended yearly for membership in the New Jersey School Development Council. The Board agrees that the budgeted amount of \$2,450 was not expended in the 1972-73 school year but that the reduced amount of \$1,450 budgeted for school years 1973-74 and 1974-75 is the amount which is expected to be required in 1974-75.

The hearing examiner finds that such sum for research activities is a minimal amount and may be expected to be required in 1974-75 in the context of an expenditure of \$1,650 in school year 1971-72 and \$2,159 in 1973-74. Accordingly, he recommends a full restoration.

Summary:	
Amount of Reduction	\$950
Amount Restored	950
Amount Not Restored	-0-

*J130I Other Expenses, Business Administration Office* *Reduction \$2,300*

The Board maintains that increased costs for paper supplies, stationery, and postage, etc. justify its proposed increase of \$2,300 in this line item for school year 1974-75. The Board also notes that its budget with respect to such expense was completely expended in school year 1973-74.

The Councils aver that no increase has been justified.

The hearing examiner recommends that the sum of \$1,000 be restored to this line item as a provision for increased costs but that a reduction of \$1,300 be sustained.

Summary: Amount of Reduction	\$2,300
Amount Restored	1,000
Amount Not Restored	1,300

*J130L Other Expenses, Personnel* *Reduction \$1,200*

The money proposed by the Board for expenditure from this line item is principally designated for the recruitment of professional personnel. The Board avers there has been an increase in such costs in recent years which has resulted in an over-expenditure in each of the 1971-72 and 1972-73 school years. Therefore, the Board argues, an increase of \$1,200 in the appropriation is warranted.

The Councils initially denied the necessity for such an increase. However, they now state that “\*\*\* it would appear that the \$1,200.00 increase in this account has been justified.” (Councils’ Reply Brief, at p. 13)

The hearing examiner concurs with this view.

Summary: Amount of Reduction	\$1,200
Amount Restored	1,200
Amount Not Restored	—0—

*J130N Legal Advertisements* *Reduction \$500*

Expenditures for the past several years, together with the additional known and anticipated costs for 1974-75, do not, in the judgment of the hearing examiner, indicate the need for the total amount proposed. Accordingly, it is recommended that \$200 be restored but that a reduction of \$300 be sustained.

Summary: Amount of Reduction	\$500
Amount Restored	200
Amount Not Restored	300

*J211, 212A,B Principals, Assistant Principals, Supervisors, Salaries* *Reduction \$23,911*

The Board has responded to the proposed elimination of one assistant high school principal. However, the current organization of a principal and three assistant principals (administration, instruction, guidance) has been established since 1968, and there is no substantial change in enrollment anticipated. The restoration of \$23,911 is therefore recommended.

Summary: Amount of Reduction	\$23,911
Amount Restored	23,911
Amount Not Restored	—0—

*J213.1 Regular Teachers, Salaries*

*Reduction \$157,622*

The Councils propose herein to reduce the teaching staff from 423 teachers to 389 but itemizes only fifteen specific areas or schools from which such reductions can be made. The Board, in its defense of the line item, has chosen to defend sixteen teaching positions at a little less than \$10,000 per teacher.

The Board's itemization of need is delineated in six pages of written testimony, and the Councils' testimony is also extensive. The hearing examiner has reviewed such testimony and concludes that the Board has already over a period of years considerably reduced the numbers of teaching staff in its schools and that such reduction has been consistent with declining and shifting enrollments. This reduction includes six positions, with costs totaling \$64,500 which the Board states have been eliminated from the 1974-75 budget. However, as an offset to such reduction there is an increase of eight positions in special education, for which a need has been demonstrated, and the Board also proposes to employ four vocational-occupational teachers.

The hearing examiner has examined this documentation and finds it is necessary that a total sum of \$134,622 be restored for use by the Board for expenditures from this line item. This restoration will provide the funding for salaries which the Board is committed to pay but does not include funding for the six positions which have been eliminated by Board action.

Summary: Amount of Reduction	\$157,622
Amount Restored	134,622
Amount Not Restored	23,000

*J213.1A Substitute Teachers, Salaries*

*Reduction \$15,000*

The Board's budget for substitute teachers decreased from \$62,000 in the 1972-73 school year to \$55,000 in school year 1973-74. However, the Board's testimony indicates that such budgetary provision was not commensurate with the need since in both years the line item was in deficit.

Accordingly, the Board had increased the proposed budget to \$70,000 for school year 1974-75, and the Councils aver the increased amount is not required. The Councils charge that the substitute teacher procurement and assignment policy appears to have been abused. Specifically, the Councils state that it appears excessive absenteeism has been encouraged and that curriculum planning work, which requires released time for regular teachers, has necessitated an unnecessary expenditure.

The Board defends such released time as necessary for the conduct of a thorough and efficient educational program and denies that there is excessive absenteeism by its teachers.

The hearing examiner believes economies can be effected in this line item if certain activities associated with curriculum improvements are encouraged by alternate means. If such means are employed, the hearing examiner finds that a

budgeted line item of \$60,000 would appear to be sufficient.

Accordingly, he recommends that \$10,000 of the reduction deemed appropriate by the Councils be sustained but that \$5,000 be restored for use by the Board.

Summary: Amount of Reduction	\$15,000
Amount Restored	5,000
Amount Not Restored	10,000

*J213.3 Supplemental Instructors, Salaries* *Reduction \$3,000*

The provision for additional special education teaching staff elsewhere in the budget and the further expansion of resource rooms do not indicate the need for substantial expansion of supplemental instruction at this time. The reduction of \$3,000 is, accordingly, sustained.

Summary: Amount of Reduction	\$3,000
Amount Restored	-0-
Amount Not Restored	3,000

*J214 Pupil Services* *Reduction \$225,933*

This reduction relates to four line items;

J214A	Library Services, Salaries
J214B	Guidance, Salaries
J214C	Psychological Services, Salaries
J214D	Auxiliary Personnel, Salaries

Although evidence of studies conducted within the district support the desirability of a third child study team, the hearing examiner cannot find sufficient justification of need to implement this major expenditure at this time. He recommends sustaining a reduction of the \$54,000 provided in J214C for this purpose.

Similarly, as desirable as it may be as a response to certain community forces, the hearing examiner cannot find a compelling need to continue the recently introduced lunchroom aide program, or to employ four additional special education aides. Accordingly, a reduction of \$33,000 is recommended to be excised from line item J214D.

The hearing examiner has considered the suggestion of the Councils that the position of one librarian be eliminated and that the functions of the Assistant Superintendent for Pupil Services, Director of Special Education, and the Speech Teacher/Department Chairman be consolidated into one position with attendant reductions in salary and supporting service costs. These are all existing positions with concrete responsibilities in the conduct of the educational program. Accordingly, the hearing examiner recommends restoration of \$138,933, which sum represents the balance of the suggested reduction.



Summary: Amount of Reduction	\$225,933
Amount Restored	138,933
Amount Not Restored	87,000

*J215A, C Clerical Salaries, Principals' Office* *Reduction \$31,618*

Except for the \$4,800 new salary for clerical support of the third child study team, the amounts budgeted in these line items are scheduled for the salaries and increments of existing staff members. The suggested reduction was based upon the elimination of other existing positions.

The hearing examiner recommends restoration of \$26,818 for such clerical salaries, and that a reduction of \$4,800 be sustained.

Summary: Amount of Reduction	\$31,618
Amount Restored	26,818
Amount Not Restored	4,800

*J220, 230A,B,C Textbooks, Library Books, Periodicals, A-V Materials* *Reduction \$32,473*

These items have been grouped together as a suggested reduction by the Councils. In the context of the Board's past practice of budgeting the same amount each of the past four years, the hearing examiner recommends that these line items be budgeted at the same level for school year 1974-75. Accordingly, he recommends a restoration of \$20,200 to these line items and the sustaining of a reduction of \$12,273 distributed as follows:

J220 —	\$4,400
J230A —	3,223
J230B —	750
J230C —	3,900

Summary: Amount of Reduction	\$32,473
Amount Restored	20,200
Amount Not Restored	12,273

*J240 Teaching Supplies* *Reduction \$50,000*

The hearing examiner has reviewed the 1973-74 expenditures and determines that an increase of approximately \$25,000 in this line item is warranted. To effect this, the hearing examiner recommends a restoration of \$45,000, including the sum of \$25,000 stipulated by the Councils, but that a \$5,000 reduction from the Board's original proposal be sustained.

Summary: Amount of Reduction	\$50,000
Amount Restored	45,000
Amount Not Restored	5,000

*J250B Travel Expenses, Instruction* *Reduction \$2,000*

The third child study team has been recommended for elimination and



Summary: Amount of Reduction	\$25,000
Amount Restored	25,000
Amount Not Restored	-0-

*J630 Heat*

*Reduction \$46,000*

The Councils had determined that the Board's proposal with respect to heating costs was excessive. However, the Board's delineation of such costs indicates its original proposal may be inadequate to meet the need, since even great energy conservation efforts would appear to be insufficient to compensate for a large increase in fuel oil costs.

The Councils, having reviewed the Board's evidence in this regard, now state that the "\*\*\* \$46,000 should be restored \*\*\*." (Councils' Reply Brief, at p. 24)

The hearing examiner concurs.

Summary: Amount of Reduction	\$46,000
Amount Restored	46,000
Amount Not Restored	-0-

*J640 Utilities*

*Reduction \$10,000*

The reduction controverted herein had been deemed appropriate by the Councils in the context of an opinion that all employees of the Board must be instructed to conserve energy and minimize telephone usage. However, the Board has concisely delineated its efforts in this regard and avers that the rapid increase in utility costs has offset all of its energy conservation efforts. In fact, the Board states that its expenditures for utility costs in the 1973-74 school year exceeded its budget appropriation by a total of approximately \$82,000.

In the context of this testimony, the Councils now concede that the \$10,000 reduction should be restored.

The hearing examiner concurs.

Summary: Amount of Reduction	\$10,000
Amount Restored	10,000
Amount Not Restored	-0-

*J650A Custodial Supplies*

*Reduction \$13,550*

The Board has effected many economies in the purchase of custodial supplies and has maintained the same budget allocation for such supplies for at least the past five years. It had had relatively small balances or over-expenditures. The budgeted increase of ten percent in this category reflects the increased square footage of recently completed construction, as well as rising costs. It is recommended that \$13,550 be restored to this line item, which includes \$6,000 stipulated by the Councils.

Summary: Amount of Reduction	\$13,550
Amount Restored	13,550
Amount Not Restored	-0-

*J660D Miscellaneous Cleaning*

*Reduction \$2,000*

The Board had programmed a total of \$10,900 during the school year 1973-74 for the leasing, cleaning, and purchase of uniforms for custodial and transportation personnel. In its testimony the Board states that such sum was required to be expended, in part at least, by certain negotiated agreements, between the Board of Education and labor unions. Historically, the Board avers the amount of \$10,900 has been the approximate requirement in each of the two prior budget years.

The Councils have reviewed the Board's testimony in this regard and in effect concede the necessity for a restoration of this reduction.

The hearing examiner concurs with respect to such restoration.

Summary: Amount of Reduction	\$2,000
Amount Restored	2,000
Amount Not Restored	-0-

*J710A,B Maintenance, Salaries*

*Reduction \$15,000*

The amount proposed by the Board herein includes only those funds needed to meet negotiated salary costs for existing personnel. No budget allocations are included for new personnel. Accordingly, the hearing examiner recommends the restoration of \$15,000 to this line item.

Summary: Amount of Reduction	\$15,000
Amount Restored	15,000
Amount Not Restored	-0-

*J720A,B Contracted Services, Buildings and Grounds*

*Reduction \$25,000*

The amounts budgeted for these purposes show only a \$4,000 increase for extension of maintenance contracts to new buildings. The detailed items and total costs include only routine maintenance services and high priority repairs. The total appropriations are not inconsistent with the size of the physical plant. Restoration of \$25,000 to these line items is recommended.

Summary: Amount of Reduction	\$25,000
Amount Restored	25,000
Amount Not Restored	-0-

*J730 A, B Replacement of Equipment*

*Reduction \$5,000*

The hearing examiner finds that budget provisions for the replacement of instructional and noninstructional equipment during the school year 1974-75 are minimal. They are almost identical to 1973-74 budgeted amounts. Restoration of \$5,000 is therefore recommended.

Summary: Amount of Reduction	\$5,000
Amount Restored	5,000
Amount Not Restored	-0-

*J730C, 120C New Equipment, Other Contracted Services, Administration*  
*Reduction \$48,000*

The hearing examiner does not find the purchase of new computerized equipment essential at this time, although such purchase may be desirable, and accordingly he recommends that the \$48,000 reduction from the J730 line item be sustained.

In regard to J120C, there is \$40,000 budgeted in this line item for which the written testimony of the Board and explanatory data support the appropriation of approximately \$34,000. This sum is committed by a contract with the Union County Technical Institute to provide computer services to meet the requirements of the PPBS program. This leaves a balance of \$16,000 available for other contracted services which will be essential to this operation.

Summary: Amount of Reduction	\$48,000
Amount Restored	-0-
Amount Not Restored	48,000

*J740B Other Expenses, Buildings* *Reduction \$30,000*

The Board anticipated a balance of \$900 in this line item at the close of the 1973-74 school year, and the ten percent increase to maintain the same level of expenditure for materials and supplies does not appear to be warranted. It is recommended that \$27,000 be restored to this line item as necessary to provide sufficient funds for the purposes planned by the Board.

Summary: Amount of Reduction	\$30,000
Amount Restored	27,000
Amount Not Restored	3,000

*J810A,B, 820B Pension Funds, Social Security, Employee Insurance*  
*Reduction \$50,000*

The Board offers no substantive proof of need for the increases proposed herein except a recital of past experience. The Councils' suggested reduction is based upon a substantial reduction in existing staff, with which the hearing examiner has not concurred. In recognition of the fact that there are known increases in the mandatory administrative costs of State-administered pension funds and in increased rates for Social Security in 1975, the hearing examiner finds these two line items to be appropriately budgeted. There is, however, no evidence offered to substantiate an almost fifteen percent increase in employee insurance, for a very limited number of new personnel to be employed for 1974-75. The hearing examiner recommends, therefore, that this increase be limited to approximately ten percent and, accordingly, that a sum of \$40,000 be restored to line item J820B, and that a \$10,000 reduction from the Board's proposal be sustained.

Summary: Amount of Reduction	\$50,000
Amount Restored	40,000
Amount Not Restored	10,000

*J870A, B Tuition, Handicapped and Vocational Reduction \$50,000*

The past history of the district indicates that the number of anticipated out-of-district placements of handicapped pupils has not materialized. Neither does it indicate that the average tuition will increase as substantially from the current year's level as the Board avers. The hearing examiner recommends that \$40,000 be restored to line item J870A, and that a reduction of \$10,000 be sustained.

Summary: Amount of Reduction	\$50,000
Amount Restored	40,000
Amount Not Restored	10,000

*J1010, J1020, J1030 Student Body Activities, Salaries Reduction \$15,000*

The Board asserts that all of the money it budgeted for expenditures from these three accounts in 1973-74 was expended. It further avows that the cost of negotiated salary agreements, increased transportation expense, and a need to equalize educational opportunities in sports for girls requires restoration of this reduction in 1974-75.

The Councils agree that the Board's written testimony substantiates the need for such restoration, and the hearing examiner concurs with this view.

It must be noted at this juncture, however, that the Councils' agreement with respect to this restoration and to the restorations of other sums to accounts J130L, J420C, J630, J640 and J660D, *ante*, is a qualified one. In each instance the Councils aver either that the Board has provided no detailed material to support its position or has chosen not to justify other reductions deemed appropriate by the Councils. This latter choice, it is observed, was in conformity with the Order issued on behalf of the Commissioner at the conclusion of the oral argument of May 13, 1974.

Summary: Amount of Reduction	\$15,000
Amount Restored	15,000
Amount Not Restored	-0-

The following table summarizes the recommendations of the hearing examiner with respect to each of the Councils' suggested reductions.

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
J110F	Supt. Off. Sals	\$ 20,400	\$ 11,000	\$ 9,400
J110I	Bus. Adm. Off. Sals.	12,798	11,798	1,000
J110K	Purch. Off. Sals.	8,245	8,245	-0-
J120B	Legal Fees	10,000	10,000	-0-

J130A	Bd. Members Exp.	5,000	5,000	-0-
J130F	Other Exp. Supt. Off.	1,500	500	1,000
J130G	Centr. Res.	950	950	-0-
J130I	Other Exp. Bus. Adm.	2,300	1,000	1,300
J130L	Other Exp. Pers.	1,200	1,200	-0-
J130N	Legal Adver.	500	200	300
J211, 212	Prins., Asst. Prins.	23,911	23,911	-0-
A, B	& Supvrs. Sals.			
J213.1	Tchrs. Sals.	157,622	134,622	23,000
J213.1A	Subs. Tchrs. Sals.	15,000	5,000	10,000
J213.3	Supp. Instr. Sals.	3,000	-0-	3,000
J214	Pupil Servs.	225,933	138,933	87,000
J215A, C	Cler. Sals. Prin. Off.	31,618	26,818	4,800
J220, 230,	Textbooks, Lib. Books,			
A, B, C	A-V Mats.	32,473	20,200	12,273
J240	Teaching Supls.	50,000	45,000	5,000
J250B	Travel Exp. Instr.	2,000	1,000	1,000
J250C	Misc. Exp. Instr.	20,000	20,000	-0-
J420C	Health Misc. Exp.	10,000	10,000	-0-
J610A, B, C	Custodial Sals.	25,000	25,000	-0-
J630	Heat	46,000	46,000	-0-
J640	Utilities	10,000	10,000	-0-
J650A	Janitorial Supls.	13,550	13,550	-0-
J660D	Misc. Cleaning	2,000	2,000	-0-
J710A, B	Maint. Sals.	15,000	15,000	-0-
J720A, B	Contr. Servs. Maint.	25,000	25,000	-0-
J730A, B,	Repl. of Equip.	5,000	5,000	-0-
J730C,				
120C	New Equip., Other Contr.			
	Servs. Adm.	48,000	-0-	48,000
J740B	Other Exp. Bldgs.	30,000	27,000	3,000
J810A, B,	Pens. Fds., Soc. Sec.,			
820B	Emp. Ins.	50,000	40,000	10,000
J870A, B	Tuition	50,000	40,000	10,000
J1010,	Student Body Activs.			
1020, 1030	& Sals.	15,000	15,000	-0-
	TOTALS	\$969,000	\$738,927	\$230,073

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and considered the extensive objections, exceptions and replies thereto which have been filed by each of the parties. Councils' principal objection is to that portion of the hearing examiner's report wherein it is said (1) that the Board's determinations with respect to established positions are made pursuant to authority granted the Board by *N.J.S.A.* 18A:11-1 and (2) that powers



conferred on the Board would be usurped if Councils' proposals are permitted to stand. In Councils' view "\*\*\*\*the Board is legally obligated to meet its contractually negotiated salary increases but it has complete control over the number and assignment of its teachers and it is not legally obligated to fill all teaching positions which have been budgeted.\*\*\*\*" (Respondents' Exceptions, Objections and Replies to Hearing Examiner's Report, at p. 6) Thus, Councils argue that certain reductions they deemed appropriate with respect to Board employees should and must be given effect. (J110F, J110I, J110K, J211, J212, J213.1, J214, J610A, B, C; J710A, B; J720A, B)

This argument of the Councils is a substantive one which, if implemented, would transfer from the Board to the Councils the authority to structure the school system whenever the Board's proposed budget is defeated at the annual school election. This argument is rejected by the Commissioner. The authority for the basic management and government of local school districts is specifically conferred by statute on local boards of education. *N.J.S.A. 18A:11-1* Teaching staff members may be employed and dismissed by action of the board of education. *N.J.S.A. 18A:27-1, 27-3, 16-1* It is the "\*\*\*\*right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils\*\*\*\*." *N.J.S.A. 18A:28-9 (Emphasis supplied.)* Accordingly, absent evidence of gross abuse, the Commissioner holds that there is no authority for a local governing body, or the Commissioner, to make a substantial substitution of discretion for that of a local board of education with respect to the established structure of a school system. There is need instead for a continuity of effort.

The Commissioner recently gave expression to this need for continuing support of a program of education in *Board of Education of the City of Plainfield v. City Council of the City of Plainfield, Board of School Estimate and County Board of Taxation, Union County, 1974 S.L.D. 913* as follows:

\*\*\*\* While the constitutional requirement which imposes on local school districts the obligation to conduct 'thorough and efficient' programs of education is nowhere precisely defined, the Commissioner holds that it must be interpreted to mean that as a minimum such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation of effort. He finds evidence herein that the recommendations are commensurate with this goal, both generally and specifically. \*\*\*\*  
(at pp. 920-921)

The finding in the instant matter is the same as in *Plainfield, supra*, with respect to line items J110I, J110K, J211 through J214, J610A, B, C, J710A, and J720B. The Commissioner does not accept the recommendations of the hearing examiner with respect to certain other reductions deemed appropriate by the Councils. The Commissioner's determinations, and certain other comments with respect to these reductions, are as follows:

*J110F Superintendent's Office, Salaries*

*Reduction \$20,400*

The hearing examiner evidently concluded that the position of Administrative Intern was, in fact, a continuing one but with a new nomenclature as the result of a reclassification. Councils now state "[n]ot only is the title of Administrative Intern new but so is the position and it has never been filled." (Respondents' Exceptions, Objections, and Replies to Hearing Examiner's Report) The Commissioner has reviewed the testimony in this regard and accepts Councils' statement as his own with respect to the position of Administrative Intern. The Commissioner also finds that the position of Executive Secretary is a continuing one and for reasons expressed, *ante*, he determines that Councils' reduction is inappropriate.

Summary: Amount of Reduction	\$20,400
Amount Restored	9,400
Amount Not Restored	11,000

*J220, 230A,B,C Textbooks, Library Books, Periodicals, A-V Materials*

*Reduction \$32,473*

Councils complain that the hearing examiner failed to set forth a finding of fact with respect to his recommendation that \$20,200 was required to be restored. The hearing examiner did indicate, however, that his recommended restoration was a limited one to the "same amount" the Board had budgeted in prior years. A review of the documentation proves this to be true since in each of the school years 1972-73 and 1973-74 an exactly identical amount of \$182,518 was budgeted by the Board. It is apparent that, with inflationary factors considered, the Board has actually reduced its purchases herein for a two-year period and the recommendation of the hearing examiner represents, in its practical effect, another reduction.

The Commissioner will let the recommendation stand as his own, with an admonition to the Board that strict budgetary control is required.

*J240 Teaching Supplies*

*Reduction \$50,000*

The Board actually expended \$192,959 for required supplies in 1971-72 and \$217,082 in 1972-73, and budgeted \$213,721 in 1973-74 and \$243,127 in 1974-75. Thus, Councils' proposed reduction, if given effect, would reduce the budgetary provisions herein to the level of 1971-72 in complete disregard of inflationary factors with respect to all purchases. The Commissioner cannot sustain such a reduction.

The Commissioner concludes, however, that the restoration to this line item recommended by the hearing examiner is somewhat excessive, and he determines that a restoration of \$230,000 for the line item is appropriate and commensurate with expected requirements and consonant with demonstrated past experience. Accordingly, the Commissioner finds that the required restoration herein is \$36,873.

Summary: Amount of Reduction	\$50,000
Amount Restored	36,873

Amount Not Restored

13,127

*J740B Other Expenses, Buildings*

*Reduction \$30,000*

Although the Commissioner concurs with the Councils that the hearing examiner's recommendation for this line item is confusing, he is not in agreement that the final recommendation is inconsistent. The expenditure proposed by the Board consists of documented estimates of cost based on past experience for materials and supplies required to insure adequate building maintenance and repair. Accordingly, the Commissioner adopts the recommendation that \$27,000 be restored.

*J870A, B Tuition, Handicapped and Vocational*

*Reduction \$50,000*

The Commissioner concurs with the Councils that the conclusion of the hearing examiner with respect to this line item runs contrary to his findings. Accordingly, the Commissioner has reexamined the documentation.

The Board's estimate of budgetary need is grounded on a projection that thirty pupils will attend classes for the handicapped which are located outside the district and that fifty-eight to sixty-six pupils will attend the Union County Vocational Institute. The Board's documentation discloses that only \$72,534 was expended from these line items in 1972-73 and it appears that expenditures for 1973-74 approximated only \$85,540. (\$72,640 and \$12,900) Expenditures in one prior year were significantly larger. (\$102,310 in 1971-72)

The Commissioner has weighed the evidence and determines that the recommendation of the hearing examiner was a liberal one which ignored the probability that many who indicated an interest in vocational school would not attend and that projected tuition costs for thirty handicapped children would not all materialize. Accordingly, the Commissioner determines that the sum of \$115,000 might reasonably be expended from this line item rather than the \$129,940 deemed appropriate by the hearing examiner. Thus the restoration shall be \$25,060.

Summary: Amount of Reduction	\$50,000
Amount Restored	25,060
Amount Not Restored	24,940

The Commissioner concurs with all remaining recommendations of the hearing examiner. The net effect is that the Commissioner deems it necessary to restore a total sum for use by the Board during school year 1974-75 which is \$24,667 less than the amount recommended by the hearing examiner. The altered line items are shown as follows:

Account Number	Item	Recommended Restoration By Hearing Examiner	Determination of Restoration by Commissioner	Change
J110F	Supt. Off. Sals.	\$11,000	\$ 9,400	-\$ 1,600

J240	Teaching Suppls.	45,000	36,873	— 8,127
J870A,B	Tuition	40,000	25,060	— 14,940
				— \$24,667

Accordingly, the Commissioner directs the Union County Board of Taxation to add to the tax levy the sum of \$714,260 in addition to that previously certified by the Mayor and Council of both the Township of Scotch Plains and the Borough of Fanwood for the operation of a thorough and efficient school system in the district for school year 1974-75.

COMMISSIONER OF EDUCATION

December 13, 1974  
Pending before State Board of Education

Patrick Cullen,

*Petitioner,*

*v.*

Board of Education of Town of West New York, Hudson County,

*Respondent.*

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Richard DeLaRoche, Esq.

This matter having been brought before the Commissioner of Education (Eric G. Errickson, Assistant Director, Division of Controversies and Disputes), by Theodore M. Simon, Esq., attorney for the petitioner, Patrick Cullen, on a *Motion for Relief, Pendente Lite*, received February 14, 1974, requesting temporary reinstatement pending adjudication of the Petition of Appeal; Richard DeLaRoche, Esq., appearing for the Board of Education of Town of West New York; and

It appearing that on August 8, 1973, petitioner was by resolution of the Board of Education of the Town of West New York (P-2) appointed as a maintenance department employee retroactive to February 1, 1973 without fixed term of the period of employment; and

It appearing that no further documentary record in the form of written employment agreement or contract was provided by the Board, or executed by the Board and petitioner, either prior to or after August 8, 1973; and

It appearing that the Commissioner has said, “\*\*\*Janitors may be employed without term, in which case they may not be dismissed without a showing of good cause.\*\*\*” *Frederick Olley v. Board of Education of Southern Regional High School, Ocean County*, 1968 S.L.D. 20, 22; and

It appearing that petitioner was, pursuant to *N.J.S.A. 18A:17-3*, a tenured employee of the Board; and

It appearing that charges purporting to show good cause for dismissal or reduction of salary of petitioner have not been forwarded to the Commissioner; and

It appearing that the Board has taken no formal action to suspend petitioner from his position of employment; and

It appearing that the Board has taken no official action to accept a valid resignation which it represents was made by petitioner in oral form on January 14, 1974; and

It appearing that petitioner, in a letter dated January 21, 1974, denied that he had submitted any oral resignation; and

It appearing that, even in the event such an oral resignation was made, a resignation is not binding upon the one who makes it until its formal acceptance by the employing board of education; and

It appearing that petitioner has been since January 14, 1974, and is now, unemployed, and is ineligible for unemployment benefits; and

The arguments of counsel having been heard regarding the allegation by petitioner that, as a result of his unemployment, irreparable harm may result to him and those dependent upon him for support; and

The Commissioner having found that there is possibility that irreparable harm may result to petitioner as a result of the Board's termination of his employment, and furthermore having determined that within the present record there is no clear showing that the Board terminated petitioner's employment within the intendment of the Tenure Employees Hearing Law; therefore

IT IS ORDERED that petitioner's request for relief, *pendente lite*, is granted; and

IT IS ORDERED that the Board of Education of the Town of West New York restore petitioner to his position as a maintenance employee forthwith, pending a final determination which will follow a plenary hearing scheduled for May 7, 1974.

Ordered this 5th day of April, 1974.

COMMISSIONER OF EDUCATION

**Patrick Cullen,**

*Petitioner,*

*v.*

**Board of Education of the Town of West New York, Hudson County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent, Richard DeLaRoche, Esq.

Petitioner alleges that he was a tenured janitorial employee of the Board of Education of the Town of West New York, hereinafter "Board," when he was dismissed by an agent of the Board without certification of charges on January 14, 1974. He prays for reinstatement to his position and compensation for lost salary.

The Board denies any improper action on its part but contends that petitioner resigned his position on January 14, 1974.

A Motion for Relief, *pendente lite*, was filed with the Petition of Appeal on February 14, 1974, and oral argument on the Motion was heard by a hearing examiner appointed by the Commissioner of Education at the State Department of Education, Trenton, on March 20, 1974. It appearing that petitioner was a tenured employee of the Board and that irreparable harm might well result during litigation, the Commissioner in an Interlocutory Order temporarily restored petitioner to his position pending a final determination of the matter.

Subsequently, a plenary hearing was conducted at the offices of the Union County Superintendent of Schools on May 30, 1974 by a hearing examiner appointed by the Commissioner. Certain stipulated facts are set forth by the parties. The report of the hearing examiner follows:

Petitioner is a plumber who began working for the Board in February 1973 as a maintenance worker and worked thereafter until January 11, 1974 without benefit of a written contract or other form of written agreement. The only documentary evidence of his employment is a resolution of the Board, dated August 8, 1973, which reads as follows:

“\*\*\* RESOLVED THAT Patrick Cullen having completed a six months probationary period in the Maintenance Department of this School System and his qualifications having been deemed satisfactory and approved by his Supervisor, be and he is hereby appointed as a Maintenance Department employee retroactive to February 1, 1973.\*\*\*” (P-2)

Thus, it is shown that petitioner was appointed without a fixed term of employment. *N.J.S.A.* 18A:17-3 states:

“Every public school janitor of a school district shall, *unless he is appointed for a fixed term*, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, \*\*\* except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.<sup>1</sup>

<sup>1</sup> Section 18A:6-9 *et seq.* \*\*\* (Emphasis supplied.)

Accordingly, it is clear that petitioner was a tenured employee of the Board from the time of his appointment by the Board without designation of a fixed term of employment. While the Board initially denied at the time of the oral argument, *ante*, that petitioner was a tenured employee, it was stipulated by the Board at the hearing that petitioner was a tenured employee of the Board’s janitorial force. (Tr. 43)

The issues that remain for determination are whether or not petitioner voluntarily submitted a valid resignation which resulted in the legal termination of his employment, and whether or not a contingency set forth by the Board requiring improved work attendance by petitioner may properly be considered by the Commissioner as grounds for petitioner’s dismissal by the Board. These issues will now be examined.

Petitioner states that on or about January 17, 1974, he reported for work after an absence of a few days occasioned by illness and was directed by his foreman to see the Business Manager. He alleges that the Business Manager thereupon confronted him with a choice of either resigning or being fired. (Tr. 8-9, 11) He further testified that he was told he would be given a letter of recommendation only if he elected to resign (Tr. 11), and that he would have to submit a letter of resignation in order to withdraw his contributions to the pension fund. (Tr. 13) Petitioner testified that he believed he had no alternative to the termination of his employment with the Board and that he turned in his keys and left, having made only the noncommittal statement, “\*\*\*Have it your own way.\*\*\*” (Tr. 16)

He further testified that he thereafter sought counsel from the West New York Education Association President, who advised him to report for work the following day, which advice he followed on at least two successive days. However, he testified he was told by the Business Manager on the second day to leave the building or he would be “picked up.” (Tr. 22) Petitioner denies that he at any time verbally resigned or submitted a letter of resignation or applied to the pension fund for the return of his contributions. He further states that he sent a letter within ten days to the Business Manager as follows:

“\*\*\* This letter is to inform you that I did not resign my position with the Board of Education. I thought I was fired.\*\*\*”

(P-1, attachment to Affidavit)



Petitioner alleges that he was illegally discharged from his tenured employment without certification of charges before the Commissioner, that a valid resignation was never submitted by him or accepted by the Board, and that in the event of such an interpretation he rescinded such by his letter, *ante*, and by his acts. He further alleges he was improperly subjected to duress in being forced to choose between resigning with promise of a recommendation and being fired without a recommendation.

The Board, however, asserts that petitioner by his own choice orally resigned his position on or about January 17, 1974, and that he thereafter failed to submit a written resignation, but that such failure in no way dissipates its effectiveness. While admitting that the Board, through its Business Manager, confronted petitioner with a choice of resigning or being fired, the Board cites a prior contingency agreed to by both parties in a salary adjustment which required that petitioner's attendance at work improve. (R-3) The Board alleges that such contingency was not met, that petitioner's work attendance did not improve, and that the agreed-upon result in such an event was termination of employment. (R-3) Additionally, the Board denies that by letter or act, petitioner ever rescinded his resignation.

At this juncture the Board has advanced a Motion to Dismiss the Petition of Appeal, on the principal ground that the Petition lacks a cause of action for which relief may be granted. (Tr. 105-108) However, the hearing examiner recommends that the Commissioner deny the Motion to Dismiss in recognition of what appears to be the presentation of a *prima facie* case by petitioner.

The hearing examiner notes the testimony of the Business Manager wherein he said:

“\*\*\* I have no authority to fire anyone.\*\*\*” (Tr. 109)

and,

“\*\*\* I had instructions from the \*\*\* [Board President] to tell him that he's fired, \*\*\*” (Tr. 117)

and,

“\*\*\* I was ordered by the Board to ask [petitioner] either to resign or \*\*\* be fired and I went on to explain to him that if he's fired it would be pretty tough to get a job somewhere (sic) else trying to get some recommendation from us but if you do resign I am sure if your recommendation is needed that the Board would give you a good recommendation.\*\*\*” (Tr. 122-123)

Such testimony, which was repeated at the hearing (Tr. 139, 154), convinces the hearing examiner that the Board, through the Board President, who also served as head of the grounds committee, directed the Business Manager to notify petitioner that he was fired. Thereafter, the Business Manager

gave petitioner the option to be fired or to resign and, in a thinly-veiled threat, led petitioner to believe that only in the event that he resigned would he be given a good recommendation for future employment. The hearing examiner believes that such confrontation and the requirement that he make an immediate choice between being fired or resigning placed petitioner under duress within the definition set forth in *Rubenstein v. Rubenstein*, 20 N.J. 359, wherein it was said by the Court:

“\*\*\* The act or conduct complained of need not be ‘unlawful’ in the technical sense of the term; it suffices if it is ‘wrongful in the sense that it is so oppressive under given circumstances as to constrain one to do what his free will would refuse.’ *First State Bank v. Federal Reserve Bank*, 174 Minn. 535, 219 N.W. 908, 61 A.L.R. 467 (Sup. Ct. 1928).\*\*\*” (at p. 367)

See also *Edward Eugene Petrosky, Jr. v. Board of Education of the Borough of Freehold, Monmouth County*, 1972 S.L.D. 432.

It is admitted by the Board that petitioner, having been appointed by the Board to his position without fixed term of employment, was a tenured employee. N.J.S.A. 18A:17-3

N.J.S.A. 18A:6-10 states with regard to tenure employees:

“\*\*\* No person shall be dismissed or reduced in compensation, \*\*\* except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing, \*\*\* by the commissioner, \*\*\* shall have been preferred against such person \*\*\*.”

N.J.S.A. 18A:6-11 requires that, if such written charge is made, the Board shall:

“\*\*\* determine by majority vote of its full membership whether or not such charge and the evidence in support of such charge would be sufficient, if true in fact, to warrant a dismissal or a reduction in salary, in which event it shall forward such written charge to the commissioner, together with certificate of such determination.”

The hearing examiner finds no evidence herein that the requirements of the above statutes were complied with by the Board prior to the Board President’s directive to the Business Manager to notify petitioner that he was fired. Absent such compliance, the hearing examiner recommends that the Commissioner find that the directive of the Board President and the subsequent notification by the Business Manager to petitioner that he was fired or could resign was *ultra vires*. No contingency agreement nor directive (R-13) may supersede nor negate legislative requirements.

The hearing examiner further finds no convincing evidence that petitioner did resign. No documentary evidence thereof exists, and no corroborating testimony was presented at the hearing confirming an oral resignation. Nor is

there corroboration that petitioner sent to the Business Manager a letter denying that he had resigned his position. (P-1) In any event, the actions of petitioner in presenting himself for work on two successive days signified conclusively that he did not desire that a resignation should be considered to be in effect. It is clear that the Board, to this day, has not officially acted to accept a resignation by petitioner. (Tr. 143) A resignation, if it did ever exist, could not be considered to be in effect until accepted by the Board. As was said in *John Kivet v. Board of Education of the Township of Wyckoff, Bergen County*, 1938 S.L.D. 774 (1930):

“\*\*\* Anson, in ‘Principles of the Law on Contract,’ 4th American Edition, says on page 34:

‘Acceptance means communicated acceptance. \*\*\* Acceptance is to offer what a lighted match is to a train of gun powder. It produces something which cannot be recalled or undone. But the powder may have lain until it has become damp, or the man may remove it before the match is applied. So an offer may lapse for want of acceptance, or be revoked before acceptance.’\*\*\*” (at p. 776)

See also *Charles R. Thompson v. Board of Education of Madison Township, Middlesex County*, 1966 S.L.D. 172 and *Fryer v. Norton*, 67 N.J.L. 23 (1901).

In summation, the hearing examiner finds that on January 17, 1974, petitioner was confronted by the Business Manager with what he believed to be a *fait accompli* which would terminate his employment. Upon later advisement he made known by his actions of reporting for work that he himself did not consider, nor did he desire that others consider, that he had resigned his position. In consideration of these findings, the hearing examiner concludes that a valid resignation was never effectuated between petitioner and the Board.

In light of the previous findings, the hearing examiner recommends that the Commissioner order the Board to reinstate petitioner to his tenured janitorial position without prejudice to the Board’s action at any time pursuant to N.J.S.A. 18A:6-10 *et seq.*, with regard to petitioner’s alleged inefficiencies or improper conduct.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and considered the single objection pertinent thereto which was submitted by petitioner. This objection is, in essence, that the hearing examiner failed to make a recommendation with respect to petitioner’s request for “back pay.” In all other respects, however, the Commissioner accepts the report of the hearing examiner as his own.

It appears evident to the Commissioner that the Board, in this instance, proceeded illegally to attempt to discharge petitioner or to coerce him, if he was ignorant of his tenured entitlement to remain as an employee of the Board, to resign. Petitioner's tenured entitlement is clear since he was not a "fixed term" employee and, thus, he had acquired a tenure status. *N.J.S.A. 18A:17-3* (See *Custodians-Maintenance-Matrons Service Association v. Bridgewater-Raritan Regional Board of Education, Somerset County*, 1971 *S.L.D.* 135.) Therefore, he could not be dismissed, as the Board attempted to dismiss him, except in the manner described in the statutes. *N.J.S.A. 18A:6-19 et seq.*

The Commissioner holds, therefore, that petitioner must be made whole retroactively to the date of January 14, 1974, when petitioner "turned in his keys and left." (Tr. 16) At that juncture the proceedings against him, as a tenured employee, were clearly improper, and petitioner's actions and reactions may not be held against him. The Commissioner so holds.

Accordingly, the Commissioner directs the Board to restore petitioner to his position retroactively to January 14, 1974, and to afford him all the emoluments which are his due. This direction is subject only to a mitigation of such benefits as the result of whatever other earnings petitioner realized in the interim period from January 14, 1974 to the time of the Commissioner's Interlocutory Order which restored petitioner to his position.

COMMISSIONER OF EDUCATION

December 13, 1974

**Gladys S. Rawicz,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the Township of Piscataway, Middlesex County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, May 29, 1973

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent-Appellee, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

We remand this matter to the Commissioner of Education for compliance with the following: (1) that the Education Association be admitted as a party to the proceedings, and (2) that pursuant to *N.J.A.C. 6:24-1.16(b)*, copies of the report of the Hearing Examiner be made available to all parties, who may then file written exceptions, objections, or replies thereto with the Commissioner.

June 5, 1974

**Gladys S. Rawicz,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the Township of Piscataway, Middlesex County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**SUPPLEMENTARY DECISION**

Decided by the Commissioner of Education, May 29, 1973

Decided by the State Board of Education, June 5, 1974

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent-Appellee, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

We affirm our previous decision in this matter and resolve that the remand be directed for the express purpose of allowing the parties to the proceeding (including the Education Association), an opportunity, at this juncture, to file written exceptions, objections, or replies to the published report of the hearing examiner pursuant to *N.J.A.C. 6:24-1.16(b)* in order that subsequent to such filing the Commissioner may properly reconsider his decision.

September 11, 1974

**Gladys S. Rawicz and Piscataway Township Education Association,**  
*Petitioners,*

*v.*

**Board of Education of the Township of Piscataway, Middlesex County,**  
*Respondent.*

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioners, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq.,  
of Counsel)

For the Respondent, Rubin & Lerner (Frank J. Rubin, Esq., of Counsel)

This matter is before the Commissioner of Education on remand from the State Board of Education (1974 *S.L.D.* 1244, supplemental decision September 11, 1974) for the express purpose of permitting Petitioner Rawicz and the Piscataway Township Education Association to file written exceptions, objections and replies to the report of the hearing examiner in accord with the procedure described in *Marilyn Winston v. Board of Education of the Borough of South Plainfield, Middlesex County*, 64 *N.J.* 582, 319 *A. 2d* 226 (1974) and *N.J.A.C.* 6:24-1.16; and

It appearing that petitioners have filed a twelve-page reply specifying various objections to the hearing examiner's report which have been carefully reviewed by the Commissioner, the following determination is made of these several objections:

The Commissioner does not agree that an observation and evaluation of Petitioner Rawicz's teaching performance had to be made by the principal instead of a fully certified vice-principal empowered to perform such an educational function.

The fact that the statement of reasons for non-reemployment given to petitioner was prepared by a school administrator and did not come initially from the Board is of no significance since the reasons given are those upon which the Board based its determination.

The substantive question whether Petitioner Rawicz was entitled to a full adversary hearing before the Board or a designated administrative officer has been dealt with by the Commissioner and answered in the negative. Also Petitioner Rawicz did avail herself of the opportunity to make an appearance before the Board and be heard in regard to her non-reemployment. See *Donaldson v. Board of Education of the City of North Wildwood*, 65 *N.J.* 236 (1974).

The remaining specific objections have been examined and, in the



judgment of the Commissioner, do not suffice to alter his previous determination in this matter; therefore

IT IS ORDERED this 13th day of December 1974, that the decision of the Commissioner issued May 29, 1973, is hereby reaffirmed.

COMMISSIONER OF EDUCATION

Pending before State Board of Education

Board of Education of the Borough of Roselle,

*Petitioner,*

*v.*

Mayor and Council of the Borough of Roselle, Union County,

*Respondent.*

COMMISSIONER OF EDUCATION

ORDER

For the Petitioner, Simone and Schwartz (Howard Schwartz, Esq., of Counsel)

For the Respondent, Irving F. Sturm, Esq.

This matter having been opened to the Commissioner of Education by a Petition of Appeal filed by the Board of Education of the Borough of Roselle, Union County, and the Mayor and Council of the Borough of Roselle having filed an Answer thereto; and

It having been represented to the Commissioner by respective counsel for the parties to these proceedings that an amicable arrangement and settlement of the controversies between the parties has been agreed upon; therefore,

IT IS ORDERED on this 16th day of December 1974 that the following moneys be restored to the 1974-75 budget of the Board of Education of the Borough of Roselle which moneys were previously reduced from the said budget by the Respondent Mayor and Council:

Salaries for Vice-Principalships at the High School . . . . .	\$20,000
Counsel fees . . . . .	2,000
Salaries for Secretarial services for special education department . . . . .	5,000
Maintenance . . . . .	8,000
Salaries for teachers . . . . .	<u>4,500</u>
TOTAL . . . . .	\$39,500

IT IS FURTHER ORDERED that the Mayor and Council of the Borough of Roselle certify to the Union County Board of Taxation this additional sum of \$39,500 to be raised by local taxation for current expenses for the public schools of the Borough of Roselle for the school year 1974-1975.

COMMISSIONER OF EDUCATION

Board of Education of the City of Elizabeth,

*Petitioner,*

v.

City Council of the City of Elizabeth, Union County,

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, O'Brien, Daaleman & Liotta (Raymond D. O'Brien, Esq., of Counsel)

For the Respondent, Frank P. Trocino, Esq.

Petitioner, the Board of Education of the City of Elizabeth, hereinafter "Board," appeals from an action of the City Council of the City of Elizabeth, hereinafter "Council," certifying to the Union County Board of Taxation a lesser amount of local tax appropriations for school purposes for the 1974-75 school year than was proposed by the Board in its budget as submitted to the Board of School Estimate.

The facts underlying the controversy were adduced in the form of testimony and documentary evidence on July 23, 1974, and September 5, 1974 at a hearing conducted by a hearing examiner appointed by the Commissioner of Education at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

On February 11, 1974, the Board certified to the Board of School Estimate the sum of \$22,767,968.68, of which \$18,649,804.05 was to be raised by local taxation, as the amount necessary to operate a thorough and efficient system of public schools for the school year 1974-75. Subsequent to a public hearing on the Board's proposed budget, the Board of School Estimate certified to Council as the amount to be raised by public taxation \$17,475,304.05, which is \$1,174,500 less than was proposed by the Board. In turn, Council certified precisely this amount to the Union County Board of Taxation. The pertinent amounts may be shown as follows: (Exhibit A-2)

	Current Expense	Capital Outlay	Totals
Board's Proposal	\$22,581,368.86	\$186,600	\$22,767,968.86
Council's Certification	<u>21,517,868.86</u>	<u>75,600</u>	<u>21,593,468.86</u>
Reduction	\$ 1,063,500.00	\$111,000	\$ 1,174,500.00

The Board alleges that a thorough and efficient school system cannot be maintained with these reduced appropriations which it alleges were arbitrarily made. It appeals to the Commissioner to restore those amounts necessary to enable the Board to comply with legislative and administrative educational requirements.

Council avers that the economies it has effected will in no way jeopardize the thorough and efficient operation and maintenance of the school system. As part of its determination Council suggested items of the budget in which it believes economies may be effected without harm to the educational program. They are set forth as follows:

Account Number	Item	Board's Budget	Council's Proposal	Amount Reduced
<b>CURRENT EXPENSES:</b>				
J110k	Sals. Purch. Off.	\$ 19,700	\$ 7,700	\$ 12,000
J130k	Exps. Purch. Off.	2,000	—0—	2,000
J213a	Sals. Tchrs.	11,363,388	11,125,888	237,500
J214a	Sals. Librs.	186,637	166,637	20,000
J214b	Sals. Guid.	407,278	397,278	10,000
J214c	Sals. Psych.	433,957	410,957	23,000
J216	Sals. Other Instr.	299,479*	151,479	148,000
J230a,b	Lib. Books, Per.	87,470	82,470	5,000
J510b	Sals. Trans.	84,900	79,900	5,000
J610a	Sals. Custs.	1,369,000	1,344,000	25,000
J710a,b	Maint. Bldgs. Grnds.	602,470*	564,970	37,500
J720b	Repairs, Bldgs.	425,475	125,475	350,000
J730a	Instr. Equip.	276,160	126,160	150,000
J1010	Sals. Stud. Body Activs.	75,000	65,000	10,000
J1020	Other Exp. Stud. Body Activs.	65,000	55,000	10,000
J1100—	Sals. Comm.	110,000	97,500	12,500
CS213a	Serv. Tchr.			
J1100—	Sals. Comm.	75,000	69,000	6,000
CS216	Serv. Aides			
<b>TOTAL CURRENT EXPENSES</b>				<b>\$1,063,500</b>
<b>CAPITAL OUTLAY:</b>				
L1220c	Impr. to Sites	22,000	—0—	22,000
L1230a	Prof. Fees. Bldgs.	4,000	—0—	4,000
L1230c	Remod. Bldgs.	85,000	—0—	85,000
<b>TOTAL CAPITAL OUTLAY</b>				<b>\$111,000</b>

\*rounded off to nearest dollar

The hearing examiner has reviewed the record in its entirety and has weighed the testimony and documentation presented by the litigants. He finds that Council's reductions were not made in an arbitrary or capricious manner but were procedurally correct and within the guidelines established by the Supreme Court of New Jersey in the case of *Board of Education of East Brunswick Township v. Township Council of East Brunswick*, 48 N.J. 94 (1966). The findings and recommendations of the hearing examiner in regard to the controverted line items are herewith set forth, *seriatim*, as follows:

<i>J110k Purchasing Office Salaries</i>	<i>Reduction \$12,000</i>
<i>J130k Purchasing Office Expenses</i>	<i>Reduction \$2,000</i>

Council contends that the Board's previous practice of assigning responsibility for purchasing to the Assistant Secretary for Administration should continue.

The Board proposes to hire a purchasing agent and establish a purchasing office to handle its present annual volume of approximately ten thousand purchase orders and vouchers necessary for purchasing \$4,000,000 worth of equipment supplies and services. The Board cites as an additional burden the newly-enacted State legislation requiring that it purchase, catalog, and keep records on books to be supplied to 8,000 parochial school pupils in the City. (Tr. II-69) Additionally, the Board anticipates an increasing volume of purchases for school lunch programs in the 1975-76 school year when it must open additional school lunchrooms to comply with the enactment of *c. 53, P.L. 1974*.

The hearing examiner finds that the added burden on the Board of purchasing and keeping records on textbooks for the parochial and private schools of the City does indeed increase substantially the volume of work it must perform in this sector. The increased volume of purchases which will necessarily result from enactment of *c. 53, P.L. 1974* will not be required until July 1, 1975. However, the present volume of this operation is supportive of the Board's position that it may not continue efficiently under the part-time supervision of the Assistant Secretary for Administration.

In view of the above finding, the hearing examiner recommends that \$12,000 be restored to J110k for purchasing office salaries and that \$2,000 be restored to J130k for purchasing office expenses.

<i>J213a Teachers—Salaries</i>	<i>Reduction \$237,500</i>
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Council maintains that the Board's requested budget increase of \$1,152,665.25 for this line item is excessive and has proposed to reduce it to an amount equal to fifteen percent above that of 1972-73. (C-4) Council avers that this amount allows sufficient funds to provide for the Board's negotiated salary increases for teaching staff members.

The Board states that such a reduction represents the salaries of twenty teaching staff members. (Tr. I-26) The Superintendent of Schools testified that the Board's budget provided for no additional authorized teaching positions (Tr. I-27) in recognition of a modest increase in enrollment of only 192 pupils.

(Exhibit C) He testified that certain bilingual teaching positions were authorized in 1973-74 but were not filled because of the unavailability of qualified, certificated teachers. (Tr. I-28) He further stated that the Board desires to fill these positions to meet the needs of non-English speaking pupils during the 1974-75 school year.

Additionally, he testified that in determining the needs for this line item the amount of \$200,000 had been deducted in recognition that some positions may go unfilled in 1974-75 and in anticipation of personnel changes which may result in savings to the Board. (Tr. I-25)

The hearing examiner finds that the Board budgeted for teachers' and substitutes' salaries in 1973-74 a total of \$10,431,133 of which \$10,320,228 was expended. Its proposed budget for this line item in 1974-75 is \$11,363,388, an increase of \$1,043,160 over the previous year's actual expenditures for the same number of teachers. The Superintendent's testimony was that the negotiated salary increases in the entire instruction series (J200) of line items would exceed \$900,000. (Tr. I-23) This represents approximately an eight percent average overall increase in all instructional salaries. Applying this percentage to the actual expenditures for teachers' salaries in 1973-74 of \$10,320,227 would indicate that at least \$825,618 in additional funds is needed in this line item for 1974-75 to pay the negotiated salary increases to provide for the same number of teachers. This would total \$11,145,845.

The hearing examiner finds the need for bilingual instructors to be an imperative need in the City of Elizabeth. (Tr. I-60) He recommends that an additional \$45,000 be provided to allow for the filling of those vacant positions, when certified instructors become available.

Additionally, the hearing examiner observes that the Superintendent has deducted the large sum of \$200,000 from this line item in anticipation of personnel changes and possible unfilled positions which may or may not materialize during the year. With such provision in this critical area, the hearing examiner recommends that an additional contingency of \$46,000 be provided in this line item of the budget.

In accord with the above recommendations, the hearing examiner recommends that the Commissioner restore to this line item the amount of \$110,957, and that the reduction be sustained in the amount of \$126,543.

*J214a Librarians--Salaries*

*Reduction \$20,000*

Council contends that the Board's plan to add additional librarians is too ambitious in the face of rising taxes, and that Council's provision of \$166,637 is adequate to provide necessary library services. Additionally, Council points to the availability of free public libraries. (Tr. I-38)

The Board states that, of its eighteen elementary schools, nine possess no library facilities whatsoever. (Tr. I-35) It further states that it desires to provide annually three additional library facilities staffed by certified, full-time librarians. (Tr. I-37)

The hearing examiner finds that the amount of \$142,691 was expended for librarians in 1973-74. He recommends that the Commissioner restore \$10,000 to this account which will be an amount sufficient to provide for negotiated salary increases and provide for two additional librarians' salaries for the school year 1974-75.

*J214b Guidance--Salaries*

*Reduction \$10,000*

Council avers that its appropriation of \$397,278 along with funds available from other line items to fund the guidance services of the school district will meet the needs of the pupils.

The Board desires to add one bilingual guidance counselor to its staff at Edison Vocational and Technical High School which presently has two guidance counselors.

The hearing examiner finds a high ratio of pupils to counselors in the Board's 875 pupil vocational and technical high school as well as the substantial number of Hispanic pupils enrolled therein. (Tr. I-60) He finds that the Board's budget of \$407,278 is barely adequate to provide the Board's previously employed guidance personnel with negotiated salary increases and to employ an additional counselor at an estimated salary of \$14,000. It is recommended that the Commissioner restore \$10,000 to this line item in order that the special needs of Hispanic pupils may be more adequately met.

*J214c Psychological--Salaries*

*Reduction \$23,000*

Council argues that funds available in other accounts are adequate to meet the Board's needs for additional child study team personnel.

The Board proposes to add one additional child study team consisting of a psychologist, a learning disabilities specialist, and a social worker to its seven existing teams. (Tr. I-40)

The testimony of the Superintendent disclosed that there is a backlog of four hundred referrals awaiting the attention of the child study teams. (Tr. I-43) Such a backlog presents compelling reason to increase the staff of qualified persons to meet this need. The hearing examiner recommends that sufficient funds be restored to this line item to employ one additional psychologist and one additional learning disabilities specialist. This will enable the Board to completely staff an eighth child study team since it was testified by the

Superintendent that eight social workers are presently employed by the Board. (Tr. I-44) The recommended restoration is computed as follows:

1973-74 Expenditure	\$371,221
Eight percent Negotiated Increments	29,698
Two Additional Personnel	24,000
Total	\$424,919
Less Council's Appropriation	410,957
Recommended Amount to be Restored	\$ 13,962

The hearing examiner finds no merit in Council's contention that funds for this purpose be found in other accounts. Such procedure would be contrary to all principles of good budgeting. He therefore recommends that \$13,962 be restored to this line item and that the reduction in the amount of \$9,038 be sustained.

*J216 Other Instructional—Salaries* *Reduction \$148,000*

Council avers that ample funds will remain in the budget to operate the Board's program following the above reduction.

The Board asserts that it has been under public pressure to provide supervision for its pupils at lunch time in all of its schools. It presently provides such supervision and a "brown bag" lunch program for about 1500 elementary pupils primarily in its Title I (disadvantaged) schools. It proposes that the present 81 aides supervising the lunchroom "brown bag" program in its non-Title I schools be increased to 161 aides at a total cost of \$148,000 for both those presently employed and those it desires to employ.

The hearing examiner recognizes the problems of working parents who must provide supervision for their children when the school does not operate a supervised lunch program. Likewise, the school administrators are frequently subjected to pressure from those parents desiring for their children the same lunchtime supervision provided for pupils in Title I schools. (Tr. I-46) However, the Board is under no compulsion until the 1975-76 school year to extend its lunch programs pursuant to the provisions of c. 53, P.L. 1974. In view of the economies sought by Council, which likewise represents the populace of Elizabeth, the hearing examiner finds that the Board may wait to extend its lunchtime supervision until September 1975. He further finds that the logistics of staffing speak eloquently for not reducing that portion of the program which the Board has already established. Accordingly, he recommends that the Commissioner restore to this line item \$78,000 and sustain the reduction in the amount of \$70,000.

*J230a,b Library Books and Periodicals* *Reduction \$5,000*

The hearing examiner observes that Council has appropriated \$82,470 to this line item and that the Board expended \$61,737 in this line item in 1973-74. The Board's allocation in 1972-73 was \$84,980 and this was radically reduced in



1973-74. The hearing examiner is aware of the gross inflation that has affected the purchasing power of funds available for this purpose. He also finds that the Board's proposed allocation of \$87,470 is only sufficient at current prices to provide less than one library book per pupil for the 15,494 pupils enrolled. Accordingly, he recommends that \$5,000 be restored to this line item.

*J510b Transportation—Salaries*

*Reduction \$5,000*

The hearing examiner finds that at the time of budget preparation one driver vacancy was listed. It is this vacancy that Council avers need not be filled. The Board states that it has filled this vacancy in order to free its bus supervisor from driving duties in order that he may more closely supervise drivers, attendants, and equipment.

The hearing examiner finds that there is compelling reason in the interests of safety and efficiency to comply with recent stringent vehicle inspection requirements to have the bus supervisor freed of driving duties. (Federal Regulation, Standard 17) He recommends that the Commissioner restore \$5,000 to this line item.

*J610a Custodial Salaries*

*Reduction \$25,000*

Council asserts that there are ample funds in its appropriation of \$1,344,000 to this line item to provide for custodial needs.

The Board argues that it has the obligation to meet its agreement with the custodial union to provide the full amount of \$1,369,000 to this line item. The Board states that it has been forced by this agreement to abandon its former economy practice of hiring some substitute custodians rather than appointing regular custodians to all positions.

The hearing examiner finds the Board's testimony and documentation somewhat limited with respect to this line item. However, the Board's 1973-74 expenditure of \$1,269,966 for custodial salaries coupled with a modest cost of living increase for custodial employees and a requirement to abandon the former practice of filling certain positions with substitutes will necessitate the restoration of \$15,000 to this line item. It is recommended that the Commissioner do so, and that he sustain the reduction in the amount of \$10,000.

*J710a, b Maintenance, Buildings and Grounds*

*Reduction \$37,500*

Council states that certain positions which have from year to year remained unfilled are in fact unnecessary and may be vacated in the interests of economy.

The Board contends that Council's reduction was recommended without sufficient information as to the Board's needs. It further states that of four positions vacant at the time of budget preparation, three have now been filled.

This line item provides for such craftsmen as carpenters, painters, masons,

electricians, and others employed for emergency and regular repairs and maintenance. The agreement now being negotiated is for the current year and will be retroactive to cover that portion of 1973-74 which followed the termination of the previous agreement. (Tr. II-73) The Board expended \$581,047 in this line item during 1973-74. A modest cost of living salary increase, coupled with retroactive payments for a portion of the previous year, will deplete the entire amount of the Board's budget request of \$602,470. In accord with this finding the hearing examiner recommends the restoration of \$37,500 to this line item.

*J720b Repairs, Buildings*

*Reduction \$350,000*

Council states in its written documentation only the following:

“\*\*\* Since the City of Elizabeth is responsible to its taxpayers for the raising of funds to support the Board of Education budget, City Council feels it is their prerogative to determine the method used in raising such funds to the best interests of said taxpayers.\*\*\*” (Document C-3)

On the first day of hearing this statement was clarified by a representation by counsel for the governing body that Council was willing to include the full amount of this item, as well as line item J730a, L1220c, L1230a, and L1230c, as bondable items, thus obviating the necessity for further testimony regarding those items. (Tr. I-6-7)

On the second day of hearing, this representation was withdrawn and Council stated that the entire amount of its suggested reduction was subject to determination by the Commissioner. (Tr. II-86) This being so, the hearing examiner ordered that additional written testimony on these accounts be furnished by the Board. This was provided subject to the right of Council to have additional cross-examination at a later date. Council waived this right, however, by a letter dated September 18, 1974.

The Board advances, in support of its needs in this line item, numerous proposed repairs with projected costs for sixteen of its twenty-four schools. (Exhibit B)

The hearing examiner finds that fourteen of these sixteen schools are from forty-three years to sixty years of age. He further finds that the Board's proposed expenditures are almost exclusively for heating and ventilation replacements, roof and parapet repairs, chalkboard resurfacing, electrical wiring and panel replacement, replacement of skylights, window shades, and defective equipment, and the removal of exterior hazards. (Exhibit B)

The hearing examiner finds both the Board's documentation and testimony offered by the Business Manager regarding its building repair needs supportive of the necessity to eliminate hazardous conditions and inefficient or non-operable equipment. (Tr. II-92-97) He concludes that such repairs as those set forth in detail herein are required in the Board's numerous older school buildings. These must be given attention to meet health and safety standards both for the welfare of pupils and to avoid future repairs of increasing magnitude that inevitably arise from neglect.

In accordance with the above finding he recommends that \$350,000 be restored to this line item.

*J730a Instructional Equipment*

*Reduction \$150,000*

Council asserts that economies may be effected by reducing this line item from \$276,160 to \$126,160 and further made a similar statement to that reported in J720b, *ante*, regarding how the funds should be raised.

The Board details its needs in this category principally in the form of replacement of equipment, furniture, audiovisual projectors, recorders, and business education machines. Included also is new equipment and furniture in certain areas as well as the conversion of certain elementary and secondary school libraries into multi-media centers. (Summary of Budget 1974-75, at pp. 5a-5b)

The hearing examiner finds that the amount proposed by the Board in its budget is \$64,000 less than that which was appropriated by Council in 1973-74. (Tr. II-160) The need to replace outdated and outworn equipment and furniture is apparent in maintaining a thorough and efficient educational program. However, Council's desire to effect economies must be given due consideration since in a municipality which does not vote on the school budget, it alone is initially assigned the function of a review body in deference to the will of the taxpayers. Having weighed the above considerations, the hearing examiner concludes that \$235,160 is essential in this line item to maintain a thorough and efficient program of education for the school year 1974-75. He recommends the restoration of \$109,000 to this line item and that the reduction be sustained in the amount of \$41,000, which approximates the cost of the Board's plans for conversion of certain facilities which may be considered in the future.

*J1010 Student Body Activities—Salaries*

*Reduction \$10,000*

Council feels that its appropriation of \$65,000 to this line item is adequate to operate the pupil activities program efficiently.

The Board states that it is required to develop programs for girls similar to those it provides for boys in order to comply with the requirements of both Title IX of the Educational Amendment of 1972 (federal) and New Jersey statutory requirements which state that all opportunities be provided equally to both sexes. (Tr. I-50) Additionally, the Board desires to expand its intramural offerings to both boys and girls at the junior high school level.

The hearing examiner finds that the Board maintains a girls' school which has not provided in all instances pupil activities similar to those made available to boys in the district. State and federal requirements are such that the Board must make them equally available to members of both sexes. This being so, there is a requirement that the Board provide additional interscholastic coaches, as well as intramural directors for female activities.

The hearing examiner finds that the Board expended a total of \$54,359 in this line item in 1973-74. Council's appropriation allows for a twenty percent

increase of \$10,641 which should provide for a reasonable expansion of the girls' activities program and for normal increments in salaries for one year. The hearing examiner, while recognizing that expansion of the intramural program into the junior high school may be desirable, knows of no compulsion that requires the Board to do so in the face of Council's desire to effect economies. He recommends that the Commissioner sustain this reduction in the full amount of \$10,000.

*J1020 Other Student Body Activities--Expenses                      Reduction \$10,000*

The Board's Director of Physical Welfare testified regarding the inflated prices of new and reconditioned athletic equipment, awards, and transportation (Tr. I-55-56), as well as a recent N.J.S.I.A.A. requirement that paid officials be provided in the so-called minor sports such as swimming and track.

The Board expended \$44,671 from this line item in 1973-74. Allowance for a twenty percent increase in cost of goods and services and for the initiation of an expansion in the girls' program at the high school level would require an expenditure of \$60,000. In accord with this finding, the hearing examiner recommends that the reduction be sustained in the amount of \$5,000 and that \$5,000 be restored to this line item.

*J1100-CS213a Community Service Teachers--Salaries                      Reduction \$12,500*  
*J1100-CS216 Community Service Aides--Salaries                      Reduction \$6,000*

These line items provide for the operation of a supplementary educational program at Community School No. 1 from 3:00 p.m. to 10:00 p.m. on weekdays and for a Saturday and Sunday program during the warmer months at the swimming pool which is part of that facility. Salaries are for teachers who instruct and direct activities and for locker room aides who supervise the facilities and assist elementary school children during the aforementioned periods of time. (Tr. I-58;Tr. II-128)

In regard to this program the Superintendent testified that:

“\*\*\* [T]here are additional expenditures because at community request and with the acquiescence of City Council, all of our community leaders, we have opened this program to operate on Saturdays and Sundays during the summer months and this has required additional expenditures \*\*\*.”  
(Tr. II-128)

This testimony was not challenged at the hearing.

The hearing examiner finds that of the \$76,000 budgeted for teachers' salaries in 1973-74, \$69,975 was expended. The amount suggested by Council allows for an increased appropriation for teachers' salaries of \$27,525. Similarly, of the \$58,000 budgeted for aides in 1973-74, \$44,883 was expended. Council's recommendation for this line item for 1974-75 provides for an increase of \$24,117 above the previous year's expenditures.

The hearing examiner, after consideration of the documentation and testimony regarding these line items and recognizing the increased

appropriations by Council, concludes that the Board has not proven the necessity for restoration of the reductions by Council and recommends that the Commissioner sustain the reductions in full.

*L1220c Site Improvements*

*Reduction \$22,000*

Council sets forth the same basis for reduction as previously stated in J720b, *ante*. The Board proposes to improve the landscaping at its Community School No. 1 and to regrade and pave with bituminous concrete its recently acquired property adjacent to the Hamilton Junior High School to provide for a more adequate play area.

The hearing examiner, in recognition of the Board's need for these improvements, recommends that the amount of \$22,000 be restored to this line item.

*L1230a Professional Fees, Buildings*

*Reduction \$4,000*

*L1230c Remodeling, Buildings*

*Reduction \$85,000*

These line items are opposed by Council on precisely the same grounds as previously stated in J720b, *ante*.

The Board documents its needs for L1230c in complete and convincing detail. (Exhibit B, at pp. 5-6 and Exhibit C, unp) These needs encompass new high pressure boilers at the Cleveland School, vandal alarm systems for three frequently burglarized schools, belts, clocks, intercommunication systems, lock cylinders, and classroom renovations.

The hearing examiner recommends that \$4,000 be restored to L1230a to provide for the necessary plans and specifications to remodel certain facilities in the Board's older schools. He further recommends that \$85,000 be restored to L1230c in order that the Board may keep abreast of its needs for improvements and replacements of major heating equipment which are necessary to maintain a thorough and efficient system of public education.

Finally, the hearing examiner observes that considerable testimony (Tr. II-105 *et seq.*) was given regarding the Board's July 1, 1974 unappropriated free balances which were \$387,084.49 on July 1, 1974. This amount represents less than two percent of the Board's current budget. Further, the Board is faced with uncertainties of fuel costs and federal and vocational funding. (Tr. II-105) In any event, the Board follows a practice of appropriating any unexpended funds into the income portion of the following year's budget. (Tr. II-107) Such a practice is in itself a prudent show of good faith and has been a practice of the Board for twenty-five years.

In recognition thereof, the hearing examiner recommends that no reduction of the unappropriated free balance be ordered by the Commissioner.

A summary of the hearing examiner's recommendations appears in the following chart.

Account Number	Item	Amount of Reduction	Amount Restored	Amount Not Restored
<b>CURRENT EXPENSES:</b>				
J110k	Sals. Purch. Off.	\$ 12,000	\$ 12,000	\$—0—
J130k	Exps. Purch. Off.	2,000	2,000	—0—
J213a	Sals. Tchrs.	237,500	110,957	126,543
J214a	Sals. Librs.	20,000	10,000	10,000
J214b	Sals. Guid.	10,000	10,000	—0—
J214c	Sals. Psych.	23,000	13,962	9,038
J216	Sals. Other Instr.	148,000	78,000	70,000
J230a, b	Lib. Books, Per.	5,000	5,000	—0—
J510b	Sals. Trans.	5,000	5,000	—0—
J610a	Sals. Custs.	25,000	15,000	10,000
J710a, b	Maint. Bldgs., Grnds.	37,500	37,500	—0—
J720b	Repairs, Bldgs.	350,000	350,000	—0—
J730a	Instr. Equip.	150,000	108,000	42,000
J1010	Sals. Stud. Body Activs.	10,000	—0—	10,000
J1020	Other Exp. Stud. Body Activs.	10,000	5,000	5,000
J1100— CS213a	Sals. Comm. Serv. Tchrs.	12,500	—0—	12,500
J1100— CS216	Sals. Comm. Serv. Aides	6,000	—0—	6,000
<b>TOTAL CURRENT EXPENSES</b>		<b>\$1,063,500</b>	<b>\$762,419</b>	<b>\$301,081</b>
<b>CAPITAL OUTLAY:</b>				
L1220c	Impr. to Sites	22,000	22,000	—0—
L1230a	Prof. Fees, Bldgs.	4,000	4,000	—0—
J1230c	Remod., Bldgs.	85,000	85,000	—0—
<b>TOTAL CAPITAL OUTLAY</b>		<b>\$111,000</b>	<b>\$111,000</b>	<b>—0—</b>
<b>GRAND TOTALS</b>		<b>\$1,174,500</b>	<b>\$873,419</b>	<b>\$301,081</b>

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the entire record of the instant matter, including the report of the hearing examiner and the objections thereto pursuant to *N.J.A.C. 6:24-1.16*.

He accepts the finding of fact and the recommendations of the hearing examiner with a single exception. The hearing examiner has sought to restore as a contingency the amount of \$46,000 to the teachers' salary line item J213a. While this amount is not unreasonable, amounting as it does to less than one half of one percent of the Board's obligations in this line item of its budget, the Commissioner finds no need for such a contingency in addition to that already available to the Board in its unappropriated free balance. Therefore, the amount to be restored to this line item is hereby decreased by the amount of \$46,000 from \$110,957 to \$64,957.

Council's request in its exceptions that the Commissioner direct that any amounts restored to line items J720b, J730a, L1220c, L1230a and L1230c be restored by way of bonding, rather than by current taxation, is inappropriate. The Commissioner does not interpose his judgment where a local board of education and the governing body mutually agree to the bonding of capital outlay items in accord with regulations issued by the State Department of Education. When such agreement cannot be reached, however, as is the case herein, and the matter becomes a dispute before the Commissioner pursuant to *N.J.S.A. 18A:6-9 et seq.*, the Commissioner will not direct that those funds which he determines to be necessary for a thorough and efficient system of schooling be raised by bonding rather than current taxation.

The Commissioner recognizes the Board's long established and desirable practice of appropriating as revenue to its succeeding budget all unappropriated balances which are not required for its current year's operation. He will not, therefore, direct that any portion of current unappropriated balances be used as revenue for the Board's 1974-75 school program.

Regarding the objection raised by Council concerning line item J216, it is observed that the hearing examiner's recommendations are fully in accord with the words of the Commissioner in *Board of Education of the City of Plainfield v. City Council of the City of Plainfield*, 1974 *S.L.D.* 913 wherein he stated that:

“ \*\*\* While the constitutional requirement which imposes on local school districts the obligation to conduct ‘thorough and efficient’ programs of education is nowhere precisely defined, the Commissioner holds that it must be interpreted to mean that *as a minimum such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation of effort.* \*\*\* ” (*Emphasis supplied.*) (at pp. 920-921)

The Commissioner determines that the amounts previously certified by Council are inadequate to maintain a thorough and efficient program of public education in the schools of the City of Elizabeth for the 1974-75 school year. Accordingly, the Commissioner hereby certifies to the Union County Board of Taxation the additional amounts of \$716,419 for current expenses and \$111,000 for capital outlay, so that the entire amount of the certification for current expenses of the school district shall be \$22,234,287.86 and the total certification for capital outlay shall be \$186,600 for the school year 1974-75.

COMMISSIONER OF EDUCATION

December 16, 1974  
Pending before State Board of Education



**Richard Onorevole,**

*Petitioner,*

*v.*

**Board of Education of the City of Englewood, Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, John A. Conte, Esq.

For the Respondent, Sidney Dincin, Esq.

Petitioner, who was employed as a teaching staff member by the Board of Education of the City of Englewood, hereinafter "Board," until he resigned in July 1970, seeks compensation for vacation time which he alleges had accrued to him at the time of his resignation. The Board denies that petitioner has any vacation rights under his employment contract and requests dismissal of the Petition.

Hearings in this matter were conducted on March 1, April 23, and May 24, 1973 at the office of the Bergen County Superintendent of Schools by a hearing examiner appointed by the Commissioner of Education. Briefs were subsequently filed by the parties in regard to the Board's position that petitioner is barred from seeking relief through the application of the doctrine of laches. Additionally, the parties filed written summations. The report of the hearing examiner is as follows:

Petitioner began his employment with the Board as a classroom teacher on September 1, 1956, and continued thereafter in that capacity until July 1, 1965. For each of the years petitioner was employed as a classroom teacher it was agreed and understood between him and the Board that his yearly employment was for ten months each year, or, as reflected in four signed employment contracts for 1956-57 (P-1), 1957-58 (P-2), 1958-59 (P-3), 1959-60 (P-4), from September 1 until June 30th each year. (Tr. I-11)

Petitioner testified that sometime during March 1965 he applied for the newly-created position of coordinator of instructional materials, hereinafter "coordinator." He was appointed to that position on May 10, 1965 by the following resolution adopted by the Board: (C-1)

\*\*\*\* On motion made, seconded and carried, the establishment of an Instructional Materials Center was authorized, and Mr. Richard E. Onorevole [petitioner] is to be appointed Coordinator of the Center at a salary at the rate of \$12,190 per year (12 months) for the school year 1965-66."

Petitioner began his duties as coordinator on July 1, 1965. (Tr. I-25) In the two subsequent years petitioner received salary notices from the Board in lieu of an employment contract. (P-6, P-7) The notice contained a statement of intention to return to the Board's employment, which petitioner signed and filed with the Board. The notice received for the 1966-67 academic year (P-6) provides in pertinent part:

"Name	Position	Degree Class	1966-67 Base Salary	Length of Contract
Richard Onorevole	Coordinator of Instructional Center	6-Yr. 12	\$12,474	12
				***"

The 1967-68 academic year notice (P-7) provides, in the same pertinent part, the following:

"Name	Position	Degree Class.	1967-68 Base Salary	Length of Contract
Richard Onorevole	Director	6-Yr.-12	\$13,340	12 Mos.
				***"

For the 1969-70 academic year and for the 1970-71 academic year the Board and petitioner entered into detailed employment contracts covering each of those years. The 1969-70 academic year employment contract (P-8) provides, *inter alia*, as follows:

"CONTRACT  
"(Administrative)

"It is agreed between the Board of Education of the City of Englewood, New Jersey, and Richard E. Onorevole that the \*\*\* Board \*\*\* has employed \*\*\* [him] \*\*\* as Instr. Comm. Area Consultant \*\*\* to perform such services \*\*\* as may be required \*\*\* for a period which will begin on 1 July, 1969 and end on the 30th day of June, 1970 at a salary at the rate of \$15,912 per year on Step 13-6yr. S-C of the present Salary Guide \*\*\*.

"Dated this May 13, 1969.

"Base	\$13,600	
"Cons. 7%	952	
"11th mo. 10%	1,360	
	<u>\$15,912</u>	***"

A review of the 1970-71 academic year contract (P-9) reflects the following differences:

1. The 1969-70 contract (P-8) sets forth a specific step, "Step 13-6 yr. S-C," of the Salary Guide, while the 1970-71 contract (P-9) has no specific step.
2. Both the signature of the Board President and the Board Secretary represent different persons.

3. The computation under the date of the contract differs in 1970-71 (P-9) from 1969-70. (P-8) The computation for 1970-71 is as follows:

“Base	\$16,000
“Cons. 8%	1,280
“11th mo. 10%	<u>1,600</u>
	\$18,880”

In all other respects, the two detailed contracts for 1969-70 (P-8) and 1970-71 (P-9) are essentially the same.

Petitioner bases his claim for compensation for accrued vacation time on three points: (1) that since July 1, 1965, when he was appointed coordinator, he was, in fact, employed as an administrator; (2) that since July 1, 1965, he had been employed on a twelve-month basis; and (3) on the then-existing policy of the Board to grant one month's vacation to administrators employed on a twelve-month basis when they became eligible for such a benefit after twelve months on the job. It is pointed out that while no copy of the Board's policy in regard to vacation time for administrators employed for twelve months was produced, the former Superintendent did testify that such was the policy of the Board. (Tr. III-52) In fact, the Board Secretary testified in regard to a motion adopted by the Board at its meeting of June 13, 1966, which provided:

“\*\*\* In accordance with the recommendations of the superintendent a resignation of Mr. Robert T. LoFranki, Assistant Principal of Dwight Morrow High School was accepted effective June 30, 1966, is to be changed to effective date of July 31, 1966, so that he may receive salary for his one month vacation in accordance with board policy.\*\*\*”

(Tr. II-28)

In regard to petitioner's experience of receiving vacation time since July 1, 1965, he testified over objection by the Board, that during the first year of his employment as coordinator of instructional materials he inquired of the secretary to the personnel department concerning vacation. (Tr. I-41) Petitioner testified he was informed that at the end of his first year he would receive a vacation period of twenty days with pay, and at the end of each year of employment thereafter he would receive twenty vacation days with pay. (Tr. I-44) Petitioner further testified that subsequent to his first year of employment as the coordinator he had twenty days off in July 1966, and each year thereafter he had twenty days off in each July until 1970. (Tr. I-45)

By letter dated July 9, 1970 (C-6), petitioner resigned his employment with the Board effective July 31, 1970. It is pointed out that, according to petitioner's testimony, the month of July had been the month when he had been on vacation for twenty days. However, subsequent to his letter of resignation (C-6), petitioner received a letter dated July 21, 1970 (P-25) from the then Superintendent of Schools which stated, in pertinent part:

\*\*\*

"It is my responsibility to advise you that I shall expect twenty days service during the month of July and when you are not going to be on the job please notify Mrs. Flamm.

"Just by chance Miss Bopp [the former secretary to the personnel department to whom petitioner earlier inquired in regard to vacation time and who is now reassigned] informed us that you would not be in 7/20/70.

"I am certain that as a professional, that I know you to be, you will full fill (sic) your obligations to the Englewood Public Schools until July 31st [1970]. \*\*\*"

Petitioner claims that he should have received twenty paid vacation days during July 1970, instead of being required to work by the Superintendent for which he now demands compensation.

In regard to his assertion that, since July 1, 1965, he was employed as an administrator, petitioner testified that when he began his duties as coordinator his hours were changed to coincide with those hours of other administrators (Tr. I-49-50); that in his new position as coordinator he did not have the same Christmas, Easter or Winter vacations as regular classroom teachers (Tr. I-52-54), and that during those periods of time he had to report to his office. Furthermore, petitioner testified that he served as the administrative officer of the Lincoln School between November 14, 1966, and the summer of 1968. (Tr. I-66) It is noted that the Board adopted a resolution in this regard (C-4) and also determined to provide petitioner with \$500 extra compensation for his extra service in addition to his regularly-assigned duties as coordinator.

The Lincoln School, according to petitioner, housed administrative offices and a pilot program for pre-kindergarten pupils which grew into a primary school program. It was that primary school program for which petitioner was the administrative officer in addition to his regularly-assigned duties as coordinator.

In any event, while performing his extra duties as administrative officer, he testified, he attended all administrative staff meetings and generally performed those duties expected of a school principal. (Tr. I-65) The former Superintendent testified, however, that while petitioner was not a member of his administrative council he was invited to attend all its meetings. (Tr. III-37)

Petitioner also contends that by virtue of his exclusion from the Englewood Teachers Association, he was, in fact, an administrator and not a regular classroom teacher. (Tr. II-43) Petitioner also points to his two detailed contracts of employment for 1969-70 (P-8) and 1970-71 (P-9) which specifically set forth the term "Administrative" under the word "CONTRACT" to indicate he was an administrator.

Petitioner also relies on a series of six memoranda all of which, except one, issued from the then Superintendent's office and were addressed to either "All Administrators" (P-11), "All Principals and Directors" (P-23), or "All Principals

and Supervisors.” (P-12, P-13, P-14) The sixth memorandum (P-15), dated October 13, 1969, contained travel directions to Westfield for a special workshop and contained the following:

\*\*\*

“REMINDER

Principals and administrators only are invited to Westfield on October 16th [1969] for luncheon and a meeting.\*\*\*”

Petitioner asserts that by virtue of his name being included on these memoranda (P-11, 12, 13, 14, 15, 23) he was, *de facto*, an administrator.

In petitioner’s view, his claim that he was employed since July 1, 1965 on a twelve-month basis is buttressed by the Board’s resolution (C-1) by which he was originally appointed coordinator. That resolution establishes his salary for 1965-66 at \$12,190 per year for twelve months. Furthermore, petitioner points to subsequent-year contracts all of which set twelve months as the term of the contract. (P-6, P-7, P-8, P-9) Finally, in support of his view that he was employed for twelve months per year since July 1, 1965, petitioner points to the Board minutes of April 11, 1966 (P-19) by which personnel salaries were established for 1966-67 in which petitioner’s name appears as a twelve-month employee in the category of coordinators and directors. In the Board minutes for April 10, 1967 (P-20), by which salaries were set for the 1967-68 year, petitioner is again categorized as a twelve-month employee with the title “Director.” Also, the Board minutes of June 10, 1968 (P-21) again refer to petitioner as a twelve-month employee. These minutes set personnel salaries for 1968-69 and petitioner was designated as “Instructional Communications Area Consultant.” Attached to the Board minutes of June 23, 1969 (P-22) is a list entitled “Administration” containing recommended salaries for the Superintendent, Assistant Superintendent, principals, directors, *et al.* Petitioner’s name is included in this list.

The former Superintendent testified, on behalf of the Board, that petitioner’s contracts for 1969-70 (P-8) and 1970-71 (P-9) reflected a position for ten months, plus extra compensation for being a consultant supervisor, plus an additional ten percent for the eleventh month of employment. (Tr. III – 4-5) In this regard the Board submitted a series of twenty-five contracts and/or notices of salary (R-4) intended to demonstrate the format of contracts used by the Board to employ administrators on a twelve-month basis. (Tr. III – 11-12) The Board argues that none of the contracts in that series (R-4) has the computation of petitioner’s contracts for 1969-70 (P-8) or 1970-71 (P-9) which set forth a base salary, plus an additional percentage for consultant supervisor, plus another percentage for the eleventh month of employment.

The former Superintendent also testified that the director of athletics was also a ten-month employee who, like petitioner, received a percentage for being a supervisor and another percentage for working the eleventh month. (Tr. III–14) In fact, the Superintendent testified, the Board used three types of employment contracts: the ten-month teacher contract; an eleventh month contract; and a twelve-month administrator’s contract. (Tr. III–17)

Finally, the former Superintendent testified that during his tenure as Superintendent, petitioner was never employed on a twelve-month basis; to the contrary, the Superintendent testified that petitioner was employed for ten months and received extra compensation for the eleventh month with the twelfth month being his own time. (Tr. III-55-56)

It remains to consider the Board's claim that petitioner should be barred from now seeking relief through the application of the doctrine of laches. In this regard petitioner testified that subsequent to receiving the Superintendent's letter dated July 21, 1970 (P-25) by which he, petitioner, was expected to work until July 31, 1970, he spoke with the Superintendent to explain his view that that period of time was properly his vacation time. (Tr. I-84) The former Board Secretary testified he recalled a meeting between the Board Secretary, the Superintendent and petitioner sometime in 1970 to discuss petitioner's vacation. (Tr. I-92) After speaking with the Superintendent, petitioner testified he then wrote to the President of the Board and objected to the requirement that he work the month of July 1970. (Tr. II-54) The Superintendent replied to petitioner on behalf of the Board President during August or September 1970. In this reply, according to petitioner, the Superintendent informed petitioner that he would not recommend that the Board compensate him for vacation. (Tr. II-54-55) Subsequent thereto, petitioner contacted a New Jersey Education Association representative to intercede on his behalf with the Superintendent. (Tr. II-56-57)

Following these efforts, petitioner then testified he retained legal counsel in an effort to receive his vacation pay. (Tr. II-57) Several communiques transpired between the Board and petitioner's then legal counsel. However, petitioner subsequently had to seek other legal counsel because his attorney resigned. (Tr. II-60) Petitioner then secured the services of present counsel.

The former Superintendent's testimony was, in general, a corroboration of petitioner's testimony with respect to the efforts which had been expended to get the matter resolved; i.e. conferences, letters, contacts by counsel and the N.J.E.A. representative. (Tr. III-48-52)

The Board asserts that petitioner left its employ on July 31, 1970, and did not file the instant Petition of Appeal until November 3, 1972. This delay of twenty-seven months, the Board avers, constitutes laches and accordingly the matter should be dismissed. In this regard, the Board relies on *Good et als. v. Lackawanna Leather Co. et als.*, 96 N.J. Super. 439, 459 (Chan. Div. 1967); *Clark v. Judge*, 84 N.J. Super. 35, 53 (Chan. Div. 1964); *Summer Cottagers' Association of Cape May v. Cape May*, 34 N.J. Super. 67, 79, 80 (Law Div. 1954), affirmed 19 N.J. 493; *Auciello v. Stauffer*, 58 N.J. Super. 522, 528-529 (App. Div. 1959); *Mitchell v. Alfred Hofmann, Inc.*, 48 N.J. Super. 396, 403-404 (App. Div. 1958); *Marjon v. Altman*, 120 N.J.L. 16, 18 (Sup.Ct. 1938); *Flammia v. Maller*, 66 N.J. Super. 440 (App. Div. 1961); *Dorothy L. Elowitch v. Bayonne Board of Education*, 1967 S.L.D. 78, affirmed State Board of Education 1967 S.L.D. 86.

Petitioner, however, asserts that he made several attempts to resolve his stated claim with the Superintendent prior to and after the effective date of his

resignation. Furthermore, he points to the fact he sought the assistance of the N.J.E.A. representative, and that he then sought the advice of counsel who attempted by letter to get the matter resolved.

Thereafter, petitioner was required to engage present counsel in early 1972 to press his claim forward. Finally, petitioner asserts that only after all these efforts failed did he then file the instant Petition of Appeal. At no time, petitioner avers, did he abandon his claim and the delay, if any, was not caused by his inaction but by his numerous attempts to reach a settlement prior to litigation.

Finally, petitioner contends that the Board failed to produce any evidence whatsoever that it was prejudiced by any delay, and absent such proof a defense of laches is inappropriate.

In support of his position that he is not barred from seeking relief because of laches, petitioner cites *West Jersey Title Co. v. Industrial Trust Co.*, 27 N.J. 144 (1958); *Pavlicka v. Pavlicka*, 84 N.J. Super.357, 368 (App. Div. 1964); *Mitchell v. Alfred Hofmann*, *supra*; *Weber v. Pieretti*, 72 N.J. Super.184, 203 (Chan. Div. 1962); *Flammia supra*; *Auciello supra*; *Bookman v. R. J. Reynolds Tobacco Company*, 138 N.J. Eq. 312 (Chan. Div. 1946); *Good et als.*, *supra*; *Clark supra*; *Blanche Beisswenger et als. v. Board of Education of the City of Englewood*, 1971 S.L.D. 489; *Ronald Giberson v. Board of Education of the Borough of South Plainfield*, 1970 S.L.D. 433; *Ralph Herold v. Board of Education of Mount Arlington*, 1967 S.L.D. 255.

The hearing examiner finds that petitioner did not deliberately delay filing his Petition before the Commissioner. Only after he attempted to settle the matter with the Superintendent and through the Board President did he then seek redress before the Commissioner. Furthermore, the counsel that petitioner had originally retained to press his claim was replaced by present counsel. It is noted here that petitioner attempted to explain the reasons for the change but the Board was successful in its objection to that testimony. (Tr. II-60)

Accordingly, the hearing examiner recommends that the Commissioner find that the doctrine of laches is inapplicable as an equitable estoppel to the claim, *sub judice*.

Further, it is the finding of the hearing examiner that petitioner was a twelve-month employee of the Board notwithstanding the manner his yearly salary was computed for 1969-70 (P-8) and 1970-71. (P-9) This finding is grounded on the clear and precise terms of those contracts setting forth the period of employment between July 1, 1969 and June 30, 1970 (P-8), and July 1, 1970 and June 30, 1971. (P-9) If the intention of the Board was, in fact, to employ petitioner on a ten-month basis, it easily could have done so by engaging petitioner for ten months. Furthermore, if the Board had wanted petitioner to provide services for the month of July or August, it could have entered into a separate agreement with petitioner for that one month. However, going back to his appointment as coordinator of instructional materials in 1965, the Board's own resolution (C-1) sets forth the period of employment as twelve



months; the notices he received for the 1966-67 (P-6) and the 1967-68 (P-7) school years set forth the duration of his employment as twelve months.

Having arrived at a finding that petitioner was employed on a twelve-month basis, the next issue to be addressed is whether he, by virtue of an alleged Board policy, is entitled to vacation time. The hearing examiner is convinced by petitioner's testimony in regard to his prior vacation time, and by the former Superintendent's testimony in regard to the existence of a Board policy to grant one month's vacation to administrators employed on a twelve-month basis, that he was entitled to one month of vacation during July 1970. The hearing examiner does not view as critical whether petitioner was acknowledged as an administrator by the Board or by the former Superintendent. Surely, by the prior practice of the Board, petitioner came to expect and, in fact, did receive vacation time until he notified the Board of his intention to resign.

Accordingly, the hearing examiner finds that petitioner was a twelve-month employee of the Board for 1970-71, and recommends that the Commissioner adopt the finding of the hearing examiner that petitioner was entitled to the vacation time or, in lieu thereof, the compensation he now seeks for the month of July 1970.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner, having reviewed the record of the instant matter, the report of the hearing examiner, and the exceptions taken thereto pursuant to *N.J.A.C. 6:24-1.16*, concurs with the findings of the hearing examiner.

There is no need to determine whether petitioner was indeed an administrator. Such a determination would be of no moment, since that aspect was rendered moot by the fact that he is no longer in the employ of the Board. The Commissioner rejects respondent's claim that the doctrine of laches as an equitable estoppel should be invoked against petitioner. Such delay as was occasioned herein was clearly the result of efforts on the part of petitioner to achieve an amicable resolution of the matter. This delay did not in any way result in inconvenience or liability to the Board.

In any event, there is ample evidence in the record to support petitioner's claim that he was employed on a twelve-month basis for a period of years beginning with the school year 1965-66. There is conclusive evidence that he was accorded the privilege of a paid vacation during each of the years thereafter until this benefit was denied him when he resigned in July 1970. There is no reason to believe that, had he not resigned, the Board would have required that he work during the month of July 1970.

Vacation leave with pay is normally an earned benefit which is of equal importance to both employers and employees because it provides a period of time for renewal and revitalization of the employee's energies.

In the instant matter, the Board and petitioner had achieved a mutually agreeable arrangement whereby he worked for an eleven-month period during the busiest time of one school year and was afforded a paid vacation during the month of July of the next school year. Such an arrangement is common in the public schools of New Jersey. Petitioner had every reason to believe that he was entitled to paid vacation leave for the month of July 1970.

The Commissioner, having determined that petitioner was entitled to twenty days of paid vacation during July 1970, hereby directs the Board of Education of the City of Englewood to pay him the sum he would have received had he remained in the School District and taken the paid vacation in July 1970. To this extent the prayer of petitioner is granted.

COMMISSIONER OF EDUCATION

December 16, 1974

**In the Matter of the Tenure Hearing of Frederick J. Nittel,  
School District of the Borough of Roselle Park, Union County.**

COMMISSIONER OF EDUCATION

**DECISION**

For the Complainant Board of Education, A. Raymond Guarriello, Esq.

For the Respondent, Ruth Russell Gray, Attorney at Law

Written charges alleging conduct unbecoming a teacher were filed against respondent with the Roselle Park Board of Education, hereinafter "Board," by the parents of three ten-year-old female pupils. Respondent has not been suspended from his teaching position; however, the Board certified the charges to the Commissioner of Education stating that they would be sufficient, if true in fact, to warrant dismissal or a reduction in salary. *N.J.S.A. 18A:6-11*

Hearing in this matter was conducted on June 17 and June 27, 1974 at the office of the Union County Superintendent of Schools before a hearing examiner appointed by the Commissioner. Two documents were submitted in evidence and counsel filed Briefs after the hearing. The report of the hearing examiner follows:

Respondent has been employed by the Board for sixteen years. He is a tenured music teacher and has been assigned to the Aldene Elementary School for the past five years. Three separate written charges, all dated January 30, 1974, were filed with the Board by the parents of three ten-year-old fifth grade girls. The charges are reproduced here as follows:

CHARGE NO. 1

"Our daughter, [L.T.] has been the object of unwarranted and unlawful advances of Mr. Frederick Nittel.

"Mr. Nittel acted in a manner unbecoming of a teacher specifically between November 27, 1973 and December 18, 1973 inclusive, by touching and running his hands on our daughter's hair, arms, chest and legs. Mr. Nittel repeatedly placed his hands under her skirt, and into her underwear on and about her vagina.

"These incidents commenced during the 1972-73 school year.

"We demand that Mr. Nittel be discharged from the Roselle Park Schools."

CHARGE NO. 2

"Mr. Frederick Nittel, Instrumental Music Teacher in the Aldene School, has conducted himself in a manner unbecoming of a teacher in his relations with my daughter [J.W.]

"Mr. Nittel between November 27, 1973 and December 18, 1973 inclusive, as an Instrumental Music Instructor did consistently place his hands on and did move his hands in a caressing manner about the upper frontal portion of [J.W.'s] chest, the inner part of the upper thigh, and the virginal (sic) area. On those occasions when she wore a dress Mr. Nittel placed his hands beneath her skirt in the virginal (sic) area. We believe these incidents will have an adverse effect upon our daughter's well-being.

"We demand that the Board of Education dismiss Mr. Nittel."

CHARGE NO. 3

"Mr. Frederick Nittel, Instrumental Music Teacher in the Aldene School, has conducted himself in a manner unbecoming of a teacher in his relations with my daughter, [J.L.]

"Mr. Nittel between November 28, 1973 and December 19, 1973 inclusive, as an Instrumental Music Instructor did place his hands on and did move his hands about the upper frontal portion of [J's] thigh.

"I demand that the Board of Education review these incidents and remove Mr. Nittel from his position as a teacher in the Roselle Park School District."

The charges, the documentary evidence and the testimony are interrelated; however, they will be examined *seriatim* because of their differences.

The alleged incidents as detailed in the charges began to unfold at a Rosary Society meeting held on the evening of the first Tuesday in January 1974. The record shows that Mrs. T., mother of L.T., testified that she was approached there by Mrs. Tg. who stated that her daughter, K.Tg., came home from school and told her that two of her girlfriends (L.T. and J.W.) had told her about

respondent "touching" them. Mrs. T. replied that she knew of no untoward incidents involving her daughter, L.T., but that she would question her "in the morning." (Tr. I-116-117)

The hearing examiner observes that Mrs. Tg.'s daughter, K.Tg., is not involved in the matter contested herein except that she triggered the resultant charges by telling her mother of the incidents as described to her by L.T. and J.W., her girlfriends.

Mrs. T. then questioned her daughter who confirmed the story told her by Mrs. Tg. She directed her daughter to discontinue instrumental music lessons, called the school principal to tell him about the alleged incidents and later called Mrs. W., mother of J.W. She did not call Mrs. L., mother of J.L. (Charge No. 3) (Tr. I-118) However, Mrs. W. called Mrs. L. and told her of the alleged incidents. (Tr. I-135)

The record shows that none of the three girls (L.T., J.W. or J.L.) ever reported to her parents any improper advances made by respondent. In each instance the parents learned of the allegations only after questioning their daughters about stories they heard. (Tr. I-117, 126, 135-136)

The incidents described in the charges allegedly occurred in respondent's classroom while he was giving flute lessons to two or three pupils at a time. Testimony given by the pupils indicates that one of them would be called to the front of the piano for practice while the others continued practicing in their chairs behind or to the side of the piano. (Tr. I-12-14, 39, 71) L.T. and J.W. attended the same instrumental music (flute) class. J.L. was in an instructional class with other girls who are not involved in the instant matter.

L.T. testified that respondent touched her "on my leg and inside my pants\*\*\* [o]n the thigh [and] where I go to the bathroom." (Tr. I-6-7, 33) She was confused about the number of times she was allegedly touched. She testified that it was about ten times, or, once in each class, or, seven times and that she was not sure. (Tr. I-24, 34) The hearing examiner observes that this particular music class, where the alleged incidents occurred, met once each week, and during the period of time in question, November 27, 1973 to December 19, 1973, there were no more than four instrumental music class meetings.

L.T. testified also that she wanted to tell her mother about the touching, but that she had trouble explaining it. (Tr. I-15-16) She did discuss the incidents with her girlfriend, J.W., however, when class was over. (Tr. I-30) L.T. testified, also, that she wanted to quit her flute lessons, but she forgot because so many things "came up in school" and because she had to tell her mother before she could quit. (Tr. I-28-29) The following exchange between L.T. and respondent's counsel is reproduced to show how L.T. expressed her feelings about respondent:

"Q. \*\*\* Now, [L], do you like Mr. Nittel?

"A. He is nice, but I mean—he is nice generally, but for the thing, I didn't like it; but, yes, he is nice.

“Q. He didn’t threaten you or anything like that?

“A. No.

“Q. [L], do you think maybe Mr. Nittel isn’t—I mean, you said for the thing he is not so nice. Is that because your parents said that that is not so nice?

“A. No; I think for what he did it isn’t so nice; but just for being nice, he is nice.\*\*\*” (Tr. I-25)

L.T. denies, however, that respondent ever touched her on the arms, hair, or chest (Tr. I-13-14) as set forth in Charge No. 1.

J.W. testified that respondent had touched her more than once on the chest and between her legs. (Tr. I-66-71 ) She testified also that she had worn slacks and that he did not place his hands under the fabric (Tr. I-72), but he had moved his hand around when he touched her. (Tr. I-70) She testified, further, that L.T. saw him touch her legs but not her chest (Tr. I-67, 75-76) and that she had seen respondent touch L.T. between the legs and that they talked about the incident. (Tr. I-77-78)

J.W. testified, also, that she told her mother of the alleged instances only after her mother questioned her about them. (Tr. I-80) She stated, also, that respondent had never threatened her, nor did he scare her. (Tr. I-81) She stated finally that she wanted to quit the band for some time because she had lost interest. (Tr. I-82-83) and that she no longer liked respondent because she was told what he did was wrong. (Tr. I-87)

J.L.’s testimony was similar. She testified that respondent started to bother her (Tr. I-42); that he put his arm around her more than once and touched her thigh (Tr. I-44); that he put his hand on her thigh under her skirt and moved it around. (Tr. I-45) J.L. testified that she wanted to quit her flute lessons, and she did so after Thanksgiving. (Tr. I-47-48) She testified also that she did not feel threatened by respondent. (Tr. I-48) Her testimony at one point indicated that she talked to L.T. and J.W. before she was approached and questioned about the alleged incidents by her parents. (Tr. I-50) At another time she stated that her conversations with L.T. and J.W. occurred after she had discussed the incidents with her parents. (Tr. I-52) In any event, she said that she felt that L.T. and J.W. were scared (Tr. I-53) and that she realized what respondent was doing was wrong after talking to them. (Tr. I-55-56) She testified, finally, that she told her parents that respondent had caressed her back (Tr. I-57-58) and that none of the allegations were discussed with her parents until her mother first raised the issue with her. (Tr. I-46)

The hearing examiner points out at this time that the pupil witnesses and their parents were sequestered except that counsel consented that the parents of each girl could be present when their daughters testified.

Counsel for respondent called each of the three mothers as witnesses.

Their testimony buttressed that given by their daughters.

Mrs. T. testified that she learned about the alleged incidents at a Rosary Society meeting and called Mrs. W., as reported *ante*. Mrs. W. and Mrs. L. testified and corroborated that story. (Tr. I-116, 118, 126, 135-138)

Mrs. T. called her daughter's school principal about the alleged incidents, and the principal arranged an evening meeting among the three parents, the other two elementary principals, and himself. (Roselle Park has three elementary schools and three elementary principals. Respondent taught music in each school on a rotating basis.) (Tr. I-117-120) Mrs. T. testified further that all the parents were convinced that respondent had committed the alleged offenses because of their daughters' statements and that they had additional meetings with the principals and one with the Superintendent. The parents asked for respondent's dismissal. Mrs. W. and Mrs. L. corroborated Mrs. T's testimony. (Tr. I-122, 129, 132, 139-141)

In corroboration of her daughter's story, Mrs. L. testified that her daughter did not want to go to music class and began leaving her flute at home. Her daughter would not say why; however, she later learned the reasons after she received the telephone call from Mrs. W. and then questioned her daughter. She testified also that her daughter was afraid in respondent's classes because he would go by and rub her thigh or her back and that her daughter was very embarrassed by the entire episode. (Tr. I-135-137, 142)

The principal of the school which the three girls attended testified. He confirmed that he had been called by their parents and had set up the meetings, as reported *ante*. (Tr. II-8-14) He testified also that he notified the Acting Superintendent of Schools and later was directed by him to alter respondent's teaching schedule. Respondent's classroom was changed to the auditorium stage which is nearer the office, and his schedule was modified to exclude the three girls from small group instrumental lessons. (Tr. II-28, 31-32, 39) The principal notified respondent of the allegations against him on January 15, 1974. (Tr. II-18) He testified that he had never before received any complaints against respondent. (Tr. II-6)

The Acting Superintendent testified as follows regarding directing the principal to change respondent's schedule:

“\*\*\* The purpose of this rearrangement was that in the Board's decision to continue Mr. Nittel's services, they directed that his services take place and his schedule be rearranged in order to fully protect Mr. Nittel and the entire circumstances.\*\*\*” (Tr. II-52)

Another principal testified that respondent was a good teacher and that the pupils liked him. (Tr. II-64) This principal observed at the meetings she attended about the allegations against respondent, that the parents were out to get the teacher. (Tr. II-65-66)

Respondent complains that neither the Board nor the school

administrators attempted to arrange any meetings between him and the parents, nor was any attempt made by the Board to determine the truth of the charges. However, respondent admitted under cross-examination that he was told by his principal that the parents had refused to meet with him. (Tr. II-106) The Board listened to the reports of the school administrators and on advice of counsel certified the charges to the Commissioner. (Tr. II-53-54) The Board did not direct respondent to undergo an individual psychiatric examination pursuant to statute. *N.J.S.A. 18A:16-2* However, respondent voluntarily submitted to such an examination, and its results are submitted in evidence. (R-1) He also submitted the results of a psychological examination administered to him and made a part of those results. (R-2)

Elizabeth B. Eken, M.D., a neuropsychiatrist who had the tests administered, has been the Director of Psychiatric Services at Morristown Memorial Hospital since 1966. She has been in private practice for twenty-seven years and Chairman of the Department of Psychiatry at the Hospital for the past fifteen years. She testified as an expert witness and evidenced her background in training and schooling in her testimony. (Tr. I-89-90)

She testified as follows:

“\*\*\* I felt that he evidenced some feelings of insecurity, which I would certainly feel he was entitled to, under the circumstances; but I found no evidence of any sort of hostility or the kinds of underlying material that would lead you to believe that this individual was an acting-out kind of person who had problems that he had to work through in an actual acting-out fashion, but rather was a somewhat passive individual, and felt that he was probably anything at all, but abnormal, that is in terms of normality, as we know it; I don't believe anybody can characterize what is normal for you, in broad, sweeping terms. We all like to think we are normal.

“I found no evidence to support any kind of diagnosis of psychopathology or pathological behavior\*\*\*.” (Tr. I-92-93)

And,

“Q. \*\*\* With reasonable medical certainty, what do you think is the probability that Mr. Nittel did these acts complained of?

“A. Well, I feel that in view of the history he gave me of events and the background material and having listened to these little people this morning, that it is most unlikely, with reasonable medical probability, that he did carry out these alleged offenses.

“Q. That he did or did not do them?

“A. I think it is most unlikely that he did them.\*\*\*” (Tr. I-100-101)

She testified, finally, that with reasonable medical certainty, there was no psychopathology in respondent's behavior. (Tr. I-112-113)



Under cross-examination, the doctor admitted that the tests would “usually” reveal individuals whose acting-out behavior was of the kind alleged in the charges, but she could not state that the acting-out could “never” happen because it did not surface in her tests and interviews with respondent. (Tr. I-111-112)

A teacher colleague of respondent testified as a character witness. He stated that he has known respondent between eight to ten years and that his observations of respondent's classes, though informal, show respondent to be a good teacher who is warmly accepted by his pupils. (Tr. II-71-73)

Respondent testified in his own behalf and denied all the charges. He does admit that he has touched some of his pupils in line with his teaching duties when he has had occasion to place their hands on their musical instruments. (Tr. II-84-85) He testified further that when one girl was at the piano she was out of sight of the other, although not always. (Tr. II-106) He testified also that one of the girls, J.L., had dropped out of his music classes during the second week in November 1973; therefore, he could not have committed the offenses against her since those offenses allegedly occurred between Thanksgiving and December 18, 1973.

Regarding the testimony of L.T. and J.W., he offered a possible reason for their stories about him. He testified that he had caught them in a compromising position at the piano and that J.W. had her hands under and between L.T.'s legs. He said they were in class early, that the class met right after lunch and when they saw him they stopped and broke up. He testified further that he reprimanded the pupils for being in class alone and that this episode occurred between Thanksgiving and the Christmas recess; however, he chose not to report it to anyone. (Tr. II-90-94)

He did report the incident to the principal for the first time on January 16, 1974, the day after the principal informed him of the charges being brought against him by the parents of the three girls. He testified that he chose not to report the incident earlier because he did not think it appropriate at the time, and he did not think it would be handled by the administration to suit everyone's satisfaction, nor did he feel that the situation would be explained correctly to the pupils. (Tr. II-93-94)

Respondent testified also that after he reprimanded the girls, their behavior was hostile towards him. (Tr. II-97) After he was informed of the parents' charges by his principal, he also told the Superintendent about the scene he had witnessed between L.T. and J.W. His reason for bringing the subject up, he averred, was to have the administration inform their parents and arrange a meeting with them in hopes that he could explain to them a possible motive for the girls' stories about him. (Tr. II-92, 98) No such meeting was ever arranged, nor does the record reveal that respondent attempted to arrange a meeting with the parents without the assistance of the school administrators.

In prior cases presented to the Commissioner involving charges founded on the experiences of pupils, the Commissioner has stated that the testimony of

pupils about their teachers must be examined with great caution.

The Commissioner said *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 S.L.D. 160, remanded State Board of Education 1963 S.L.D. 251, decided by the Commissioner 1964 S.L.D. 142, affirmed State Board of Education 1966 S.L.D. 225, reversed and remanded 93 N.J. Super. 404 (App. Div. 1967), decided by the Commissioner 1967 S.L.D. 215:

“\*\*\* ‘It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher’s mercy because there is no way to prove certain charges except by the testimony of children.’ *Palmer v. Board of Education of Audubon*, 1939-49 S.L.D. 183, 188.\*\*\*” (at pp. 160-161)

*In the Matter of the Tenure Hearing of Mary Worrell, School District of the Township of Lumberton, Burlington County*, 1970 S.L.D. 378; *In the Matter of the Tenure Hearing of Anthony Polito, School District of the Township of Livingston, Essex County*, 1974 S.L.D. 662

Mindful of these decisions, the hearing examiner critically examined the testimony adduced at the hearing. The testimony given by the three girls is clear, forthright, and believable. There are minor discrepancies in their precise recollection of particular occurrences; however, the essential charges in their stories were not discredited. In describing their appearance and their demeanor as witnesses, the hearing examiner noted that they were average, or small in size for their age (ten years); they appeared to be prepubescent and they were physically immature. All of the girls were nervous, which could be explained, in part, by the nature of the hearing, because they knew why they were there to testify. They were embarrassed by their testimony, and they appeared ashamed when they testified; for example, L.T. testified that respondent touched her “[o]n the thigh \*\*\* inside my pants \*\*\* where I go to the bathroom\*\*\*” (Tr. I-6-7); J.W. indicated that he touched her chest; she reluctantly said the word “chest.” She testified that he also touched her “in between the legs” but could not or would not describe the words exactly where he touched her. (Tr. I-67-68) She said he touched “the front” of her body and the “top” of her legs and that he moved his hands around when he touched her. (Tr. I-69-70)

J.W. was most embarrassed and reluctant to testify, but her testimony was believable. Although she testified that he did not place his hand under her skirt and on the “virginal” (sic) area, as set forth in the charge, because she was wearing slacks, she did not waver from her story about respondent improperly placing his hands on her body.

J.L.’s testimony was also forthright and believable irrespective of discrepancies pointed out by respondent. (Respondent’s Brief, at pp. 10-12) It is

doubtful that the testimony of ten-year-old pupils about incidents which occurred approximately six months earlier could be razor sharp. Some of the precise events would necessarily be hazy and confusing because of the lapse of time and the gravity of the situation they were facing. Nevertheless, all of their stories were basically the same, that respondent had on more than one occasion improperly placed his hands on them.

The fact that they were sequestered and were able to relate their stories without serious contradiction lends additional weight and credibility to their testimony. Further, no reason nor motive was shown for their "confessing" the "touching" after they were questioned by their mothers. If the incidents had not occurred, what possible motive would prompt them to tell such stories to their parents about their teacher, and what did they have to gain? If L.T. and J.W. were angry with respondent for allegedly reprimanding them for their alleged "compromising position" they certainly did nothing about it. In fact the reprimand, according to respondent's testimony was, "You should not be here alone \*\*\*" and "You shouldn't be in this classroom alone and you're early." (Tr. II-91)

In the hearing examiner's judgment, this is not the kind of serious rebuke that would remain smoldering in the minds of ten-year-old pupils and then surface four to six weeks later with practically identical "confessions" and then only *after* being questioned by their mothers. To suggest that the stories were fabricated and that the scenario described herein was contrived by the girls, is simply unbelievable. Such a plot would involve the three girls, one of whom was in another instructional class, a fourth girl who gave the initial story to her mother who, in turn, notified Mrs. T. who then called a second mother who called a third. After this chain of events, the three mothers questioned their daughters and were given practically identical stories. The hearing examiner cannot believe that such a plot existed.

Neither has it been shown that the parents nor anyone else had any motive in bringing the charges against respondent.

The Board admits that respondent has served for sixteen years without a blemish on his record, and no question has been raised about his qualifications nor his ability to instruct pupils. (Tr. II-84) Respondent has not suggested any reason why J.L. would testify that he made improper advances toward her. She had not been rebuked for any reason and apparently can be connected with the other girls only through the theory of a conspiracy since she was not in their class. Respondent testified that J.L. was not even a pupil of his during the time in question, November 27, 1973 to December 18, 1973, and that she had dropped his instrumental music class during the second week in November. (Tr. II-101) There was no corroboration of this testimony either by respondent's records of pupil attendance, the homeroom teacher's records of pupil attendance, or his/her testimony. Respondent was specifically asked by the hearing examiner about records of pupil attendance in music classes. Although respondent replied that such records were kept, none were produced. (Tr. II-111-115) No later request to submit proofs in this regard was made by respondent.

The hearing examiner finds that the dates set forth in the charge concerning J.L. are accurate and cannot be disregarded by respondent's recollection offered in his testimony that she dropped his class in mid-November.

Respondent testified also, *ante*, that he did not report the incident between L.T. and J.W. "playing with each other" because he did not think the administration would handle the situation properly. Yet, the record shows he did nothing about the alleged incident except to report it after he learned of the charges against himself. He could have reported in confidence to the parents, the school nurse, or the guidance counselor if he lacked faith in the good judgment of the school administrators, but he said nothing from the time of the alleged incident "before Christmas," 1973 to January 16, 1974, the day after the principal notified him about the parental complaints.

Although respondent now avers that he has been threatened by the Board with an additional charge for not reporting this matter if he should raise this accusation about the girls, no further charge has been raised. (Tr. II-94-97)

In light of the testimony adduced and for the reasons set forth above, the hearing examiner concludes that the weight of the believable testimony shows that respondent committed the offenses essentially as set forth in each of the charges. He recommends, therefore, that the charge of conduct unbecoming a teacher be sustained.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the objections, exceptions, and replies pertinent thereto which have been filed by the parties. The objections of respondent are primarily concerned with the credibility of the pupils who testified at the hearing and with the final conclusion by the hearing examiner that their testimony was "believable."

Such testimony must, of course, be examined with "\*\*\*\* extreme caution, and with meticulous care. *Palmer v. Board of Education of Audubon, Camden County*, 1939-49 S.L.D. 183; *In the Matter of the Tenure Hearing of Pauline Nickerson, Peapack-Gladstone, Somerset County*, 1965 S.L.D. 130; *In the Matter of the Tenure Hearing of Mary Worrell, School District of the Township of Lumberton, Burlington County*, 1970 S.L.D. 378 \*\*\*." (*In the Matter of the Tenure Hearing of Mary Louise Connolly, School District of the Borough of Glen Rock, Bergen County*, 1971 S.L.D. 305, at 313) The necessities of circumstance sometimes require the use of just such testimony. The Commissioner set forth his opinion with respect to the use of the testimony of children as follows in *Palmer, supra*:

\*\*\*\* It is the opinion of the Commissioner that testimony of children \*\*\* against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation

sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at the teacher's mercy because *there is no way to prove certain charges except by the testimony of children.* \*\*\*" (Emphasis supplied.)

Thus, the balanced judgment which must be made in such matters requires a careful analysis of both the credibility of the witnesses and of often conflicting statements. The rights of both pupil and teacher must be assiduously protected. The question herein is whether the finding of the hearing examiner has been a balanced one which may be substantiated on the basis of the total record.

The Commissioner determines that it is and that respondent, by his actions, has displayed conduct unbecoming a teacher in the public schools. It remains to determine what penalty, if any, should be assessed. The Commissioner is cognizant that respondent's record as a teacher has been unblemished. This question will now be addressed.

*In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County*, 1969 S.L.D. 159, affirmed State Board of Education 1970 S.L.D. 448, affirmed Docket No. A-539-70 New Jersey Superior Court, Appellate Division, March 14, 1972, the Commissioner was primarily concerned with a charge of corporal punishment. In the course of the decision, however, the Commissioner also said:

\*\*\*\* The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A. 18A:6-1*) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. \*\*\*" (1969 S.L.D. at 173)

The finding in the instant matter is no less definitive than in *Appleby* and the Commissioner determines that respondent's abuse of the pupil's right to be free from offensive bodily touching was a gross abuse which warrants his dismissal. As the Commissioner recently said *In the Matter of the Tenure Hearing of Jacques L. Sammons, School District of Black Horse Pike Regional, Camden County*, 1972 S.L.D. 302:

\*\*\*\* they [the teachers of this State] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children.\*\*\* This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.\*\*\* Those who teach do so by choice \*\*\*." (1972 S.L.D. at 321)

As the Court said in *Redcay v. State Board of Education*, 130 N.J.L. 369, 371 (1943), affirmed 131 N.J.L. 326 (E. & A. 1944):

\*\*\*\* 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.\*\*\*" (Emphasis supplied.)

For an example of a case where a teacher with a tenure status was dismissed as the result of one incident see *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick, Middlesex County*, 1971 S.L.D. 566; affirmed State Board of Education 1973 S.L.D. 773; affirmed New Jersey Superior Court, Appellate Division, Docket No. A-1680-72 (November 28, 1973). The determination herein is that unfitness has been shown. Accordingly, the Commissioner holds that respondent's protection of tenure is forfeit and he orders his dismissal as a teacher in the School District of Roselle Park effective December 31, 1974.

COMMISSIONER OF EDUCATION

December 22, 1974

Pending before State Board of Education

**In the Matter of the Abolishment of Business Administrator by the  
Board of Education of the Township of Wayne, Passaic County.**

COMMISSIONER OF EDUCATION

**DECISION**

For the Wayne Board of Education, Goodman and Rothenberg (Sylvan G. Rothenberg, Esq., of Counsel)

The Wayne Board of Education, hereinafter "Board," proposed at this juncture to abolish the position of School Business Administrator and requests the approval of such abolishment by the County Superintendent of Schools, the Commissioner of Education, and the State Board of Education. The request is opposed, however, by the County Superintendent of Schools and by the Superintendent of the Wayne Township School District and is thus in controversy.

Accordingly, pursuant to the statutory mandate, *N.J.S.A.* 18A:6-9, which confers on the Commissioner the authority to hear and decide controversies which arise under the school laws, a hearing was conducted, with respect to the request, on June 19 and September 5, 1974 at the office of the Passaic County Superintendent of Schools, Paterson, by a hearing examiner appointed by the Commissioner. Subsequent to the hearing, a Memorandum was filed by counsel to the Board. The report of the hearing examiner is as follows:

The matter controverted herein is grounded in the provisions of the statute *N.J.S.A.* 18A:17-14.1 which provides that local boards of education may "appoint a school business administrator" whenever the "necessity" for such position has been agreed to by a county superintendent of schools and been approved by the Commissioner and the State Board of Education. The statute of reference, in its entirety, is cited as follows:

“A board or the boards of two or more districts may, under rules and regulations prescribed by the state board, appoint a school business administrator by a majority vote of all the members of the board, define his duties, which may include serving as secretary of one of the boards, and fix his salary, whenever the necessity for such appointment shall have been agreed to by the county superintendent of schools or the county superintendents of schools of the counties in which the districts are situate and approved by the commissioner and the state board. No school business administrator shall be appointed except in the manner provided in this section.”

The statute was enacted by the New Jersey Legislature and incorporated in the School Law (Title 18A) by *c. 212, § 1, P.L. 1962*.

Pursuant thereto the State Board of Education adopted the following resolution on April 3, 1963 with respect to the appointment of school business administrators in school districts with more than twenty-five teachers:

“WHEREAS: A State-wide Committee to Study School Business Practices presented to the State Board of Education a report setting forth reasonable, constructive and necessary steps in a plan to improve school administration in the public schools of New Jersey, and

“WHEREAS: The State Board of Education, at its meeting of April 6, 1960, adopted the report as a statement of policy, said report to be considered to be part of this resolution, and

“WHEREAS: Chapter 212, Laws of 1962, authorized the establishment of the position of School Business Administrator and the promulgation of rules and regulations pertaining thereto, therefore be it

“RESOLVED: That, the following rules and regulations are hereby adopted, pursuant to Chapter 212, Laws of 1962, for the guidance of local boards of education in the establishment of the position of School Business Administrator.”

“Any school district establishing the position of School Business Administrator shall meet the following conditions:

“A. School Districts with more than twenty-five teachers:

“1. In requesting the establishment of the position of School Business Administrator, the board of education shall present to the County Superintendent of Schools a chart of organization clearly showing relationships of the School Business Administrator, a well-defined policy outlining duties and responsibilities to be assigned, and the proposed salary.



- “2. The following are major areas of the duties and responsibilities which may be considered by the board of education as functions of the School Business Administrator *in cooperation with all members of the staff having related administrative responsibilities*:
  - a. Budgeting and Financial Planning
  - b. Purchasing and Supply Management
  - c. Plant Planning and Construction
  - d. School Community Relations
  - e. Personnel Management (in the business area)
  - f. In-Service Training (in the business area)
  - g. Operation and Maintenance of Plant
  - h. Transportation
  - i. Food Services
  - j. Accounting and Reporting
  - k. Insurance
- “3. Upon certification by the County Superintendent of Schools of the necessity for such a position, the Commissioner and the State Board of Education may approve the establishment of a position of School Business Administrator.
- “4. Any person appointed by a board of education to the position of School Business Administrator shall hold an appropriate certificate prescribed by the State Board of Education, and he shall be considered a member of the professional staff of the school district.
- “5. The School Business Administrator shall perform those business functions as outlined in the policy of the board of education and as approved by the Commissioner and the State Board of Education.
- “6. Nothing in these regulations shall prevent the School Business Administrator from serving as Secretary of the Board of Education, or from carrying out responsibilities delegated by statute to the secretary of the board of education requesting the establishment of the position of School Business Administrator pursuant to these rules.\*\*\*” (*Emphasis in text.*)

Thereafter, on September 14, 1967, the Board resolved by majority vote of its membership to request the County Superintendent of Schools, the Commissioner of Education, and the State Board of Education to approve the establishment of the position of School Business Administrator in its district. (P-3) Concurrently, the Board resolved that the duties of the position should embrace responsibility for:

1. Budgeting and financial planning;
2. Purchasing and supply management;

3. Personnel management;
4. In-service training;
5. Plant planning and construction;
6. Transportation;
7. Accounting and reporting; and
8. Insurance.

The Board further resolved at that juncture that any person appointed to the position must hold an appropriate certificate prescribed by the State Board of Education and that such person “\*\*\* shall be considered a member of the professional staff of the district\*\*\*.” (P-3) It was also resolved that nothing in the Board’s regulations “\*\*\* shall prevent the School Business Administrator from serving as Secretary of the Board of Education, or from carrying out responsibilities delegated by statute to the Secretary of the Board of Education\*\*\*.” (P-3)

The County Superintendent of Schools agreed with the Board’s request and such agreement was forwarded to the Commissioner. (Tr. I-32) Ultimately the Commissioner and the State Board approved the creation of the position of School Business Administrator in Wayne pursuant to the statutory prescription, *N.J.S.A. 18A:17-14.1*, which required such approval when the “necessity for such appointment” had been established. The hearing examiner has ascertained that the date of the approval by the State Board of Education was October 4, 1967.

From that time forward to the date of April 11, 1974, the position of School Business Administrator continued to be a viable one within the administrative organization of the Wayne Township schools, although on that latter date there was no incumbent in the position. However, on the evening of April 11, 1974, the Board by a vote of 5-4 approved the following resolution:

“WHEREAS: The Board of Education of the Township of Wayne no longer desires to continue the position of School Business Administrator, therefore be it

“RESOLVED: that the Board of Education of the Township of Wayne requests the approval of the County Superintendent of Schools, the Commissioner of Education and the State Board of Education for the abolition of the position of School Business Administrator for this district, and that the Board of Education of the Township of Wayne maintains that the duties and responsibilities of the Board Secretary be consistent with those defined in Title 18.” (P-3)

Subsequently, the Passaic County Superintendent of Schools addressed a letter dated May 6, 1974 to the Commissioner and enclosed a copy of the Board’s resolution, *ante*, of April 11, 1974. (P-3) The County Superintendent said in his letter that he had approved the request to establish the position of School Business Administrator in Wayne in 1967, but that he could not approve

this latter request of the Board to abolish the position and to “\*\*\* revert back to the secretary’s position.” He also said:

“\*\*\* Wayne is a large school system which needs both an experienced and qualified person in this position.\*\*\*”

The County Superintendent also enclosed with his letter to the Commissioner a letter from the Wayne Township Superintendent of Schools. This letter is recited in its entirety as follows:

“I am in total disagreement with the action taken by the Wayne Board of Education in petitioning for the abolishment of the position of School Business Administrator for the Wayne Schools.

“I consider this action a backward step for the school district. The reduction of standards and experience for the man responsible for the handling of a budget of over \$17,000,000. and a plant of over \$33,000,000. is inviting potential disaster.

“Should this request be granted by the Commissioner of Education and the State Board of Education, it would create a two-headed monster which would result in the regression of this district and bring about political chaos.”

The letter of the County Superintendent of Schools, together with the enclosures, was referred by the Commissioner to the Division of Controversies and Disputes, State Department of Education, on May 6, 1974. Thereafter it was considered within that Division and on June 4, 1974, the Director of the Division addressed a letter to counsel for the Board. The Director said in this letter that the request for an abolition of the position of School Business Administrator was considered to be “\*\*\* a controversy under the school law (*N.J.S.A. 18A:6-9*) which requires a hearing with testimony on the merits of the proposal.\*\*\*”

The hearing of June 19 and September 5, 1974, followed.

At this juncture the hearing examiner finds that there are two principal questions to be determined by the Commissioner with respect to the Board’s request. These questions, in part at least, are derived from a review of the contentions of the Board which were expressed at the hearing and, subsequent thereto, in the Board’s Memorandum. Concisely stated these questions are:

1. Is the request of the Board for approval of the abolishment of the position of School Business Administrator required prefatory to abolishment in the context of the statute, *N.J.S.A. 18A:17-14.1*, which authorizes the creation of such position only when the “necessity” for it has been established, or may the Board abolish the position by unilateral action at any time?

And,

2. If the request for approval of abolishment of the position is required, are there good grounds to justify a conclusion that the Board's request should be granted?

These questions will now be discussed *seriatim*.

The Board's position with respect to the first question is an apparent anomaly.

On the one hand, the Board has made the request for an approval to abolish the position of School Business Administrator. On the other hand the Board argues that no such request is required and that it may exercise its own discretion in the matter. In the Board's view, as expressed by its counsel:

“\*\*\* I find no authority which requires an official action on the part of anybody whether it be the local superintendent, or the State Board of Education to dissolve the position once it has been established.

“Therefore, I question, initially, the \*\*\* jurisdiction of this hearing\*\*\*.”  
(Tr. I-8)

The Board argues that it is not the petitioner in this matter, and that it should not be required to bear the burden of proof. Instead, the Board argues that “\*\*\* those persons or parties who attacked the validity of that resolution should move forward with the burden of proof\*\*\*.” (Tr. I-10)

Nevertheless, the Board did offer testimony in support of its resolution, and this testimony will be reported, *post*, with respect to Question 2.

The hearing examiner determined that the Board is the petitioner in this matter and required it to bear the burden of proof. (Tr. I-12-13) This determination was grounded in a view that the specific statutory mandate (*N.J.S.A.* 18A:17-14.1) to prove the “necessity” for the position of School Business Administrator prior to its creation must, by inverse logic, require that proof be offered that such necessity no longer exists in order to abolish it.

The hearing examiner holds to this determination and supports it with a decision of the Commissioner in *Chester M. Stephens v. Board of Education of the Township of Mount Olive, Morris County*, 1963 *S.L.D.* 215. This decision involved the creation and/or abolishment of the position of Superintendent of Schools and thus, in this respect, it differed from the instant matter. In other respects it is clearly on point. In *Stephens*, as herein, the statutory prescription (*R.S.* 18:7-70) required that the “necessity” for the position of Superintendent of Schools be “agreed to in writing by the County Superintendent of Schools and approved by the Commissioner and the State Board.” In *Stephens*, as herein, the basic question was whether or not the “\*\*\* Board of Education can unilaterally abolish \*\*\*” a position that requires for its creation such agreement and approval.

In considering these questions, the Commissioner said:

“\*\*\* It must be clearly noted that by the terms of the statute (*R.S. 18:7-70*)\*\*\* the establishment of the superintendency rests solely on the confirmed necessity for the position. The determination of such necessity is no mere formality.\*\*\*

“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).\*\*\*” (at pp. 216-217)

Thereafter, the Commissioner found that the local board of education had illegally abolished the position of superintendent of schools since no agreement to, or approval of, the action had been secured from those who had originally agreed the position was a “necessity.”

Thus, the hearing examiner finds that the Board’s request for an approval of the abolishment of the position of School Business Administrator is mandatory and that prior approval for the abolishment of such position is necessary before the abolishment may be effected.

It is necessary to examine next the merits of the Board’s resolution to abolish the position.

Two members of the Board testified with respect to the resolution of the Board. (P-3) In essence, this testimony was that the Board had accepted the resignation of its School Business Administrator in early 1974 and had thereafter sought a replacement. However, according to one Board member, after a replacement acceptable to the Board was found “\*\*\* insurmountable problems arose.” (Tr. I-19) Such problems appear to have been principally concerned with the fact that the proposed replacement could not be certified as a School Business Administrator “unless certain credits were taken” (Tr. I-19) although it was represented that he had a degree in education plus fifteen years in a managerial position. (Tr. I-18)

The Board concluded that the proposed replacement could be employed as Board Secretary instead of a certified Business Administrator, and one Board member said:

“The former Business Administrator’s duties and assignments of the new

Board Secretary are identical. Therefore, the Wayne Board of Education chose to go in that direction.”

(Tr. I-20)

A second Board member stated his view in this manner:

“I personally feel that having the Board Secretary’s position would give the Board a lot more flexibility as to the type of individual they could hire. They could bring someone in from the business world to run the business sector of a school district. So it is a comparable position.”

(Tr. I-27)

This desire for “flexibility” with respect to the appointment of a person to manage the Board’s business affairs appears to be the principal reason for the Board’s desire, at this juncture, to appoint a Board Secretary rather than a School Business Administrator. There was no other direct testimony at the hearing in support of an implied contention that the position of School Business Administrator for the Board is no longer a “necessity.”

Testimony was also elicited at the hearing from the Wayne Superintendent of Schools, the Passaic County Superintendent of Schools, the Director of the Bureau of Teacher Education and Academic Credentials of the State Department of Education, and a representative of the New Jersey Association of School Business Officials.

The Wayne Superintendent of Schools detailed the facts with respect to pupil enrollment, staffing, business affairs, transportation, etc. in the schools of Wayne in both oral testimony and in certain documents submitted into evidence. He testified that when he had first assumed his duties in Wayne, in 1962, there had been approximately 7,500 pupils (Tr. I-46) but that there ensued an “\*\*\* expansive period of development from 1962 until about 1970-71.\*\*\*” (Tr. I-46) This development resulted in an enrollment of 12,290 pupils in the 1969-70 school year, although such enrollment decreased to 11,813 pupils in school year 1973-74. (P-6) The Superintendent also testified that the professional staff of the district had grown during the same period of time and now approximates 600 teachers, 25 administrators, and other personnel. He estimated that the district employs a total of approximately 1,400 persons.

A document submitted by the Superintendent which sets forth the total budgetary appropriations of the district discloses that the school budget in the 1960-61 school year totaled approximately \$2,120,000 but that this budget had increased to more than \$15,300,000 for school year 1974-75.

Further, the Superintendent testified:

“\*\*\* I’m opposed to the abolishment of the position of School Business Administrator. I think it is a lessening of the qualifications for a person in a very key role, a very sensitive area, one of the tremendous responsibilities, not only to the Board of Education but to the children and the citizens in the community.\*\*\*”

(Tr. I-48)

This view was also expressed in similar fashion by the representative of the Association of School Business Administrators.

The State's Director of the Bureau of Academic Credentials testified with respect to the certification requirements necessary for qualified school business administrators and for the board secretary's position. He indicated that no certificate was required for the position of board secretary but that the position of school business administrator did require certification.

He also detailed the alternate ways by which school business administrators may be certified, if they are the holders of a bachelor's degree. He indicated that the requirements for a certificate had been increased in 1969 (Tr. II-5), and that it is now required that 30 semester hours of college credits be obtained for full certification as a school business administrator. *N.J.A.C.* 6:11-10.10

The requirements with respect to the appointment of a secretary of a board of education are recited in *N.J.S.A.* 18A:17-5 as follows:

"Each secretary shall be appointed by the board, by a recorded roll call majority vote of its full membership, for a term to expire not later than June 30 of the calendar year next succeeding that in which the board shall have been organized, but he shall continue to serve after the expiration of his term until his successor is appointed and qualified. The secretary may be appointed from among the members of the board and, subject to the provisions of this title and any other law, the board shall fix his compensation; provided, however, that the secretary shall not receive compensation from the board for any period during which he is an elected or appointed member of the board.

"In case of a vacancy in the office of secretary, the vacancy shall be filled by the board within 60 days after the vacancy occurs and if the board does not make such appointment within such time the county superintendent shall appoint a secretary who shall receive the same compensation as his predecessor in office received and shall serve until a secretary is appointed by the board."

A certificate is not required of those who perform the duties of the office. Such duties are detailed in the statutes *N.J.S.A.* 18A:17-7 *et seq.*, and, as noted by the Board, they are in general similar to and comparable with the duties of a school business administrator as established by the aforementioned resolution of the State Board of Education adopted April 3, 1963.

The hearing examiner has carefully reviewed the testimony and the facts pertinent to this controversy. He finds no proof in the record to support a conclusion that there is any less "necessity" now for the position of School Business Administrator in the Wayne Township School District than there was in 1967 when the position was created. The school system is a large one. Its business affairs are intricate and complex. The person entrusted with the prime responsibility for supervision of business affairs should be eminently qualified by both academic credentials and practical experience to perform the tasks assigned to him.



It is, of course, true as the Board argues, that the Board would have more flexibility in the appointment of a person to perform business duties if the position of School Business Administrator were abolished and a Board Secretary appointed instead. It may well be that in this one instance the Board could find and appoint a person well qualified by experience to perform the duties of a Board Secretary ably and efficiently in the Township of Wayne. Such officials may be found performing in this manner throughout the State.

The hearing examiner observes that this short-term view with respect to the necessity of the controverted position ignores some fundamental facts and principles which appear to have an encompassing validity. The membership of local boards of education constantly changes. Those whom a board of education employs for specific positions also come and go. The work and duties which must be performed, however, must go forward day by day and year by year.

The question, then, is whether or not the Board shall have such necessary duties performed over the years by persons who meet the highest standards of preparation, both academic and experiential, as determined by the State Board of Education, or performed by persons who meet only those standards the Board deems appropriate at any given time. An adoption of this latter view would not be in the best interests of the pupils or citizens of Wayne, since it was determined that it was necessary in 1967 to establish the position of School Business Administrator, and there is no evidence that such necessity is any less compelling at this juncture.

Accordingly, the hearing examiner recommends that the Commissioner and the State Board of Education refuse the request of the Board to abolish the position of School Business Administrator in the Township of Wayne.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the reply thereto which has been filed by the Board. This reply takes no exception to the primary finding and conclusion of the hearing examiner's report but requests a clarification with respect to whether or not the Board may fill the position of Board Secretary without filling the position of School Business Administrator. This question is raised because there is no specific statutory requirement that a vacancy in the position of School Business Administrator must be filled; however, the statute *N.J.S.A. 18A:17-5* provides that local boards of education "shall" fill vacancies in the office of board secretary within specified time periods. The applicable statute is recited in its entirety as follows:

"Each secretary shall be appointed by the board, by a recorded roll call majority vote of its full membership, for a term to expire not later than June 30 of the calendar year next succeeding that in which the board shall have been organized, but he shall continue to serve after the expiration of his term until his successor is appointed and qualified. The secretary may

be appointed from among the members of the board and, subject to the provisions of this Title and any other law, the board shall fix his compensation; provided, however, that the secretary shall not receive compensation from the board for any period during which he is an elected or appointed member of the board.

“In case of a vacancy in the office of secretary, the vacancy shall be filled by the board within 60 days after the vacancy occurs and if the board does not make such appointment within such time the county superintendent shall appoint a secretary who shall receive the same compensation as his predecessor in office received and shall serve until a secretary is appointed by the board.”

Thus, the position of board secretary is statutorily mandated and required to be filled.

In the judgment of the Commissioner, the requirement to fill the position of school business administrator, when such position has been specifically authorized by statutory prescription (*N.J.S.A.* 18A:17-14.1), is no less mandatory. The authorization for the position is predicated on a finding of “necessity.” Absent a finding that the necessity no longer exists, and there is no such finding in this instance, the position must be filled. The Commissioner so holds.

This determination is grounded not only on the statute *N.J.S.A.* 18A:17-14.1, but also on the clear expression of the State Board of Education with respect to a requirement of continuity in the conduct of school business affairs. This expression is set forth in *N.J.A.C.* 6:3-1.18(c) as follows:

“All *changes* or modifications in the original plan concerning the position of School Business Administrator as submitted to the County Superintendent of Schools, the Commissioner of Education and the State Board of Education *must be approved* in the same manner as the original plan.”  
(*Emphasis supplied.*)

It is evident, then, that the Board must follow its “original plan” in this instance and appoint a School Business Administrator with the identical assigned duties previously delegated by the Board to the person holding the position.

This finding of the Commissioner does not preclude the Board from making the appointment of an acting school business administrator when, by reason of absence, disability, disqualification, illness, death or some other cause, it is not possible nor feasible to make a permanent appointment of a certified person. The statutes specifically authorize such appointment of temporary officers or employees. *N.J.S.A.* 18A:16-1.1 The rules of the State Board are explicit and the Commissioner holds that they are applicable in this instance. *N.J.A.C.* 6:3-1.1 These rules provide:

“Acting administrators

“(a) If because of illness or death or some other good and sufficient

reason, the board of education must fill the post of superintendent of schools, assistant superintendent of schools, high school principal, or elementary school principal with a person who is designated as the acting administrator in a respective situation and who is not properly certified to hold the position, it shall be the duty of the board of education to make written application to the Commissioner of Education for permission to employ such person in an acting capacity, stating the reasons why such action is necessary.

“(b) If such approval is given by the Commissioner of Education, it shall be of three months’ duration, and may be renewed by him upon application for a period of three months at a time. If the acting status of said individual is to extend beyond a year, no such permission can be given except upon recommendation of the Commissioner of Education to the State Board of Education that the application of the local board of education be granted.”

The above rules were promulgated prior to the time when the Legislature, in 1962, enacted *N.J.S.A. 18A:17-14.1* which provides discretion for local boards of education to appoint school business administrators. Accordingly, the Commissioner finds no significance in the fact that the rules with respect to acting administrator contain no reference to the position of school business administrator. The position of school business administrator, when approved, is of great administrative importance. Its approval depends on a conformity with the same procedures applicable to approval of the position of superintendent of schools. *N.J.S.A. 18A:17-15* Similarly, the request to fill the position with a person to serve in an acting capacity must be identically processed. The Commissioner so holds while recognizing, at the same time, that the rule *N.J.A.C. 6:3-1.1* is not definitive in this regard. A recommendation to effect an appropriate change in the rule to conform to this opinion will be forwarded by the Commissioner to the State Board of Education.

The Commissioner concurs with the report of the hearing examiner; accordingly, the Board’s request for abolishment of the position of School Business Administrator is denied and the Commissioner directs the Wayne Board of Education to fill the position as soon as possible.

COMMISSIONER OF EDUCATION

December 24, 1974

**Board of Education of the Borough of Lodi,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Lodi, Bergen County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Gerald P. Lo Proto, Esq.

For the Respondent, Carbonetti and Di Maria (John M. Di Maria, Esq., of Counsel)

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," certifying to the Bergen County Board of Taxation a lesser amount of appropriations for the 1974-75 school year than the amounts proposed by the Board in its budget, which was rejected by the voters. The facts of the matter were submitted in the form of written exhibits, and a hearing was held on October 1, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

At the annual school election held February 13, 1974, the voters of the school district rejected proposals to raise by local taxation \$3,960,484 for current expenses. The proposed budget was then delivered to Council, pursuant to statute, for the determination of the amount of appropriations for school purposes to be certified to the County Board of Taxation. On March 27, 1974, Council adopted a resolution certifying the sum of \$3,860,484 for current expenses.

The amount in issue may be shown as follows:

	<b>Proposed by Board</b>	<b>Certified by Council</b>	<b>Reduction</b>
Current Expense	\$3,960,484	\$3,860,484	\$100,000

The Board contends that the action of Council was arbitrary and without consideration of the needs of the school system. The Board further contends that the amount certified by Council for current expenses is insufficient to maintain a thorough and efficient system of schools in the district as required by law. Thereafter, Council submitted to the Board a document setting forth proposed reductions in various line items which are represented in the following table:

# CURRENT EXPENSE

Account Number	Item	Board's Budget	Council's Proposal	Amount Reduced
J130E	Adm. Legal Servs.	\$ 8,000	\$ 4,000	\$ 4,000
J213.1,	Sals. New Tchrs.,	2,571,359	2,535,359	36,000
213.2,	Bedside Instr.,Supp.			
213.4	Instr.			
J214A,	Sch. Librs. Sals.,	102,344	95,344	7,000
230A	Lib. Books, A-V Mats.			
J214B	Guid. Pers. Sals.	97,878	93,878	4,000
J214C	Psych. Sals.	49,907	47,407	2,500
J216	Tchr. Aides Sals.	30,000	25,000	5,000
J220	Textbooks	46,000	44,000	2,000
J240A	Teaching Supls.	50,000	45,000	5,000
J250C	Misc. Exps. Instr.	15,000	10,000	5,000
J410A5	Other Prof. Sals.	3,848	2,348	1,500
J420A	Supplies	3,000	2,000	1,000
J520A	Transportation	65,000	60,000	5,000
J520C	Trans. Extracurr. Activs.	10,000	4,000	6,000
J620A	Contr. Servs.	42,000	37,000	5,000
J660B	Veh. Oper. Exps.	5,000	4,000	1,000
J810A	State Retire. Fund	16,000	14,000	2,000
J870	Tuition	85,000	77,000	8,000
TOTAL CURRENT EXPENSE		\$3,200,336	\$3,100,336	\$100,000

On the basis of the evidence adduced from oral testimony and documents, the hearing examiner makes the following findings as to each of the proposed reductions, *ante*:

## J130E Legal Services - Other Expenses

Council supports its reduction in this line item stating that: (1) the budget increase in the Administration account has been too great since the 1972-73 budget; (2) the actual expenditure in 1973-74 is not yet available; and (3) sufficient funds are available in other line items to compensate Board counsel for extra legal services. The J130E line item is a part of the Administration account, and that account increased by \$15,640 since the 1973-74 school budget, \$8,000 of that increase being for extra legal services.

The Board contends that its attorney receives a salary of \$7,237 per year, and that the increase is necessary because of litigation or pending litigation in seven legal actions.

The hearing examiner observes that line item J130E is new and that no moneys were budgeted in this line item during the past two years. Evidently, moneys for legal services were not singularly identified as they are in this budget; nevertheless, a reduction of \$4,000 will allow for a \$4,000 increase in this line item and will allow, also, an \$11,640 increase in the Administration account. The hearing examiner recommends that this suggested reduction be sustained.

*J213.1, J213.2, J213.4 Salaries - New Teachers, Bedside Instruction, Supplemental Instruction*

Council eliminated \$36,000 from these three line items which are part of the Instruction account setting forth teachers' and administrators' salaries. Council argues that the \$227,555 increase over last year's budget is too great, irrespective of the mandatory increases in teachers' salaries. Council objects also to the introduction of any subjects where new teachers are required, and it states that it is improper to budget for full salaries for retiring teachers since new teachers receive less compensation.

The Board supports its allocations in these line items stating that the increases are necessary because of the new organizational plan of its schools. The Board states also that it had to relieve overcrowding in its old high school and eliminate a staggered schedule for pupils. It listed several other conditions in the school system having to do with crowding and inadequate facilities. Finally, the Board testified that this increase is necessary for supplemental instruction for pupils referred by the child study team, and to properly utilize the facilities and implement the recommendations of the Middle States Association of Colleges and Secondary Schools, and the New Jersey State Department of Education. The Board testified (regarding teacher turnover) that this did not produce any significant savings in salaries.

The hearing examiner observes that the entire increase in the Instruction account is approximately nine percent higher than the budgeted amount for 1973-74; therefore, he recommends that \$30,000 be restored for teachers' salaries and bedside instruction. However, he recommends further that the \$6,000 reduction representing teacher turnover savings be sustained.

*J214A, J230A School Librarians - Salaries; Library Books and A-V Materials*

The increase in these two line items is \$30,963 over the amount budgeted for the 1972-73 school year. The Board asserts that \$7,000 is required for a new librarian. Counsel argues that this line item can easily be reduced without harming the efficiency of the program.

The hearing examiner recommends that Council's reduction be sustained; however, the moneys set aside for librarians' salaries should not be reduced, rather, the \$7,000 reduction should be made in library books and audiovisual materials. This economy will allow the Board an expenditure for library materials of \$43,000, which is still \$12,152 more than the amount budgeted last year.

*J214B, J214C Guidance Personnel - Salaries; Psychologist - Salaries*

The Board's testimony that it needs an additional guidance counselor is convincing; therefore, the hearing examiner recommends that Council's reduction of \$4,000 in line item J214B be set aside. However, the amount budgeted in J214C, which includes the salaries of three members of the child study team, has risen from \$30,409.60 in 1972-73 to \$31,208 in 1973-74, to \$49,907 in 1974-75, an increase over last year of \$18,699.

The hearing examiner recommends that the \$2,500 reduction in line item J214C be sustained. The amount of \$16,199 remaining in this line item appears reasonable for salary increases for three staff members.

*J216 Teacher Aides - Salaries*

The Board asserts its need for aides to relieve teachers of monitoring duties during lunch and playground time as provided in its agreement with the Lodi Teachers' Association. Council argues that \$25,536 was budgeted in this line item last year and that it is unnecessary to raise this appropriation to \$30,000. Further, it was disclosed at the hearing that the cafeteria program is not included in the Board's budget. It was disclosed further that at the end of the 1973-74 school year the cafeteria program made \$29,000 profit.

The hearing examiner recommends that the \$5,000 reduction recommended by Council be sustained. He further recommends that the Commissioner direct the Board to examine its lunch prices for pupils and reduce the cost of pupil lunches over a reasonable period of time so that the large unexpended balance in the cafeteria program will be greatly reduced.

*J220 Textbooks*

Council suggested a \$2,000 reduction in this line item, noting that the budgeted amount increased from \$36,804.36 in 1972-73 to \$53,123 in 1973-74 and was reduced to \$46,000 in 1974-75. The Board asserts that new books and more books are essential to a good educational program.

The hearing examiner recommends that Council's reduction be sustained. Although there is a reduction in the budgeted amount from last year, it must be pointed out that the same number of new books are not required each year; further, the reduction is nominal and should not impair the efficiency of the school program.

*J240A Teaching Supplies*

Council recommended a \$5,000 reduction in this line item citing decreasing pupil enrollments. The Board asserts that because of its new school organizational plan (K-6, 7-8, 9-12) it was necessary to provide more supplies to the middle school and the high school in order to fully utilize the facilities and implement the programs offered.

The hearing examiner recommends that this \$5,000 be restored.

*J250C Miscellaneous Expenses for Instruction*

These moneys are budgeted for field trips and tuition for teachers taking academic courses for the improvement of instruction. Council argues that the increase is too large; however, the hearing examiner finds that the same amount (\$15,000) was budgeted last year. He recommends that the \$5,000 reduction be restored to insure the same level of support provided during the previous school year.



*J410A5 Other Professional Salaries*

Council recommended a reduction of \$1,500 for the services of a podiatrist.

Although this service would be desirable, the hearing examiner finds that it is not necessary, and he recommends that Council's reduction be sustained.

*J420A Supplies*

Council asserts that its \$1,000 reduction is necessary because the Board's budget doubled over the amount allocated last year. The Board argues that new health rooms in its high school and in the Roosevelt School had to be provided with all the necessary supplies.

The hearing examiner finds that these health related supplies are necessary and recommends that the \$1,000 reduction be restored.

*J520A Transportation*

*J520C Transportation - Extracurricular Activities*

*J660B Vehicle Operation - Expenses*

Council suggested reductions in these line items of \$5,000, \$6,000 and \$1,000 respectively. No reasons for these recommended economies were given.

The Board cites State law for providing transportation to handicapped and vocational school pupils and its transportation contracts. It asserts that extended extracurricular activities at the high school and its new school organization require all of the budgeted moneys. Finally, the Board asserts that its vehicles are old and in need of repair. This, coupled with the rise in cost of oil and gasoline, is the reason for the increase.

The hearing examiner recommends that the amounts suggested for reduction in these three line items be restored.

*J620A Contracted Services*

Council recommended a \$5,000 reduction from this line item which still allows a \$29,000 increase over the amount budgeted last year by the Board. Previous amounts budgeted were \$16,289.28 (actual) in 1972-73, \$8,000 in 1973-74, and \$42,000 in 1974-75.

The Board asserts that it needs additional services for its new organizational plan, and that it changed from engaging an outside maintenance company to hiring its own custodians.

The hearing examiner finds that Council's suggested reduction is reasonable and recommends that it be sustained.

*J810A State Retirement Fund*

Council asserts that the Board overestimated the amount required in this line item by \$2,000. The Board asserts, however, that it has no discretion here.

A fixed charge is based on the number of its employees and a percentage of their salaries. This is controlled by law.

The hearing examiner recommends that the \$2,000 reduction be restored.

#### *J870 Tuition*

There is no question that tuition costs must be borne by the Board. The actual expenditure for 1972-73 was \$283,121.05. The amount of \$330,024 was budgeted for 1973-74. The actual expenditure is not yet available. This figure was increased by \$40,000 for the 1974-75 school year to \$370,024.

The hearing examiner finds that Council's suggested reduction is reasonable as it allows for a \$32,000 increase over the amount budgeted last year. Council states also that declining enrollments will effect a savings.

The hearing examiner recommends that Council's reduction be sustained.

The hearing examiner's recommendations are recapitulated:

#### CURRENT EXPENSE

Account Number	Item	Proposed Reduction	Amount Restored	Amount Not Restored
J130	Adm. Legal Servs.	\$ 4,000	\$ -0-	\$ 4,000
J213.1,	Sals. New Tchrs,	36,000	30,000	6,000
213.2,	Bedside Instr.,			
213.4	Supp. Instr.			
J214.A,	Sch. Librs. Sals.,	7,000	-0-	7,000
230A	Lib. Books, A-V Mats.			
J214B	Guid. Pers. Sals.	4,000	4,000	-0-
J214C	Psych. Sals.	2,500	-0-	2,500
J216	Tchr. Aides Sals.	5,000	-0-	5,000
J220	Textbooks	2,000	-0-	2,000
J240A	Teaching Supls.	5,000	5,000	-0-
J250C	Misc. Exps. Instr.	5,000	5,000	-0-
J410A5	Other Prof. Sals.	1,500	-0-	1,500
J420A	Supplies	1,000	1,000	-0-
J520A	Transportation	5,000	5,000	-0-
J520C	Trans. Extracurr. Activs.	6,000	6,000	-0-
J620A	Contr. Servs.	5,000	-0-	5,000
J660B	Veh. Oper. Exps.	1,000	1,000	-0-
J810A	State Retire. Fund	2,000	2,000	-0-
J870	Tuition	8,000	-0-	8,000
TOTAL CURRENT EXPENSE		\$100,000	\$59,000	\$41,000

In summary, the hearing examiner recommends that the Commissioner restore \$59,000 to the Board's budget for the 1974-75 school year.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has read the report of the hearing examiner and considered the exceptions filed by the parties. The exceptions assert only that sufficient testimony and evidence have been adduced to support each litigant's position; therefore, the Board requested full restoration of the entire \$100,000 reduction and Council requested that the total reduction be sustained.

The hearing examiner's report is complete, thorough and well reasoned; therefore, the Commissioner adopts that report as his own without exception. Accordingly, the Commissioner certifies to and directs the Bergen County Board of Taxation to raise the additional amount of \$59,000 for current expenses for school purposes for the 1974-75 school year to insure a thorough and efficient program of education.

COMMISSIONER OF EDUCATION

December 24, 1974

Elizabeth H. Rogers,

*Petitioner,*

v.

Board of Education of the Northern Burlington Regional School District  
et al., Burlington County,

*Respondent.*

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Rogers & Smith (Robert F. Rogers, Esq., of Counsel)

For the Respondent, Parker, McCay and Criscuolo (Richard J. Dill, Esq., of Counsel)

Petitioner, a nontenure teacher in the employ of the Board of Education of the Northern Burlington Regional School District, hereinafter "Board," during school year 1972-73, asserts her class assignments for 1973-74 were inequitable and were given to her for partisan reasons in a discriminatory manner. She demands judgment to this effect, and a fair and impartial assignment. The Board denies the assertions of petitioner, and maintains it has performed all acts and done all things consistent with law for the lawful conduct of its schools and, therefore, the Petition should be dismissed with prejudice.

A hearing in this matter was conducted on March 25 and April 30, 1974 at the office of the Burlington County Superintendent of Schools, Mount Holly, by

a hearing examiner appointed by the Commissioner of Education. At the time a total of twenty-three documents was received in evidence. Subsequent to the hearing, petitioner submitted a Written Statement in Lieu of Summation, and the Board submitted a Summary and Memorandum of Law.

The report of the hearing examiner is as follows:

The Board has, for a number of years, attempted to group pupils by ability and has assigned letter designations for such groups in the gradation from "A" (high ability) to "D" (low ability). (R-1, R-2, R-3) In general, at the seventh and eighth grade levels, this grouping practice has resulted in the classification of three groups as "A" groups, six as "B," six to eight as "C," and three as "D," in the years 1971-72 through 1973-74. (P-11)

When assigning such groups to teachers the Board has employed a policy of balancing so-called low ability groups with those of pupils of higher ability. Thus, no teacher in the years 1971-73 has had all "A" groups or all "C" or "D" groups but, in general, a balanced proportion of some two or three groups.

It is this balanced proportion which is the subject of the complaint herein, since petitioner asserts that her total teaching assignment for the 1973-74 school year was "significantly worsened" (Petition of Appeal, at p. 3) by school administrators because of certain criticisms she had voiced. She asserts that such action was discriminatory, retaliatory, done with malice aforethought, and constitutes a

\*\*\*\* legal deprivation of petitioner's right of due process and a denial of equal protection.\*\*\*\*  
(Petition of Appeal, at p.5)

The evidence with respect to the assignment of teachers during the school year 1973-74, and in prior years, is in documentary form, but was also the subject of rather extensive interpretive testimony at the hearing. This factual documentary evidence, and a summary of the testimony is set forth as follows:

Petitioner has served as an employee of the Board for two separate periods of time. She was initially employed during the 1966-67 academic year and such employment continued to the fall of 1968. Her second period of employment, as a teacher of mathematics, began in September of the 1972-73 academic year.

Her class assignment during this latter year consisted of four eighth grade "C" groups and one elementary algebra group, equated by petitioner as "C"—"D" level. (Petition of Appeal, at p.3) Each of her five classes met in different classrooms of one school building.

On March 1, 1974, school administrators surveyed the teaching staff with respect to their intentions for the 1974-75 school year and requested a statement of preference for "teaching assignment" and "session." (R-5) It is noted here that the school in which petitioner taught was and is on double sessions. Petitioner replied that her choice of teaching assignment was:

First Choice	— Math	— Grade seven
Second Choice	— Math	— Grade eight
Third Choice	— Math	— Grade nine

She also indicated that she wished to be assigned to the afternoon session, and she appended the following statement at the bottom of the survey sheet:

“This year I have had an assignment of 4 8C groups and one Elementary Algebra group in 5 different classrooms. I am very much interested in receiving an assignment which is much more intellectually stimulating and much less physically exhausting.” (R-5)

Following this comment of petitioner, there is an Appendix written by the Superintendent of Schools on or after June 6, 1973. The Appendix states:

“Interest H.S. [high school] or 7th grade. Try to make 8th grade with “B” groups.”

On May 30, 1973, petitioner was informed by administrative memorandum (R-6) that her assignment for the academic year 1973-74 was to the afternoon session with five classes of eighth grade mathematics. The ability level of such classes was not further delineated at that time.

On August 17, 1973, the principal of petitioner’s school sent her the following letter:

“It has been necessary to make a change in the teaching assignment previously assigned to you. In replacement of one eighth grade math period, I was able to assign a seventh grade math class which was your first choice.\*\*\*” (P-5)

The seventh grade class of reference was classified later in the month of August as a “B” ability group. At that later time, too, petitioner was informed that the balance of her teaching assignment consisted of two “D” sections and two sections classified as “C.” It is this total assignment which petitioner states is discriminatory. She avows that such assignment is not balanced, as she alleges all others had been in a prior three-year period, with three “A” sections as compensation for two “D” sections.

Accordingly, on September 11, 1973, petitioner addressed a letter to her principal and set forth objections. This letter contradicted alleged administrative assertions that assignments were not rotated and that the classes assigned to petitioner would be easier since they were smaller. She concluded:

“\*\*\* I feel that these 2 8D sections were deliberately removed from their traditional place in order to worsen my assignment and to force me to resign.” (P-6)

Thereafter, on September 17, 1973, the building principal addressed a reply to petitioner. (P-9) In it he said that:

1. Certain scheduling changes had been dictated by changing pupil interests and pupil population.
2. The schedule was not stable because of the number of pupils from military bases.
3. Petitioner had been placed in one room for four periods and given a seventh grade section with a higher ability level than any class petitioner had had during the 1972-73 academic year; he had reduced the size of the "D" sections assigned to petitioner.

The principal also said in his letter:

\*\*\*\* May I point out that the students in the 'D' sections need a dedicated teacher perhaps even more than the high ability groups. They are not in the 'D' section because they are disciplinary problems, but because of their poor performance in school. The students in your 'C' sections are of average ability and are capable of good work.\*\*\*\* (P-9)

He also denied the assignment was designed to cause petitioner to resign and observed that he had recommended petitioner for employment for the 1972-73 academic year. Further, he said:

\*\*\*\* You must realize that teachers who have been with the school for a number of years have shown their ability in particular courses and that it would be capricious to change their assignment to make what you consider an improvement in your assignment.\*\*\*\* (P-9)

Petitioner's reply to the principal was a detailed rebuttal of what he had said. She observed that in two years and ten assignments she had been assigned only one group which she classified as "average" and that six pupils of the sixteen enrolled in one of her "D" classes\*\*\*\* have psychological studies on them indicating extensive disturbances and emotional needs\*\*\*\*. (P-10) She further stated that her other "D" class had an enrollment of twenty-two pupils which she said was "too many," and she averred:

\*\*\*\* 8C and 8D sections are the worst assignments in your school. Poor performers, non-achievers, combined with puberty, put these students at the most difficult times of their lives. These students demand constant discipline.\*\*\* In addition to giving me the more difficult lower groups without notice, you have increased my preparations from two to three, thereby making my overall assignment considerably more difficult and time consuming.\*\*\*\* (P-10)

On the same date, petitioner also addressed a letter to the Superintendent of Schools in which she said:

“Because of unfair and discriminatory treatment by the administration, with respect to my assignment, I herewith request a leave of absence, without pay, for the balance of the school year 1973-74, and an impartial and unprejudiced reassignment next year.” (P-7)

The Superintendent, by return letter, indicated the Board had no provisions for an extended leave of absence, other than sick leave, either with or without pay. Thereafter, petitioner scheduled an operation which her physician had advised and requested she be granted sick leave. This leave, which began on a date not clearly defined in testimony or evidence, extended to April 8, 1974. (Tr. I-90)

Thereafter, the Board represents that petitioner was given notice on April 25, 1974, that she would not be reemployed for the 1974-75 school year, and, upon request, was given a written statement of reasons on June 26, 1974.

Testimony with respect to the nature of petitioner's assignment for the academic year 1973-74 was given at the hearing by petitioner, the Superintendent of Schools, and by a former guidance counselor who now helps to supervise a federal project in Pennsylvania. An officer of the local teachers' association also testified.

The former guidance counselor testified with respect to petitioner's assignment for school year 1973-74 in the context of the schedules of other teachers. He said:

\*\*\*

“Q. Did you find any patterns with respect to the schedules, developed therein?

“A. Well, it seems over the past several years in reference to the information presented here, including the current year, that there has been some kind of compensatory assignment made, in which group levels are sort of equated so that people who have high groups also get low and middle groups are balanced off against each other in most cases.

“Q. And with respect to the Petitioner's assignment, do you note any deviation from that pattern?

“A. Yes, it's the only group I could find, over the past three years, in which, when two low groups were assigned, that the compensatory, or the appropriate three high groups seems to be apparent through what I reviewed, were not assigned.”\*\*\*” (Tr. I-8)

He also indicated that in his opinion there was an evident attempt to stabilize schedules from year to year (Tr. I-28), to require only two preparations, and to equate low groups with high groups in teacher assignments. (Tr. I-27)



The Superintendent of Schools testified that three teachers in addition to petitioner had had three teaching preparations in the 1973-74 academic year. (Tr. I-69) He also testified he knew of no exceptions and could find none in Exhibit P-1 to the general rule of practice that, with the exception of petitioner's schedule for 1973-74, three "A" sections were grouped with two "D" sections in the assignment of classes to teaching personnel. (Tr. I-51) He then concluded that, in this respect, petitioner's schedule was a "deviation" from the pattern. (Tr. I-52)

The hearing examiner has considered such testimony and reviewed the pertinent exhibits and finds that there was, in fact, as alleged by petitioner, a pattern of teacher assignments in the Northern Burlington Regional Schools during the years 1971-74. Such pattern was not always uniform but, in general, it was a pattern wherein designated high ability classes were balanced with lower ability groups in the total assignment of teachers.

Specifically, the hearing examiner also finds that one distinct pattern of class assignment during the period was the pairing of three "A" classes with two "D" classes and that petitioner's assignment of two "D," two "C" and one seventh grade "B" class during the 1973-74 academic year was a deviation from the pattern.

It remains to assess the seriousness of this deviation in the context of petitioner's assertion of discrimination, and in the context of other testimony that petitioner's schedule was improved in other ways by the addition of a seventh grade class designated "B" and by the assignment of two, rather than five, teaching stations. Other elements of the Board's testimony must also be set forth.

Petitioner avers that the principal reason for her allegedly inferior assignment during the 1973-74 academic year was her exercise of the constitutional entitlement to speak freely. In support of this avowal, she cites a total of three incidents. On one occasion, she testified, she was assigned as a proctor for a large group of pupils who were taking achievement tests, and that she was "very upset at the amount of cheating that was going on \*\*\*." (Tr. I-95) Thereafter, she stated she addressed a series of written recommendations to school administrators. (P-4)

The second and third incidents related by petitioner were concerned with the alleged improper supervision of a school dance (Tr. I-96) and with alleged wide variations in the ability levels of pupils in her various classes. (Tr. I-97) Additionally, however, petitioner also recites the details of a dispute with school administrators which was concerned with a supervisory report and a resultant conference pertinent thereto. (Tr. I-111)

In this latter regard, she avers she was concerned with an evaluation report she alleged was "untruthful." (Tr. I-111) Upon receipt of this report, petitioner complained with respect to its contents and a conference with school administrators was scheduled. However, such conference was the subject of a dispute since petitioner appeared for it accompanied by a representative of the

teachers' association and with a tape recorder. (Tr. I-111) She states the representative was told to leave, and that the tape recorder was not permitted to be used. (Tr. I-112) She now avers that such exclusion constituted a denial of "\*\*\*\*her rights of due process\*\*\*\*." (Petitioner's Written Statement, at p. 17)

There is lengthy testimony in the record from the principal of the Junior High School in the Burlington Regional School District. (Tr. II-64-104) Such testimony was concerned with the intricate details of the scheduling routine, of the balancing of teacher requests with class apportionment, and of solving problems inherent in scheduling when as many as 200 pupils, children of military personnel, appear in September as new enrollees. (Tr. II-75) In summary, he indicated that he had attempted to maintain the schedules of teachers with longer service without change (Tr. II-77), and that other schedules had been altered by mutual agreement. (Tr. II-74) In still other schedules certain changes were required. These alterations are summarized in the document R-12. The document shows that petitioner had three schedule changes for the 1973-74 academic year, and that five other teachers each had two changes.

With respect to petitioner's schedule for the year, he said:

"\*\*\*\* I assigned her the 7B math in an effort to try to meet what she had requested on her intention sheets, that's the March 1st sheet. The seventh grade was her first choice and I gave her a seventh grade class when it came up.\*\*\*\*" (Tr. II-82)

The witness was also asked whether or not, in his opinion, petitioner was treated differently than other teachers with respect to her schedule. He said:

"\*\*\*\* I don't feel so. It's coincidental that some people have similar schedules.

"Q. Who else has a similar schedule as Mrs. Rogers on that?

"A. I meant there was a pattern, that is what I thought you were referring to . . .

"Q. Well, you say that there has not been a pattern in your assignments of balancing D sections with B sections or A sections?

"A. There has been a pattern but it has been coincidental, not a purposeful plan.\*\*\*\*" (Tr. II-103)

He also indicated he believed petitioner's assignment was a balanced one and not a "poorer" one than that of anyone else. (Tr. II-104) He said:

"\*\*\*\* She has some of the lowest ability levels. She has some average students and some above average students.\*\*\*\*" (Tr. II-104)

The hearing examiner has reviewed such testimony in the context of the whole record herein. He has already found that there was in existence a pattern of assignment in the Northern Burlington Regional School District, and that petitioner's schedule for the 1973-74 academic year represented a deviation from it.

However, the hearing examiner cannot find evidence that the assigning of eighth grade "D" sections to petitioner in 1973 was an attempt, as petitioner charges, to "worsen" her assignment or force her to resign. (P-6) Such a view ignores the facets of the assignment which were more favorable to petitioner. She was, in fact, given a group (7 "B") which was a higher rated ability group than any she had taught in 1972-73. Her teaching stations were reduced from five to two. One of the eighth grade "D" classes she taught had only sixteen pupils. (R-12)

Furthermore, at a time in August 1973 prior to petitioner's complaint about her schedule, the letter to her from the principal can only be judged as affable in tone. He stated, as cited *ante*, that he was able "\*\*\*\* to assign a seventh grade math class, which was your first choice \*\*\*, " and the letter concluded:

"I hope you have had a pleasant summer. I'll be seeing you in a couple of weeks." (P-5)

He also stated, in testimony, that he "\*\*\*\* tried to please her\*\*\*\*" by the action. (Tr. II-88)

Such testimony and evidence cannot, in the judgment of the hearing examiner, be sublimated to a narrow focus on scheduling details which petitioner believed were adverse. Furthermore, the hearing examiner finds no substance in the basic argument herein that a teaching schedule is somehow "worsened" because a certain part of such schedule is devoted to the teaching of pupils who learn more slowly. As the principal stated in his memorandum of September 17, 1973 to petitioner:

"\*\*\* students in the 'D' sections need a dedicated teacher perhaps even more than the high ability groups.\*\*\*" (P-9)

In summation, the hearing examiner finds that the variations of the teacher assignment patterns which are evidenced herein do not constitute evidence of a deliberate, discriminatory treatment of petitioner in the context of the total consideration given her by the Board. He recommends, therefore, that this Petition be dismissed.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and the objections thereto filed by the parties. Petitioner takes particular exception to that part of the hearing examiner's report which states that he finds no

substance in the basic argument that a teaching schedule is somehow worsened because a certain part of such schedule is devoted to the teaching of pupils who learn more slowly. In petitioner's opinion that is not the "basic argument" nor issue. Instead, she maintains the issue herein is the one which was set forth at the conference of counsel prior to the hearing, as follows:

"Does the Burlington Regional Board have a class assignment policy? If there is such a policy is it implemented fairly and equitably or is it used as a weapon for partisan reasons in a discriminatory manner?"

Even accepting this statement of the issue, however, the Commissioner determines that the findings of the hearing examiner are pertinent to it. The hearing examiner found there had been a pattern of class assignment in prior years. He also found that this pattern was not followed strictly in the 1973-74 school year but that the deviation from it was not one of major proportion and it was balanced by other factors which were favorable to petitioner. The Commissioner concurs with these findings and he concludes that the total record sustains them.

There is no legal right for a teaching staff member to be assigned specific numbers of high or low ability pupils. A past practice in this regard does not constitute a rule. Assuming *arguendo* that there is such a rule, there can be no holding by the Commissioner that the rule must be inflexible. While a local board of education should follow its own rules, it is not always strictly bound by them. *Long Branch Education Association v. Board of Education of the City of Long Branch, Monmouth County*, 1974 S.L.D. 1191 (decided December 10, 1974); *Samuel Hirsch v. Board of Education of the City of Trenton, Mercer County*, 1960-61 S.L.D. 189; *Noonan and Arnot v. Board of Education of the City of Paterson*, 1938 S.L.D. 331, 336 (1925) In the instant matter there was reason for the departure from past practice of which petitioner now complains. (Tr. II-75, 77, 84)

Accordingly, the Commissioner determines that petitioner's assignment for the 1973-74 school year was neither improper nor discriminatory. Additionally, the Commissioner finds no merit in petitioner's claim that her service as a nontenured teacher entitled her to seniority rights over other nontenured teachers at the time when the Board decided to reduce its staff of teachers of mathematics. The rules of the State Board of Education with respect to seniority (*N.J.A.C.* 6:3-1.10) are, by specific reference, pursuant to the statutory prescription contained in *N.J.S.A.* 18A:28-9 *et seq.* These statutes comprise Article 3 of the chapter and the Article contains the definitive notation "Effect of Reduction of Force *Upon Persons Under Tenure.*" (*Emphasis supplied.*) Petitioner advances no claim to tenure and possesses no rights to a tenure status.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

December 24, 1974

Pending before State Board of Education

**In the Matter of the Tenure Hearing of Mary Burns, School District of the  
Township of Readington, Hunterdon County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioner, Wesley Lance, Esq.

It appearing that the Board of Education of the Township of Readington, hereinafter "Board," having considered charges made against Mary Burns, hereinafter "respondent," by George Ihnat, principal of the Whitehouse School, pursuant to *N.J.S.A. 18A:6-10 et seq.*; and it appearing that the Board has determined that the charges would be sufficient, if true in fact, to warrant her dismissal; and it appearing that the Board has properly certified said charges to the Commissioner of Education by letter dated May 15, 1974, and served a copy of said charges and certification upon respondent by certified mail; and it appearing that a copy of the charges, together with a copy of the Board's resolution of certification, was served by certified mail upon respondent on May 23, 1974 by the Assistant Director of the Division of Controversies and Disputes; and it appearing that respondent failed to file an Answer to the charges made against her prior to July 10, 1974, when she was again sent a communication by the Assistant Director; and it appearing that respondent made no response to the previous communication; and it appearing that the Board's attorney by letter dated November 1, 1974, served Notice of Motion for Summary Judgment by certified mail upon respondent; and it appearing that the Assistant Director by certified mail served notice of receipt of the aforesaid Notice of Motion for Summary Judgment on respondent and allowed a further ten days for respondent to reply; and it appearing that to this date respondent has at no time moved to respond nor defend herself against the charges certified against her by the Board; and it appearing that respondent has been given every opportunity to defend herself and has not done so for a period embracing seven calendar months; now, therefore,

IT IS ORDERED on this 24th day of December 1974 that respondent Mary Burns is dismissed from her employment with the School District of the Township of Readington, Hunterdon County, as of the date of her suspension by the Board of Education of the Township of Readington, Hunterdon County.

COMMISSIONER OF EDUCATION

December 24, 1974

**Leroy Lynch and Essex County Vocational and Technical Teachers' Association,  
Thomas M. Kuzik, George W. Sigmund, Paul J. Bowles,  
Marie V. Iadipaoli, Felix N. Villarin, Robert C. Worthing,  
Vincent J. Kozakiewicz, Lila R. Kantrowitz, Peter A. Swolak,  
and Eloise Martino Forster,**

*Petitioners,*

*v.*

**Board of Education of the Essex County Vocational School District,  
Essex County,**

*Respondent.*

## **COMMISSIONER OF EDUCATION**

### **DECISION**

For the Petitioners, Cole, Geaney & Yamner (John F. Fox, Esq., of Counsel)

For the Respondent, Maurice R. Strickland, Esq.

Petitioners, teaching staff members employed by the Board of Education of the Essex County Vocational School District, hereinafter "Board," are joined by the Essex County Vocational and Technical Teachers' Association, hereinafter "Association," in alleging that the Board's action appointing two individuals to administrative positions within the school district was improper and in violation of adopted policies which had been negotiated between the Board and the Association.

The Board denies petitioners' allegations and states that petitioners have failed to exhaust their remedies by refusing to submit the instant complaints to advisory arbitration.

Petitioners request relief in the form of an Order of the Commissioner of Education directing the Board to make all appointments in conformance with the provisions of the negotiated policy, and a finding by the Commissioner that the Board violated the adopted policy as agreed to between the parties.

A hearing in this matter was held on November 5, 1973 in the office of the Essex County Superintendent of Schools, East Orange, by a hearing officer appointed by the Commissioner. Depositions of certain witnesses and other documents were received and marked in evidence.

The first disputed appointment concerns the position of apprentice coordinator. A notice from the Superintendent of Schools dated November 4, 1971 (Exhibit P-1) was distributed to each school within the district, and to other school districts, with a copy to the Association. This notice set forth the particulars of the position of apprentice coordinator, including the salary range, fringe benefits, duties, and required experience and educational background of

applicants. Applicants were required to submit written resumes to the Superintendent no later than November 19, 1971, together with a covering letter of application. The notice contained, *inter alia*, the following statement in regard to education, experience and duties which were required of the successful candidate:

\*\*\*

“*Education:* Successful completion of a curriculum approved by the New Jersey State Department of Education which will enable the individual to obtain the certificate required for the position.

“*Experience:* Approved administrative and/or supervisory experience desired. Vocational-technical administrative and/or supervisory experience preferred. Minimum of six years of approved experience in trade and/or occupational fields required preferably in apprenticeable trades.

“*Duties:* Coordination of Apprentice Training programs. Assume responsibility for planning programs in Apprentice instructional areas and for supervision of instructional personnel. Assume such duties as may be assigned by the Superintendent.”\*\*\*” (Exhibit P-1)

Eighteen candidates applied for the position of apprentice coordinator. (Exhibit P-2) In his deposition, the Superintendent testified that members of the Board served as a screening committee which reviewed the resumes and personnel folders of the applicants, and subsequently interviewed the applicants. (Dep. 9-12) According to the Superintendent, two of the eighteen applicants were not then employees of the Board. (Dep. 11) Following the interviews, the Board's committee made a recommendation of several candidates and the Superintendent then recommended one candidate to the Board. The Superintendent recommended one of the two applicants who was not an employee of the school district at the time, and the Superintendent's recommendation was accepted by the Board. (Dep. 13) The Superintendent testified that two of the eighteen candidates held the regular certificate for the position of apprentice coordinator as issued by the State Board of Examiners, and none of the remaining sixteen held that certificate or possessed a letter of eligibility from the State Board of Examiners indicating that they met the requirements and could secure such certificate upon application. (Dep. 16) According to the Superintendent, the two applicants who possessed the regular certificate for this position were John L. Kelly, who was not an employee within the district, and George W. Sigmund, a teaching staff member.

The letters of application, resumes, employment records and certification of Petitioners Kuzik (Exhibit J-1), Sigmund (Exhibit J-2), Iadipaoli (Exhibit J-3), Villarin (Exhibit J-4), Worthing (Exhibit J-5), and Kozakiewicz (Exhibit J-6) were marked in evidence as part of this record subsequent to the hearing. Petitioners Iadipaoli, Kozakiewicz and Worthing applied for both positions of apprentice coordinator and supervisor of instruction. Petitioner Kuzik applied for the position of supervisor and Villarin applied for the apprentice coordinator position. (Exhibit P-2) Also, the similar documentary records of John L. Kelly



(Exhibit J-7), who was appointed apprentice coordinator, and Frank J. Polito (Exhibit J-8), who was appointed supervisor of instruction, were stipulated for the record.

A notice from the Superintendent, dated February 23, 1972 (Exhibit P-3), was distributed to each school, to other school districts and to the Association, regarding the position of supervisor of instruction. This notice, which is similar in format to the notice concerning the apprentice coordinator vacancy (Exhibit P-1), required applicants to submit letters of application and resumes to the Superintendent no later than March 6, 1972. The salary range for this position is identical to that for apprentice coordinator. The notice contained, *inter alia*, the following in regard to education, experience, and duties required for the position of supervisor of instruction:

\*\*\*

*“Education:* Masters Degree in Administration and Supervision minimum requirement. Applicants to be considered also must hold a certificate issued by the New Jersey State Department of Education with an endorsement of Principal or Supervisor.

*“Experience:* Vocational-Technical administrative and/or supervisory experience preferred but not required.

*“Salary:* \$14,597-\$20,440 - For 12 month school year. It is possible that applicant with superior qualifications may be offered a higher beginning salary based on an evaluation of his previous experience.

*“Duties:* Supervision of instruction, teacher training, supervise curriculum construction, aid in securing teacher applicants, serve on budget committee and work closely with administration on all assigned tasks.

.....

*“Applicants who have applied for administrative and/or supervisory positions during the past year need not submit resumes nor appear for interviews. Any applicants in this category need only to submit a letter indicating an interest in the opening. In each such instance, resumes and results of recent previous interviews will be considered.*

*“Only new applicants should submit detailed resumes with a covering letter of application to Stephen Andrasko, Superintendent, Essex County Vocational Schools, 90 Washington Street, East Orange, New Jersey 07017. All such resumes must contain the title of the endorsement on the certificate held.” (Emphasis in text.)* (Exhibit P-3)

A total of thirteen applicants applied for the position of supervisor of instruction. (Exhibit P-2) The successful candidate, Frank J. Polito, had been a teaching staff member within the school district since September 1, 1961. (Exhibit J-7)

The Board's policy regarding promotions was negotiated with the

Association for the period beginning July 1, 1971, and ending June 30, 1973. (Exhibit P-4) It is stipulated that the Board's formal action appointing individuals as apprentice coordinator and supervisor of instruction respectively took place on March 28, 1972 during the period of time the promotion policy was in effect. The portion of the promotion policy which petitioners claim was violated by the Board is reproduced as follows:

\*\*\*

"B. The Board acknowledges and the Association agrees that each of the following factors enter into promotions:

- "1. Certification for position.
- "2. The nature of the promotion as to duties.
- "3. Experience in the area of promotion.
- "4. Seniority of employment.

"C. The Association acknowledges that the Board has the final authority and responsibility for promotion.

" 1. The Board agrees to give due weight to the professional background and attainments of all applicants and other relevant factors.

" 2. In filling such vacancies, preference shall be given to qualified teachers already employed by the Board when all other factors are substantially equal, seniority shall be a major factor.

" 3. Announcements of appointments shall be made by posting a list in the office of the central administration and in each school building, and a list shall be given to the Association indicating which positions have been filled and by whom immediately after Board approval." (Exhibit P-4)

Paragraphs nos. 1, 2 and 3 under "C" above appeared in identical language in the 1970-71 promotion policy. (Exhibit P-5) The portion which appears above as paragraph "B" was not included in the 1970-71 policy. In the promotion policy adopted for the 1973-74 and 1974-75 school years, the provisions are identical to the 1971-72 and 1972-73 policy.

Petitioner Lynch testified that he was a member of the Association's negotiating committee which negotiated the 1971-72 and 1972-73 promotion policy with the Board. (Tr. 11) He testified that a major objective of the Association was the strengthening of the seniority factor in the promotion policy ultimately adopted for 1971-72 and 1972-73. (Tr. 11-12) According to this witness, the Association desired a promotion policy which would insure that, if several applicants for a position had equal qualifications, the person possessing the greatest seniority within the school district would be selected as the successful candidate. (Tr. 12) In Petitioner Lynch's words, "\*\*\*\* if all qualifications were equal, then the person who had more seniority should be hired.\*\*\*\*" (Tr. 15)

Petitioner Kuzik, the vice-president of the Association during 1972, testified that in negotiations for the 1971-72 and 1972-73 promotion policy, the Association's position was that: "\*\*\*\* if we had two candidates\*\*\*\*that were equal in qualifications, then the person with the seniority would receive the

promotion.\*\*\*” (Tr. 19)

The President of the Board, in her deposition, testified that she served on the Board’s committee to interview and screen the eighteen applicants for the position of apprentice coordinator. She testified that following the interviews the Board recommended several candidates for review by the Superintendent. (Dep. 18-19) According to the Board President, the Superintendent then recommended one candidate to the Board and the Board subsequently formally voted on the appointment. (Dep. 30, 36) The President testified that the Board Committee considered each applicant’s certification, qualifications, experience, and any other factors which would be relative to the type of position to be filled. She testified that she asked each applicant why he/she was applying for the position, and what in particular each applicant could offer in terms of service to the school children and the school system. Also, she testified, other standard questions were asked of each applicant. The Board President further testified that each applicant was also permitted to make his own presentation before the Board began to ask questions. (Dep. 31-32) She testified that, since some applicants who were interviewed for the apprentice coordinator position were also applicants for the position of supervisor of instruction, these persons were not called for a second interview by the Board. (Dep. 34) This procedure was followed because the Board believed that it was not necessary to again question the same applicants, since the members could fairly judge the answers which would be given by these persons. (Dep. 35)

When questioned whether she believed it essential to promote applicants from within the system, the Board President testified that she would “\*\*\* consider the person who was best qualified for a job.\*\*\*” (Dep. 36)

The Board President testified that the Board followed the same procedure of recommending several candidates to the Superintendent for the position of supervisor of instruction. (Dep. 37)

When questioned why Mr. Kelly was employed as the apprentice coordinator, as an applicant from another school district, instead of one of the Board’s teaching staff members who were applicants, the Board President testified:

“\*\*\* Because he had the best qualifications and he had his certification right in his hand for the job.\*\*\*” (Dep. 42)

A member of the Board testified that he had served on the Board’s committee to interview and screen applicants for the two positions. This Board member voted for the Superintendent’s recommendation for the supervisor of instruction position, but he voted negatively on the recommendation for an apprentice coordinator. He testified that his negative vote did not mean that he believed another candidate possessed qualifications superior to those of Mr. Kelly, but was based on the principle that he believed the position should not have been filled by a person from outside the school district. (Dep. 65, 70)

Petitioner Iadipaoli was an applicant for both the position of apprentice coordinator and supervisor of instruction. She testified that she was interviewed

by the Board on or about January 5, 1972 for the apprentice coordinator position, at which time the supervisor position had not been advertised. After the supervisor of instruction position was advertised on February 23, 1972, she filed an application. She testified that the notice for the position (Exhibit P-3) and a letter she received acknowledging her application stated that it would not be necessary to appear for another interview. (Tr. 28-29) This petitioner testified that the Superintendent sent her academic credentials to the State Board of Examiners, through the office of the County Superintendent of Schools, to secure an evaluation of her eligibility for an apprentice coordinator certificate. She received a copy of this evaluation from the Superintendent's secretary, which stated that she was deficient one course in organizing and supervising apprenticeship programs. (Tr. 29-30) She testified that she sent a letter to the Superintendent stating that she had taken such a course, and this was recorded on her professional improvement sheet. She notified the Superintendent that she would submit an official transcript from Rutgers University so that her personnel records would show that she had completed this academic study and therefore was qualified to receive an apprentice coordinator certificate. (Tr. 30) This petitioner testified that her formal application for this certificate was submitted on March 16, 1972. (Tr. 30-31) Miss Iadipaoli's records disclose that she was issued a certificate to serve as coordinator of apprentice programs in April 1972. (Exhibit J-3) She testified that in her opinion she was discriminated against because she was certified, had supervisory experience and had seniority over the other applicants from within the school district, but the Board avoided appointing her as coordinator because she was a woman. (Tr. 31) This petitioner also testified that the successful candidate for the position of supervisor did not possess the appropriate certificate as supervisor of instruction, but that she did hold such a certificate. The records disclose that the individual appointed as supervisor of instruction held a principal's certificate at the time of his appointment, and secured the certificate as supervisor of instruction in June 1973. (Exhibit J-8)

Petitioner Iadipaoli's resume (Exhibit J-3), which was submitted as part of her application for both the position of apprentice coordinator and supervisor of instruction, discloses that she held the permanent supervisor's certificate issued November 1969, and states that she believed she qualified for the apprentice coordinator's certificate at that time.

Given these facts as adduced from both the testimony and the documentary evidence, the issue whether the Board violated its promotion policy by its appointment of two individuals, other than petitioners, to the aforementioned positions is referred to the Commissioner for determination.

This concludes the report of the hearing officer.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner, and observes that no exceptions to that report have been filed by the parties. The Commissioner adopts the findings of fact set forth in the report of the plenary hearing.

Local boards of education, as agencies of the State, have been invested by the Legislature with certain broad powers necessary for the thorough and efficient operation of a local school district.

*N.J.S.A.* 18A:11-1 provides, *inter alia*, that:

“The board shall \*\*\*

“c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service \*\*\* and

“d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.”

Also, *N.J.S.A.* 18A:27-4 sets forth certain rule-making powers of local boards of education as follows:

“Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto.”

It is clear that any rules or policies adopted by local boards of education which relate to employment may not be inconsistent with the school laws, Title 18A, Education. Nor may such rules or policies have the practical effect of amending the school laws either to remove statutory authority from local education boards or prevent the boards from conducting a thorough and efficient system of public schools as mandated by the New Jersey Constitution, *Art. VIII, Sec. IV, par. 1*. See *Lullo v. International Association of Fire Fighters Local 1066*, 55 *N.J.* 409, 440 (1970).

In this case, the Board did adopt a policy regarding promotions, following negotiations with the Association. (Exhibit P-4) The Commissioner has examined this policy and finds it to be reasonable and in accord with the school laws.

The action of the Board in the instant matter, appointing individuals as teaching staff members, specifically in the positions of supervisor and apprentice coordinator, was clearly an exercise of the discretionary authority vested in local boards of education by the Legislature. *N.J.S.A.* 18A:11-1, 18A:27-1,4 As the court pointed out in *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327, 332 (*App. Div.* 1965), a determination made by an administrative

agency, such as a local board of education under clear statutory authority, is entitled to a presumption of correctness and will not be overturned unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The burden of proof required of petitioners to show that the Board's action was unreasonable, discriminatory or otherwise improper is not met in this case, and the Commissioner so holds. The record before the Commissioner discloses that the Board followed its policy with respect to promotions of teaching staff members, and exercised its judgment by recommending several candidates from whom the Superintendent chose one as his recommendation to the Board. The record discloses that the Board did consider the factors of certification, the nature of the position to be filled, the experience of the applicants in regard to the type of position being applied for, seniority, and the potential for success of each individual applicant. Although in most school districts the screening process is usually performed by experienced school administrators, it is not a fatal defect in this instance that the initial screening and interviewing process was performed by a committee of Board members.

The appointment of teaching staff members, and the pattern of staff utilization are two of the vital factors which influence and determine the quality

of the educational program within a given school district. This is so because the ability and competence of the teaching staff members have a higher coefficient of correlation to the instructional process and the achievement of pupils than any other factor such as the schoolhouse, or the materials for instruction. It was an understanding of these principles that caused the court in the case of *Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education*, 108 N.J. Super. 301 (App. Div. 1969), cert. den. 55 N.J. 310 (1970), to state that:

“\*\*\* We endorse the principle, as did the court in *Kemp v. Beasley*, 389 F. 2d 178, 189 (8 Cir. 1968), that ‘faculty selection must remain for the broad sensitive expertise of the School Board and its officials’\*\*\*.”

(at p. 312)

Petitioners in this matter allege that the Board's action was improper because the candidates possessing the longest period of employment within the School District were not appointed by the Board to the vacant positions of supervisor and apprentice coordinator. Thus petitioners imply that seniority may be the overriding factor in the determination of who shall be promoted. The Commissioner does not agree. In the first instance, the record is barren of any proof of discriminatory or unreasonable motives on the part of the Board. Secondly, the Board may and should consider length of service as a factor when considering who shall be promoted, but, regardless of seniority or any other single factor, this Board and all other local boards of education have the responsibility to appoint the most able and competent person to fill any teaching staff position, including all administrative and supervisory positions. This is a basic responsibility which underlies the comprehensive requirement of all local education boards to provide the most thorough and efficient program of education possible, given all the circumstances unique to each school district.

In this instance, the teaching staff member who was appointed supervisor of instruction possessed a principal's certificate at the time of his appointment, and therefore qualified for the position. Several months later he also secured the certificate for supervisor of instruction, which was not necessary since he already held the principal's certificate. Nothing in the record before the Commissioner shows that either of the successful appointees was other than well qualified for the positions they attained.

The Commissioner has previously stated that:

“\*\*\* [I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.” *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, aff'd State Board of Education 1939-49 *S.L.D.* 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E. & A.* 1948)

The Commissioner finds and determines that petitioners' allegations are without merit and their cause of action is groundless. Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 24, 1974

Pending before State Board of Education

**Denis McDowell and Judith McDowell, his wife,**

*Petitioners,*

*v.*

**Board of Education of the Borough of Island Heights, Ocean County,**

*Respondent.*

COMMISSIONER OF EDUCATION

#### DECISION

For the Petitioners, Denis McDowell and Judith McDowell, *Pro Se*

For the Respondent, Berry, Summerill, Rinck & Berry (Seymour J. Kagan, Esq., of Counsel)



Petitioners are parents of a son who was denied entrance to the kindergarten program conducted by the Board of Education of the School District of the Borough of Island Heights, hereinafter "Board," because his fifth birthday occurred after October 1, 1974, the cutoff date previously adopted by the Board which establishes eligibility for kindergarten entrance.

Oral argument for interim relief and immediate placement of the pupil in kindergarten was presented to a hearing examiner on September 18, 1974 at the State Department of Education, Trenton. The parties were thereafter advised by the hearing examiner that he would recommend to the Commissioner of Education that the requested interim relief be denied because additional circumstances, not fully explained prior to the oral argument, now required the Commissioner's determination on the merits of the Petition. The parties submitted this matter on Briefs. The report of the hearing examiner follows:

The essential facts are not in dispute. Petitioners' son was born on October 28, 1969, as verified by the birth registration certificate. He would not be five years old until after the date adopted in the Board's policy on minimum age requirement for kindergarten entrance, which is October 1. (Exhibit A) However, petitioners' letter to the Board dated February 22, 1974, made the following request:

"We have a son who will be five years old on October 28, 1974. He, therefore, misses the registration cutoff date for kindergarten for the 1974-75 school year. We would like you to please consider him for an early registration. We feel he would benefit more from this than being kept home for another year until he is six.

"If you could interview or test him we think you would agree as Christopher is a bright responsible child for his four and a half years. He works well in a group and can follow instructions better than his six year old brother. He has been to nursery school for about six months and worked very well there.

"Academically, Christopher does very admirably. He knows and uses basic concepts for arithmetic and reading and can read simple words by sounding them out.

"We would at least appreciate an interview for him and a chance for you or whoever may be qualified to test him and then decide on the results of such testing whether or not he should enter school this coming fall.

"Thank you for your time and trouble." (Exhibit D)

The Board acknowledged petitioners' request and arranged for testing of the infant. This testing was administered by the school's administrative principal who described it as follows:

"When Mrs. McDowell and her son came to the school I spoke with the youngster, asking his name, age, where he lived and general questions

about the weather and things he liked to do. Following this initial conversation, Mrs. McDowell, Christopher and I went to the Kindergarten room. At this location I administered to Christopher several Frostig exercises which involved copying line segments and line configurations. I also administered several shape-matching exercises, picture-matching exercises, and design matching exercises. All of these are representative of Kindergarten tasks, readiness tasks and eye-hand coordination and small motor skills tasks. No formal or standardized tests were given. Mrs. Owens, Kindergarten teacher was present.

“Christopher performed all tasks well and seemed a bright and verbal child. It was my opinion, at that time, that he could perform well in a kindergarten class the following school year.” (Exhibit J)

On the basis of this testing and the administrative principal’s recommendation, the Board passed a resolution at its public meeting on April 8, 1974, approving “early entrance to kindergarten for one child.” (Exhibit B) Petitioners were then notified by the Board Secretary as follows:

“At the regular monthly meeting of the Island Heights Board of Education held on April 8th the board approved entrance of your son Christopher into Kindergarten for the 1974-75 school year.” (Exhibit E)

Petitioners were thereafter notified by the administrative principal by letter dated April 18, 1974, that they should register their son on May 10, 1974, and they were advised to supply evidence of certain immunizations. Petitioners registered their son and gave evidence of the following required immunizations: DPT, polio, mumps, and measles. (Exhibit F)

Petitioners’ son was then invited “\*\*\*to visit kindergarten on June 11, 1974 at 9:00 a.m. Bring Mommy with you. We will sing some songs, hear a story and have a snack. Hope you will come.” (Exhibit H)

At the regular meeting held June 10, 1974, the Board passed a resolution rescinding its motion on April 8, 1974, which granted petitioners’ son early entrance. Petitioners were notified by letter dated June 10, 1974 from the Board Secretary as follows:

“At the regular meeting of the Borough of Island Heights Board of Education, held June 10, 1974, the board voted to rescind its motion of April 8, 1974 regarding early admissions of your child.” (Exhibit I)

At the oral argument the Board moved to dismiss this matter as being moot because petitioners had withdrawn their older child who would enter first grade and the infant child described herein and had placed them in another New Jersey school system. (Exhibit K)

Petitioner Denis McDowell stated that his wife and children are living in another community to take advantage of its kindergarten program while this matter is in litigation. He stated further that he removed his children from the

Island Heights School District because he had been told that if the Board should receive an adverse decision from the Commissioner, his son would be physically barred from school until the Board exhausted its appeals.

A letter from the Board's counsel dated August 14, 1974, which states in part that he has been instructed by the Board to appeal any adverse decision of the Commissioner for *pendente lite* admission of petitioners' child supports petitioners' contention that the children were removed from the Island Heights schools because there was no other choice. They believed that their infant son was entitled to enter kindergarten and did not believe the Board would admit him. These are the newly-developed circumstances which prompted the hearing examiner to recommend that interim relief be denied.

The hearing examiner finds, therefore, that the salient issue to be determined by the Commissioner is whether or not petitioners' son acquired the right to attend kindergarten in the Island Heights School District pursuant to the resolution (Exhibit E) of the Board modifying in this instance its entrance age requirement.

The statutory and discretionary authority of the Board to make, amend, and repeal rules is not attacked herein. The Board asserts that its action was not (1) patently arbitrary, (2) without rational basis, or (3) induced by improper motives, but was taken because it received additional requests for early entrance to kindergarten, and that it feared overcrowding pursuant to *N.J.A.C. 6:20-1.3* which reads as follows:

“ \*\*\* 3. The maximum enrollment for any kindergarten class shall be 25 pupils per teacher. The county superintendent of schools may give permission to increase the number in a room to any number he chooses provided another teacher, an auxiliary teacher, or a teacher aide is employed full-time to provide for the increased size.\*\*\* ”

The Board asserts further that when a board of education acts within its discretionary authority, the Commissioner should not interfere or substitute his judgment for that of the local board. *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (1960) (Board's Brief, at pp. 2-5)

The Board argues, finally, that the infant acquired no vested right since he had not been enrolled, nor did he attend any classes; therefore, his right to a free public school education has only been postponed for a year.

In previous decisions by the Commissioner, it has been held that “\*\*\* an acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting.” *Marion S. Harris v. Board of Education of Pemberton Township, Burlington County*, 1939-49 *S.L.D.* 164 (1938) (at pp. 165-166) See also *Samuel Hirsch v. Board of Education of the City of Trenton, Mercer County*, 1961 *S.L.D.* 189; *Anthony Amorosa v. Board of Education of the City of Jersey City, Hudson County*, 1964 *S.L.D.* 105; *Leon Gager v. Board of Education of the Lower Camden County Regional High School District No. 1, Camden County*, 1964

*S.L.D.* 81; *James Docherty v. Board of Education of West Paterson, Passaic County*, 1967 *S.L.D.* 297; *Leonard V. Moore v. Board of Education of the Borough of Roselle, Union County*, 1973 *S.L.D.* 526.

The Board avers that this matter is distinguishable from the cases cited, *ante*, in that the persons represented therein had signed contracts with their boards giving them vested rights.

In the hearing examiner's judgment, pupils also have rights. They have a right to be treated equitably and a right to expect that those persons charged with the responsibility of charting the educational future of children will do so in their best interest. The hearing examiner finds in the instant matter that the infant acquired a right to attend kindergarten in the Borough of Island Heights because of the several actions of the Board as demonstrated in Exhibits E, F, I, J, *ante*.

The hearing examiner recommends, therefore, that:

1. The Commissioner direct the Board to enroll petitioners' son immediately.
2. That no other pupil in the school district be tested for early admission because it is too late in this school year, two and one-half months having already passed.

This concludes the report and recommendations of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and the exceptions filed by respondent.

Respondent asserts in its exceptions that petitioners acquired no vested rights pursuant to any contract; that the class already has a maximum of twenty-five pupils which may not be exceeded without an additional employee being hired; and that the hearing examiner's recommendations are not based on any legal conclusions.

It is acknowledged that no contractual right exists between petitioners and the Board; however, pupils in our schools seldom, and possibly never, have contracts to support promises made to them by school officials, or rights acquired by them; *e.g.*, the right to play on a team or in the band, or to be elected to the National Honor Society. In every instance, however, pupils must be treated fairly as a common law right.

The Board's exceptions cite *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288 (*App. Div.* 1960). It should be noted that *Kopera* was a teacher and the decision of the court in that matter had to do with the withholding of a salary increment. The Commissioner commented about fair play in *J. Michael Fitzpatrick v. Board of Education of Montvale*, 1969 *S.L.D.* 4,

as follows:

“ \*\*\* Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play.\*\*\* ” (at p. 7)

It is clear that the Board has the authority to make, amend and repeal rules for the management of the public schools. *N.J.S.A.* 18A:11-1 Nothing contained herein diminishes that authority nor prevents the Board from establishing a new deadline date for kindergarten entrance consistent with law. In regard to the affected infant in this case, the Board acted favorably upon his parents' request, then later rescinded its action in the belief that by admitting the McDowell infant it would receive other applicants for early admission, which would require the hiring of additional staff. The passage of time and the hearing examiner's recommendations make these fears groundless.

The Commissioner, therefore, adopts the report of the hearing examiner as his own and issues the following directives: the Board of Education of the Borough of Island Heights is hereby directed to admit the McDowell infant immediately, and new applicants for admission to kindergarten for this school year who are under age need not be considered for entrance. The County Superintendent of Schools may waive the requirement for additional staff or an aide in this instance because of the unique circumstances which produced this determination, provided that the class does not exceed twenty-six pupils.

COMMISSIONER OF EDUCATION

December 26, 1974

**Board of Education of the City of South Amboy,**

*Petitioner,*

*v.*

**City Council of the City of South Amboy, Middlesex County,**

*Respondent.*

COMMISSIONER OF EDUCATION

#### DECISION

For the Petitioner, George J. Otlowski, Jr., Esq.

For the Respondent, John J. Vail, Esq.

Petitioner, the Board of Education of the City of South Amboy, hereinafter "Board," appeals from an action of the City Council of the City of South Amboy, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37

certifying to the Middlesex County Board of Taxation a lesser amount of appropriations for school purposes for the 1974-75 school year than the amount proposed by the Board in its budget which was rejected by the voters on February 13, 1974. The facts of the matter were educed at a hearing conducted on August 28, 1974 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election, held February 13, 1974, the Board submitted to the electorate a proposal to raise \$1,263,576 by local taxation for current expenses. This item was rejected by the voters, and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary to operate a thorough and efficient school system in the City of South Amboy in the 1974-75 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A. 18A:22-37*.

After consultation with the Board (Tr. 112), Council made its determination and certified to the Middlesex County Board of Taxation an amount of \$1,141,488.49 for current expenses, which amount is \$122,087.51 less than that proposed by the Board.

The Board contends that Council's certification provides insufficient funds to provide a thorough and efficient system of schools in the City of South Amboy for the 1974-75 school year and asserts that this limitation would cause deterioration in the quality of education.

Council maintains that it acted properly and after due deliberation, and that the items reduced by its action are only those which are not necessary to a thorough and efficient educational system. As part of its determination, Council suggested specific line items of the budget in which it believes economies may properly be effected as follows:

#### CURRENT EXPENSE

Account Number	Item	Board's Budget	Council's Proposal	Reduction
J110	Admin. Sals.	\$43,600.00	\$42,000.00	\$ 1,600.00
J120	Servs. Adm.	11,100.00	9,100.00	2,000.00
J130	Other Exps. Adm.	12,400.00	9,900.00	2,500.00
J200	Instr. Sals.	868,814.00	817,379.00	51,435.00
J240	Teaching Supls.	28,000.00	22,000.00	6,000.00
J310	Attend. Officer Sal.	2,000.00	1,600.00	400.00
J410	Health Servs. Sals.	21,702.00	20,202.00	1,500.00
J420	Other Exps. Health	900.00	800.51	99.49
J520	Contr. Servs. Trans.	76,659.00	75,659.00	1,000.00
J510	Operational Sals.	48,900.00	43,000.00	5,900.00
J630	Heat	20,000.00	19,000.00	1,000.00
J650	Custodial Supls.	9,000.00	6,500.00	2,500.00
J720	Contr. Servs. Maint.	128,450.00	93,498.00	34,952.00
J730	New and Replace. Equip.	19,160.00	15,460.00	3,700.00

J820	Ins. and Judgments	52,000.00	46,000.00	6,000.00
J910	Lunchroom Supvrs. Sals.	3,000.00	2,000.00	1,000.00
J1010	Stud. Body Activs. Sals.	12,500.00	11,000.00	1,500.00
TOTAL CURRENT EXPENSE				\$123,086.49

Note: The reductions above exceed by \$998.98 the amount by which Council in its certification reduced the Board's budget.

The Board charges that Council acted in haste, without sufficient consultation with the Board, and in an arbitrary and capricious manner in arriving at its suggested line item reductions. (Petitioner's Memorandum of Law, at pp. 5-6)

The hearing examiner finds that, while consultation between Council and the Board subsequent to the defeat of the budget was limited to one brief meeting, Council adhered to the guidelines as set forth by the New Jersey Supreme Court in *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick*, 48 N.J. 94 (1966).

It is further found that the 1973-74 audit report establishes that the unappropriated free balance in the Board's current expense account as of June 30, 1974, was \$7,903.59, an amount equaling approximately one half of one percent of the annual budget. (Exhibit A-2)

The hearing examiner presents his findings and recommendations on each of the line items in dispute for the consideration of the Commissioner, as follows:

*J110 Administration - Salaries* *Reduction \$1,600*

Council states that salary increases proposed by the Board for the Board Secretary, office personnel, summer help, and the custodian of school moneys are exorbitant and in excess of federal guidelines. Council further states that the

Board has failed to show its need for increasing summer help from \$135 in 1973-74 to \$900 in 1974-75.

The Board asserts that Council may not reduce contractual salaries required by salary policies and salary guides adopted by the Board for 1974-75.

The hearing examiner finds that the contracted salaries herein controverted are not for additional personnel but, with the exception of summer help, are established positions. The right of a board of education to adopt salary guide policies for such positions was recognized by the Commissioner in *Board of Education of the Westwood Regional School District v. Mayor and Council of the Borough of Westwood and Mayor and Council of the Township of Washington, Bergen County*, 1972 S.L.D. 93, wherein he said:

\*\*\*\* [S]alary guide policies for non-teaching staff personnel, formally adopted by a local board of education, must be honored as proper



exercises of the lawful discretion of the board, unless the terms of such policies are so grossly extravagant as to be unreasonable.\*\*\*” (at p. 106)

The hearing examiner finds that the Board has properly contracted for \$42,700 in administrative salaries for 1974-75. There is no showing that any one of these salaries is grossly extravagant. However, the hearing examiner finds that the Board has insufficiently documented its need for an increase of \$756 over the previous year's expenditure for summer help. In view of the above findings, the hearing examiner recommends that \$835 be restored to this line item and that the reduction be sustained in the amount of \$765.

*J130 Other Expenses - Administration*

*Reduction \$2,500*

Council holds that an increase of appropriation in this line item from \$5,000 in 1973-74 to \$12,400 in 1974-75 is unjustified.

The Board cites the increase from a five-member to a nine-member board as supportive of its increased needs in this sector. Additionally, it advances the needs of the Superintendent and three principals to attend meetings, pay dues, registration fees and miscellaneous expenses. Finally, the Board states that it intends to hold a referendum for a new school in 1974-75, thus increasing the costs for elections from \$2,200 to \$4,500.

The hearing examiner finds the Board's evidence supportive of its need for increased funds for elections, Board and administrators' expenses. He finds insufficient documentation to justify an increase of nearly eighty percent over the 1973-74 expenditures of \$6,930.77. It is recommended that \$550 be restored to this line and the reduction sustained in the amount of \$1,950.

*J120 Contracted Services - Administration*

*Reduction \$2,000*

Council holds that an increase of \$2,000 beyond the 1973-74 appropriation is inflationary and unreasonable.

The Board contends that increasing litigation and preparation of extension of credit and architectural plans for a new high school necessitate the budget increase in this line item of \$2,400 to provide for the fees of architects, attorneys, and auditors.

The hearing examiner finds that actual expenditures in this line item were \$5,799.50 in 1973-74. While it appears certain that needs in this line item will exceed those of 1973-74, he finds that the Board has failed to prove its need for an increase exceeding by ninety-two percent those expenditures of the previous year. Therefore, it is recommended that the Commissioner restore \$800 to this line item and sustain the reduction in the amount of \$1,200.

*J200 Instruction - Salaries*

*Reduction \$51,435*

Council seeks to reduce J215 (Clerks-Salaries) by \$5,138 and J213 (Teachers' Salaries) by \$46,297 as follows:

Teachers in positions previously established	\$15,797
Area Coordinators	500
Eliminate three proposed new positions	<u>30,000</u>
	\$46,297

Council asserts that \$817,379 is adequate and that one additional clerk in the high school office is unnecessary as are the three new teachers the Board proposes to employ.

The Superintendent testified that the Board has added one additional teacher to its Junior High School staff in order to prevent certain classes from increasing to unmanageable size. (Tr. 43) He testified further that one other teacher has been employed as a Title I teacher, and that the third prospective teaching position has not been filled in the elementary school and may or may not be filled depending upon pupil enrollment.

The hearing examiner finds that increased enrollment in the sixth grade justifies the addition of one additional teacher. (Tr. 43) (Exhibit A-1, at p. 6) He further finds that the negotiated agreements and the Board's estimates require the following provisions for salaries:

58 Teachers Previously Employed (Exhibit A-1, p. 8)	\$727,384.50
3 Principals (Exhibit A-1, p. 11)	54,435.00
4 Area Coordinators (Exhibit A-1, p. 13)	3,000.00
Bedside Teachers (Exhibit A-1, p. 15)	5,500.00
Credit Reimbursement (Exhibit A-1, p. 15)	5,000.00
Sabbatical and Regular Substitutes (Exhibits A-1, p. 15)	26,148.00
One Additional Teacher, <i>ante</i>	10,000.00
Clerks (Exhibit A-1, p.19) (Exhibit G, p.21)	<u>28,870.00</u>
	\$860,337.50

There is evidence that the Board has negotiated salaries for teachers and stipends for coordinators in good faith. When such is done the law speaks clearly in *N.J.S.A. 18A:29-4.1* as follows:

"A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members \*\*\*. Every school budget adopted, certified or approved by the board, the voters of the district, the board of school estimate, the governing body of the municipality or municipalities, or the commissioner, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year."

Additionally, it is clear that the Board is obligated to pay negotiated salaries totaling \$28,870 for clerks, *ante. Westwood, supra*

The hearing examiner concludes that the Board has properly contracted

for and otherwise estimated its instructional salary needs at \$860,337.50 This leaves an uncommitted balance of \$8,476.50 in the Board's proposed appropriation for this line item. In recognition of the relatively low unappropriated balance of \$7,903.59, *ante*, the hearing examiner recommends that \$51,435 be restored to this line item in order that the Board may meet its statutorily imposed obligations to pay its teachers and clerks the negotiated salaries and otherwise be able to provide bedside instruction, substitutes, and credit reimbursement as required.

*J240 Teaching Supplies*

*Reduction \$6,000*

Council avers that a sixty-five percent increase from \$17,000 budgeted in this line item in 1973-74 to \$28,000 in 1974-75 is unjustified.

The Board cites among its reasons for this increase the addition of four new programs including a metals shop and a hands-on science program for eighth grade pupils. Additionally, the Board advances the initiation of a Title III program requiring matching funds of \$6,200 from the Board.

The amount of \$18,037.84 was actually expended from this line item in 1973-74. Having weighed the evidence presented by the parties, the hearing examiner concludes that the Board has sufficiently documented its needs in this sector for increased funds. It is further recognized that inflationary pressures must be considered in this vital area of teaching supplies. Accordingly, it is recommended that \$6,000 be restored to this line item.

*J310 Attendance Officer - Salary*

*Reduction \$400*

Council argues that no allocation was previously made for expenses of the attendance officer. The Board states that fairness dictates that he be given an allowance for the use of his automobile. It is this item alone that is in contention.

Provision to the extent of \$130 was provided in the budget for an automobile allowance in 1973-74. The hearing examiner finds that the attendance officer's salary is \$1,600. It is clear that the expenses of operating an automobile have increased greatly during the past year. He recommends that \$400 be restored to this line item in order that the Board may compensate the attendance officer for the use of his automobile in the performance of his duties.

*J410 Health Services - Salaries*

*Reduction \$1,500*

Council avers that no increase is required in this line item and that the Board's proposed figure is inflationary.

The Board lists contracted salaries for its nurse, psychologist, psychiatrist, dental inspector, medical inspector, and social worker which total \$22,646.

This figure is in excess of the Board's proposal of \$21,702 for this line item. The Board, for reasons set forth in *Westwood, supra*, is empowered to fix reasonable terms of compensation for its non-teaching employees. Accordingly, it is recommended that \$1,500 be restored to this line item.

*J420 Other Expenses - Health*

*Reduction \$99.49*

Council states that it reduced this line item to a figure \$50 greater than the previous year's appropriation of \$750.01. The Board states only that the need for medical supplies speaks for itself. It proposed \$900.00 for this line item.

The hearing examiner, while recognizing that the Board needs certain medical supplies annually, is in no way convinced of the Board's total needs by such a self-serving statement. He finds that \$727.48 was expended from this line item in 1973-74. He recommends that the reduction be sustained in full.

*J520 Contracted Services - Transportation*

*Reduction \$1,000*

The hearing examiner finds that the Board has failed to present documentation or testimony regarding Council's reduction of this line item and recommends that it be sustained in full.

*J610 Operational Salaries*

*Reduction \$5,900*

Council asserts that the Board's proposal to hire an additional janitor is unwarranted, as is the increase in this line item from \$30,000 in 1973-74 to \$48,000 in 1974-75.

The Board states that it is required to fulfill its contractual obligations to one janitor, one matron, and one maintenance man totaling \$25,100. It further lists as a contractual obligation to Custodial Cleaning Service the amount of \$18,500 and estimates its summer help and overtime pay requires \$5,100.

The hearing examiner observes in the Board's documentation an apparent shift from a plan to employ five janitors and one maintenance man to employment of one janitor, one matron, one maintenance man and the contracting of services from Custodial Cleaning Service. A careful review of the limited information provided by the Board leads to the conclusion that the Board has insufficiently documented its needs in this sector to support a projected sixty percent increase from the 1973-74 actual expenditures of \$28,616.51 to those proposed for 1974-75 totaling \$48,000. Additionally, it is found that Council's suggestion leaves an amount sufficient to provide for a fifty percent increase. Accordingly, it is recommended that the reduction of \$5,900 be sustained.

*J630 Heat*

*Reduction \$1,000*

Council states that its research shows \$19,000 to be adequate for this line item. The Board avers that fuel costs have increased threefold in the past year, requiring a similar increase in its budget provision.

The hearing examiner observes that heating costs are indeed greatly inflated and that further increases in heating fuel are threatened. While such predictions are uncertain, as is the severity of winter conditions, it is imperative that the Board heat its schools. No precise calculation of heating costs may be made under such conditions. Accordingly, it is recommended that the Commissioner rely upon the Board's estimate of its needs and restore \$1,000 to

this line item.

*J650 Custodial Supplies*

*Reduction \$2,500*

Council asserts that a ninety percent increase in this line item is unjustified. The Board maintains that the maintenance on its building built in 1919 requires above-average custodial supplies.

The hearing examiner observes that \$5,141.46 was expended from this line item in 1973-74. Council proposes to provide \$6,500 which would allow for a twenty-six percent increase for custodial supplies. The hearing examiner, in recognition of the greatly inflated prices of such supplies, concludes that a larger percentage of increase is required and recommends that \$800 be restored to this line item and that the reduction be sustained in the amount of \$1,700.

*J720 Contracted Services - Maintenance*

*Reduction \$34,952*

Council bases its detailed reductions and deletions of the Board's proposed expenditures in this line item on the advice of certain contractors, teachers, and maintenance persons.

The Board states that the portion of the school plant built in 1919 has deteriorated through neglect to a very poor condition requiring that its 1973-74 appropriation of \$39,300 be increased to \$128,450 in 1974-75.

A contract was signed (Exhibit D) and work completed on the renovation of two toilet rooms during the summer of 1974 at a cost to the Board of \$34,850. (Tr. 70) The Superintendent testified that the State Department of Health had ordered that these facilities be renovated. (Tr. 75, 107-108) Council objected to this work being contracted and completed prior to the decision of the Commissioner regarding this controverted item. (Tr. 15-16) The hearing examiner, having examined the testimony and documentation, and in no way being influenced by that which appears as a *fait accompli*, concludes that the Board had no choice but to complete this work required by the State Department of Health during the summer months in order that it might open school at the normal time in September 1974. (Photographs 1, 2, 3, 4) (Tr. 84-85) He further finds that the Board followed the advice of its architect (Exhibit E) and correct bidding procedures and awarded a contract for this work which exceeded its own estimates by \$9,850.

Additionally, the Board cites as an imperative need the repair of the two existing boilers in the high school portion of its building. In this regard the Superintendent testified that at present only one boiler is functional in the entire building and that school has been closed at least once yearly in cold weather as a result of its breakdown. (Tr. 89) He further testified that heating is inefficient and lacks proper zoning when operating from a single boiler. (Tr. 88) The hearing examiner concludes that standby boilers are indeed an imperative need and that the Board's proposal is a feasible and economical approach to meet this need. (Tr. 90)

Further review of the documentary evidence and testimony presented convinces the hearing examiner that there exists a compelling need to replace

window sashes (Photographs 9, 10, 11, 12) (Tr. 76), renovate at least two classrooms (Tr. 62), replace electrical fixtures and service, repair and replace doors, replace and repair plumbing and plaster (Photographs 6, 7) (Tr. 99), to do those myriad things necessary to maintain its building and equipment, and to renovate the older portion of its building. Failure to keep abreast of this required maintenance can only result in greater costs as the consequences of neglect are compounded in the future. The Board's budget request for this line item may well be inadequate to do all that should be accomplished. However, it is implausible to expect that the results of past neglect may all be remedied in one budget year. The hearing examiner recommends that the Commissioner restore to this line item \$20,000 and sustain the reduction in the amount of \$14,952.

*J730 New and Replacement Equipment*

*Reduction \$3,700*

Council alleges that the Board has failed to document its needs causing an increase in this line item from an appropriation of \$13,700 in 1973-74 to \$19,160 in 1974-75.

The Board cites its principal needs as being replacement of typewriters, audiovisual equipment, two classrooms of furniture, lockers, home economics equipment, industrial arts equipment, and business machines.

The Board actually expended \$16,427.01 from this line item in 1973-74 and is in 1974-75 faced with inflated prices for both new and replacement equipment. While Council properly seeks economies, the hearing examiner concludes that the Board cannot present a thorough and efficient program of education with outdated machines and equipment. Nor can it operate with decreasing expenditures in an inflationary period. Although the Board is operating one of the smaller high schools in the State, it must nevertheless provide efficiently operating modern equipment. The hearing examiner recommends that \$2,900 be restored to this line item and that \$800 of the reduction be sustained.

*J820 Insurance Judgments*

*Reduction \$6,000*

Council charges that the Board has failed to justify an increase from \$36,000 in 1973-74 in this line item to \$52,000 in 1974-75.

The Board states only that it is involved in litigation which may result in a judgment which will necessitate this increase.

The hearing examiner finds that \$38,342.78 was actually expended in this line item in 1973-74 and that Council has appropriated \$46,000 for 1974-75. Absent a more complete documentation by the Board of this line item, it is concluded that the Board has failed to prove its need. Accordingly, it is recommended that the reduction be sustained in the amount of \$6,000.

*J910 Lunchroom Supervisors - Salaries*

*Reduction \$1,000*

Council holds that its recommended appropriation of \$2,000 is adequate in that the school does not provide a lunchroom program. Council further avers

teachers should not be paid extra for this duty.

The Board states only that it pays an employee \$2.00 per hour for lunchroom supervision.

The hearing examiner, noting that \$1,058.25 was paid from this line item in 1973-74, finds insufficient documentation or testimony to find that the appropriation is inadequate. He therefore recommends that the reduction be sustained in full.

*J1010 Student Body Activities*

*Reduction \$1,500*

The hearing examiner finds the total of contracted salaries for extracurricular coaching, supervision, and advisorships for 1974-75 to be \$11,580. (Board's Exhibit A-1, at p. 14) In keeping with this finding he recommends that \$580 be restored to this line item and that the reduction be sustained to the extent of \$920.

The hearing examiner observes that the Board seeks an additional appropriation, not heretofore requested, for special education which would increase provision in this sector of the budget from \$130,000 to \$146,000. (Memorandum of Law, at p. 15) The Board states that it has already over-expended in this area and appeals on an emergency basis to the Commissioner to increase this appropriation. Specific details of the alleged over-expenditure were not provided with this request.

The Commissioner has spoken in the past regarding a similar request in *Board of Education of the Township of South Brunswick v. Township Committee of the Township of South Brunswick, Middlesex County*, 1968 S.L.D. 168 as follows:

“\*\*\* The Commissioner must take the position \*\*\* that the Board is bound by the budget which is prepared and cannot, at this late date, seek to increase funds for certain items by seeking to have acceptable reductions in other accounts overridden for such purpose.\*\*\*” (at p. 171)

In accord with this frequently applied principle, it is recommended that the Commissioner deny this request by the Board to add \$16,600 to the approved appropriations. *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon, Passaic County*, 1971 S.L.D. 76, 79

In summary, it is recommended that the controverted line items discussed, *ante*, be determined as follows:

**CURRENT EXPENSE**

<b>Account Number</b>	<b>Item</b>	<b>Amount of Reduction</b>	<b>Amount Restored</b>	<b>Amount Not Restored</b>
J110	Adm. Sals.	\$ 1,600.00	\$ 835.00	\$ 765.00
J120	Contr. Servs. Adm.	2,000.00	800.00	1,200.00



J130	Other Exps. Adm.	2,500.00	550.00	1,950.00
J200	Instr. Sals.	51,435.00	51,435.00	—0—
J240	Teaching Supls.	6,000.00	6,000.00	—0—
J310	Attend. Officer Sal.	400.00	400.00	—0—
J410	Health Serv. Sals.	1,500.00	1,500.00	—0—
J420	Other Exps. Health	99.49	—0—	99.49
J520	Contr. Servs. Trans.	1,000.00	—0—	1,000.00
J610	Operational Sals.	5,900.00	—0—	5,900.00
J630	Heat	1,000.00	1,000.00	—0—
J650	Custodial Supls.	2,500.00	800.00	1,700.00
J820	Contr. Servs. Maint.	34,952.00	20,000.00	14,952.00
J730	New and Replace. Equip.	3,700.00	2,900.00	800.00
J820	Ins. and Judgments	6,000.00	—0—	6,000.00
J910	Lunchroom Supvr. Sals.	1,000.00	—0—	1,000.00
J1010	Stud. Body Activ. Sals.	1,500.00	580.00	920.00
TOTAL CURRENT EXPENSES		\$123,086.49	\$86,800.00	\$36,286.49

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the report of the hearing examiner and observes that no objections have been filed thereto; therefore, the Commissioner accepts that report in its entirety and adopts it as his own.

Accordingly, the Commissioner directs the Middlesex County Board of Taxation to add to the tax levy the sum of \$86,800 for current expenses in addition to the amount previously certified by the City Council of the City of South Amboy, for the operation of a thorough and efficient school system in the district for the school year 1974-75.

COMMISSIONER OF EDUCATION

December 26, 1974

“D.N., Sr.,” “J.N.,” and “D.N., Jr.,”

*Petitioners,*

*v.*

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

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, American Civil Liberties Union (Peter Buchsbaum, Esq., of Counsel)

For the Respondent, Wittman, Anzalone, Bernstein & Dunn (Thomas W. Dunn, Esq., of Counsel)

D.N., Sr. and J.N., hereinafter “petitioners,” are father and mother respectively of D.N., Jr. who was, in September 1970, classified and placed in a special class for neurologically impaired pupils in the schools operated by the Board of Education of the Borough of Closter, hereinafter “Board.” Petitioners allege that they thereafter sought, and have been improperly denied, access to the school records of their son in contravention of their statutory and constitutional rights. They appeal to the Commissioner of Education to order the Board to permit them to inspect, copy, and photograph these records.

The Board admits denying petitioners access to certain of these records but maintains that this denial is in the best interest of petitioners and is in full compliance with both its own stated policies and all legal requirements.

A hearing in this matter was conducted on May 29, 1974, and June 25, 1974 at the offices of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner. Briefs were submitted by the respective parties subsequent to the hearing. It is also noted that a related action, on a Civil Action Summons brought by petitioners before the Superior Court (Law Division) in Bergen County, is being held in abeyance pending the Commissioner’s decision in the instant matter. The report of the hearing examiner is as follows:

A brief recitation of the undisputed facts reveals that D.N., Jr. entered the second grade in the Closter School system in September 1968. He was evaluated as being deficient in reading during that school year and was thereafter provided supplementary instruction and tutored during the summer of 1969. (R-1; R-2; R-3) During the 1969-70 school year while D.N., Jr. was in the third grade, petitioners were informed at a conference with his teacher that he would not be promoted to the fourth grade. Upon the recommendation of the school nurse and with full knowledge of petitioners, D.N., Jr. was examined by a neurologist. (Tr. I-31) He was thereafter classified by the Board’s Child Study team and placed in a special class for neurologically impaired pupils in September 1970.

Petitioners became dissatisfied with this placement and the educational program of D.N., Jr. and on numerous occasions requested that they be allowed to see his entire school record including the original data and examination reports kept in the confidential files of the Child Study Team.

In response to these requests they were on a number of occasions given interpretations of the data in D.N., Jr.'s record by members of the Child Study Team, and the school's neurological consultant. (Tr. I-16,28,37,61,69,70,103; R-5; R-7; R-10) Petitioners were, however, refused direct access to their son's records. (Tr. I-16, 18) It is this refusal which gives rise to the present controversy.

It is significant that, while petitioners were obviously dissatisfied with the Child Study Team's interpretation of data relating to D.N., Jr. which led to his placement in the neurologically impaired class (Tr. I-6), such interpretation is not at issue herein. The issue is solely whether petitioners have right of access to *all* data in D.N., Jr.'s school records. (Tr. I-42-43)

In September 1971 petitioners withdrew D.N., Jr. from the Closter schools and entered him, at their own expense, first as a pupil in a private day school and one year later in a parochial school. (Tr. I-57)

Petitioners allege that, in view of their dissatisfaction with D.N., Jr.'s classification, placement and educational program, access to this data is necessary in order that they may determine what basis existed to classify and place D.N., Jr. in the Board's special class. (Tr. I-6) They further allege that this access is necessary in order that they may determine what help they should provide to meet the educational needs of their son in the future. In this regard Petitioner D.N., Sr. testified at the hearing as follows:

\*\*\*\* I felt that I had to see the records for myself in order to be able to challenge anything on the records. And, I didn't want these records to travel with him for the rest of his life without his parents being able to look at them and being able to challenge anything that may be harmful.

\*\*\*

"Well, these things do travel with kids. They go into computer banks and things like that. Everybody has access to these records but the parents it seems, and the child, when he's eighteen years of age, our insurance companies, banks, they all have this material, and I don't want this down for him. I love him. He's my son, and I'm going to fight to see those records.\*\*\*" (Tr. I-22)

Petitioners argue that denial of access to their son's complete records is violative of their constitutional rights as set forth in the Fourteenth Amendment of the United States Constitution; *Article VIII, Section IV, Paragraph 3* of the New Jersey Constitution; and of their statutory rights as provided in *N.J.S.A. 18A:36-19, N.J.S.A. 47:1A-1 et seq.* Additionally, they argue that their parental right of access to pupil records is established by *N.J.A.C. 6:3-1.3* which reads in pertinent part as follows:

“\*\*\* (c) Items of information contained in the records of a given pupil shall be made available, upon request, for inspection by a parent, guardian or other person having custody and control of the child \*\*\*.

\*\*\*

“(e) Nothing in these rules and regulations contained shall be construed to prohibit the board of education, or any office or employee of the board designated by the board, to withhold items of information which, in the judgment of the said board, or its designated officer or employee, are of a confidential nature or in which the applicant for such information has no legitimate interest.”

Petitioners assert that they as parents do have a legitimate interest in the records in order that they may fulfill their parental obligation to see that their son is properly educated. They argue that no information concerning their child may be held confidential from them as parents, and that confidentiality is provided by statute only to guard against the intrusion of an outside third party. (Brief for the Petitioners, at p. 4)

Petitioners argue similarly that their rights of “legitimate interest” as concerned parents are extended by *N.J.A.C. 6:28-2.4* which reads:

“\*\*\* (f) Only those personnel and approved agencies directly concerned with determining classification or the making of recommendations for placement, and those directly involved in the educational program of the individual child shall have access to the classification records.

“(g) Interpretations of examination results and professional findings prior to special placement shall be reported to the parent or guardian of a child classified by the basic child study team and records of such reporting shall be maintained.”

In regard to their responsibility for their son’s education, petitioners state the following:

“\*\*\* Petitioners do not dispute the fact that the school as education provider has a significant interest in the test results. However, the child and parents have the ultimate interest; if the diagnosis is inaccurate or erroneously interpreted, it is the pupil who bears the main brunt of the error both in the short and long run.\*\*\*” (Brief for the Petitioners, at p. 9)

The hearing examiner directs the attention of the Commissioner to the extensive additional arguments of law set forth in pages 12 through 20 of the Brief for the Petitioners with respect to allegations of violation of *N.J.S.A. 47:1A-1 et seq.*, the Right to Know Law, and of petitioners’ constitutional rights. No useful purpose would be served by a summation of those arguments in this report.

Petitioners called as an expert witness a Temple University Associate Professor of School Psychology who is a practicing school psychologist and

school consultant in New Jersey. (Tr. II-3, 11) He testified that it is his recommendation and practice, except in rare instances such as child abuse cases, to release to the parents all objective information, test scores, and opinion about the personality of the child. (Tr. II-11-12) He testified that, although he makes such data and reports available to the parents, it is his practice to:

“\*\*\* encourage parents not to take home a report about the child’s intelligence or something like that, where there is a possibility they might store it away, and the child might eventually find it when it is outdated and irrelevant, but this is up to the parents; I think that the parent has a right to that information and it should be discussed between the parent and the psychologist. \*\*\*” (Tr. II-16-17)

And,

“\*\*\* [T]he client for the psychologist is really the child and the parents, rather than the school \*\*\*. The decision should [be] \*\*\* made in the best interest of the child and the child[’s] parents or guardians should be involved in the process of making these decisions.\*\*\*” (Tr. II-18-19)

And,

“\*\*\* [T]he major benefit [is that] the parent feels that they’re [sic] being involved with school, there is no secret record about their child that they’re not aware of \*\*\*. [I]t’s just no question that the feedback conference with a professional sharing the information with the parents had benefited, in my opinion, both the school and the parents and the children.\*\*\*” (Tr. II-24)

And,

“\*\*\* [I]t may not be important for him [the parent] to take the report home.\*\*\* [But] he should be able to see the report that the school has.\*\*\*” (Tr. II-28)

And,

“\*\*\* I generally talk with the parents about the possibility of where the report would end up. I request them to destroy it after several years. For instance, there are many cases where children are diagnosed as neurologically impaired and the child grows out of it; \*\*\* the information would be irrelevant.\*\*\*” (Tr. II-34)

The Board, for its part, avers that it has complied fully with New Jersey State regulations in classifying D.N., Jr. and by holding frequent conferences with petitioners in which detailed interpretations of D.N., Jr.’s records were made by its professional personnel. In support of this position the Board’s Child Study Team psychologist testified that his understanding of the State requirement is that:

“\*\*\* [W]e are obliged to interpret fully all evaluations and recommendations to parents. But, not to give them written copies of anything in the record.\*\*\*” (Tr. I-104)

The Board’s psychologist testified that in the instant case and in general he believes that there are clear and present dangers in providing parents with the complete records. In this regard he stated:

“\*\* [B]y providing these records to these parents we might be giving them information that they could easily misuse, however good their intentions, and so, we felt particularly fortunate that the State regulations were so clear, and in indicating we should interpret rather than give records to parents. And, this is one of those cases where we felt the regulations served a particular valid purpose.\*\*\*” (Tr. I-97)

And,

“\*\*\* It’s very difficult for some parents to, for most parents I should say, to interpret information reports, documents, written by professional members of the Child Study Team, since these reports are written in technical language, designed to be read by other professionals. \*\*\* I think someone without the appropriate training would have difficulty interpreting correctly by merely reading this without the assistance of a professional person\*\*\*.” (Tr. I-91)

And,

“\*\*\* I think a parent might have a difficult time trying to remediate a serious problem in the home and might even do more damage than anything constructive in the process. I can also conceive of \*\*\* parents reading a report about their child \*\*\* that they might interpret as very damaging to themselves, or certainly as an unfortunate reflection upon themselves, and this in turn would damage their relationship with the school and school personnel, and it might make it very difficult to work with these parents in the future.\*\*\*” (Tr. I-92-93)

And,

“\*\*\* [I]t’s so easy for a parent who \*\*\* has not had professional training \*\*\* to so readily misinterpret these scores or come to erroneous conclusions on the basis of them.\*\*\*” (Tr. I-123)

And,

“\*\*\* [P]arents sometimes tend to become \*\*\* very impatient with the child to succeed, and frequently this results in a very highly charged emotional situation at home, \*\*\* and often a very unfortunate traumatic and tense situation arises in those situations.\*\*\*” (Tr. I-108)

The Board further asserts that to provide copies of the entire record would

be violative of the physician-client privilege. However, the Board's psychologist testified, with respect to sharing the Child Study Team's reports, that:

“\*\*\* Our policy has been that when a parent wants to consult a professional not associated with the public schools, that if the parent will give us a signed release in authorization, we'll forward all reports to those authorities hired by the parents to do some kind of private evaluation. In fact, many times \*\*\* we encourage them to take the child to a private professional person so that our findings, results can be compared with those of someone working independently of the school.\*\*\*” (Tr. I-94)

The Board's psychologist further testified that the records of a pupil are kept in a locked file in the Child Study Team office available only to the members of the Child Study Team. (Tr. I-132) He stated that only on the authorization of a parent are they forwarded to another school if the pupil is entered in another school system, and that the Child Study Team will send no reports of the confidential records or copies of them, to anyone without the parents' signed permission. (Tr. I-132) This testimony was not disputed at the hearing. He testified further with respect to the confidential treatment of such records that in the event that an administrator or teacher in the school desired to review them, it would be done only by sitting down and reviewing them with the entire Child Study Team. (Tr. I-134)

With respect to D.N., Jr.'s records, the Board's psychologist testified that they are presently in the Child Study Team's inactive files, and that no request has been made by the parents to forward them to any other professional or any other school. (Tr. I-134) He further testified that the entire matter of D.N., Jr.'s records and classification procedures had been reviewed by representatives of the State Department of Education in much detail. (Tr. I-135)

The Board holds that its denial to petitioners to read and copy the records of their son was a sound exercise in discretion, statutorily based, and in the best interests of D.N., Jr. and all others concerned. (Brief on Behalf of Respondent, at pp. 6, 8, - 9) Additionally, the Board denies the allegation of petitioners that they need fear unlawful or improper dissemination of their son's records to computer banks or unauthorized persons. (Brief on Behalf of Respondent, at pp. 13-14)

In summation, the hearing examiner finds that D.N., Jr. was classified by the Board's Child Study Team as neurologically impaired, and that this classification process was thereafter carefully reviewed by the Branch of Special Education and Pupil Personnel Services of the State Department of Education which found the classification and educational program prescribed to be consonant with the records available. (R-4) Numerous requests by petitioners to read and copy all records of the Child Study Team pertaining to D.N., Jr. were denied by the Board. However, on numerous occasions the Board's agents interpreted the records and reports for the parents in accord with its policy which states:

“\*\*\* All confidential records on any youngster in the Closter Public



Schools who is under the Child Study Team jurisdiction, upon the request of the parents, will be interpreted to parents by a member of the Closter Child Study Team in the presence of other Closter Child Study Team members.” (R-11)

The sole matter for determination of the Commissioner is whether the Board’s denial to petitioners to read and copy all records pertaining to D.N., Jr. was violative of petitioners’ constitutional, statutory or common law rights of access to these records.

This concludes the report of the hearing examiner.

\* \* \* \*

The Commissioner has reviewed the entire record of the instant matter with special attention to the arguments of law set forth in the Brief of Petitioners. He has further reviewed the report of the hearing examiner and the exceptions filed thereto pursuant to regulations of the State Board of Education.

The Commissioner is aware that broad variations exist within the various States, municipalities, and school districts of the United States with regard to access to sensitive records. In this instance petitioners argue that they, as parents, have a legitimate interest in the complete classification data of their son. Such a rationale is not devoid of logic, especially when coupled with their obvious interest in his educational progress and total welfare.

The Commissioner determines, however, that their fears are groundless with respect to the inappropriate release of information relative to D.N., Jr. by the Closter Board of Education or its agents, who maintain these records in such fashion as to carefully preclude their availability to unauthorized third parties.

Without question the Board was entitled, had it so chosen, to establish a policy which would allow full access by parents to all classification records of minor pupils, such as was recommended with certain limitations by the Temple University professor of school psychology who testified herein. *N.J.A.C.* 6:3-1.3(c) This, however, it did not choose to do. Rather, it acted in accord with the provisions of *N.J.A.C.* 6:3-1.3(e) and *N.J.A.C.* 6:28-2.4, thus precluding access of parents to the raw data, test results, and consultant reports used in classification.

Based upon considerations it believed to be in the best interests of its pupils and of the community, the Board chose to make this information available to parents only in oral form in conferences wherein its professional personnel interpreted the classification data and consultant reports. *N.J.A.C.* 6:28-2.4 Such a policy, authorized by current State Board of Education regulations similarly is not without its logic, especially when based upon the important considerations which were expressed by the testimony of the Board’s psychologist. Petitioners refer to such considerations as purely speculative fears. The Commissioner does not agree. In such a sensitive area as the classification and education of handicapped pupils there is an ever-present danger that parents,

being inextricably and emotionally involved, and frequently lacking in specialized training, may overreact or misinterpret such raw data and consultation reports to the detriment of the child.

In this respect, the Commissioner is constrained to caution boards of education that, in the event it is mandated that such data be made available for the scrutiny of parents, pursuant to revised rules now advertised by the New Jersey State Board of Education in the New Jersey Register, they must not abandon their important function of requiring that Child Study Team personnel make adequate interpretation of such data to parents and guardians.

Additionally, it is clear in this case that the Board appropriately makes available to other professionals the data and consultation reports only when authorized by the parents.

In any event, it is the determination of the Commissioner that the Board's policy was properly in accordance with the rules of the New Jersey State Board of Education (*N.J.A.C.* 6:3-1.3) and the statutory provision that such regulations be promulgated pursuant to *N.J.S.A.* 18A:46-11 and *N.J.S.A.* 18A:36-19. Absent a showing that the Board or its agents acted in arbitrary or capricious manner, the Commissioner determines that the Board's refusal to allow petitioners to see and copy the entire classification file of D.N., Jr. was in accord with its own policy and the pertinent laws and regulations of the State of New Jersey.

Petitioners argue that *N.J.S.A.* 47:1A-1 *et seq.*, mandates the relief they seek. Again the Commissioner does not agree. This statute states clearly that:

"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."  
(*Emphasis supplied.*)

Similarly, *N.J.S.A.* 47:1A-2 recognizes that there is limitation to the right of access to records wherein it says:

"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 \*\*\* shall, for the purposes of this act, be deemed to be public records.\*\*\*"  
(*Emphasis supplied.*)

The Legislature made no move when it promulgated this "Right to Know Law" to revise the provisions of *N.J.S.A.* 18A:46-11 or *N.J.S.A.* 18A:36-19 which give the New Jersey State Board of Education the right to establish regulations relative to educational services. Until such time as they may be

changed, they remain an extension of the effective laws of this State.

This being so, the Commissioner finds no violation of petitioners' constitutional, statutory, nor common law rights. Nor does he find the Board's denial of access to be violative of the federal Family Educational Rights and Privacy Act of 1974 (Pub. Law 93-380, August 21, 1974) since this Act seeks only to regulate the distribution of federal funds rather than directly control the existing practices in the several States.

Petitioners may wish to consider reenrollment of their son in the public schools for the purpose of reclassification pursuant to the relevant statutes. Any reclassification is also subject to the laws and Board policies existing at the time reclassification is made.

Petitioners should be aware, also, of the proposed changes in State Board of Education rules for inspection of pupil records; and if they are adopted in March or April 1975, petitioners may then request that they be permitted to review these records.

There being no cause for further action, the Petition is dismissed.

COMMISSIONER OF EDUCATION

December 26, 1974

Pending before State Board of Education

**In the Matter of the Annual School Board Election Held in the  
School District of the Township of Wayne, Passaic County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Michael C. Rudolph, Esq.

For the Respondent, A. Michael Rubin, Esq.

This matter having been brought before the Commissioner of Education in the form of a Petition of Appeal with supporting Brief, received on November 27, 1974 requesting that the Commissioner invalidate the appointments by the

Passaic County Superintendent of Paul Ferguson, William Robertson and Mario J. Drago, hereinafter "appointees," to the Board of Education of the School District of the Township of Wayne, hereinafter "Board"; and a Brief having been filed for the above named appointees; and

It appearing that the above appointees, being the same candidates previously declared elected, were appointed to the Board by the County

Superintendent on November 19, 1974, subsequent to the Commissioner's decision of November 15, 1974, declaring three seats on the Board vacant for failure to elect; and

It appearing that the Commissioner's reasons for declaring the aforesaid seats vacant was that flagrant abuse of the election laws resulted in the casting and tallying of 124 invalid affidavit ballots; and

It appearing that the State Board of Education on December 4, 1974, affirmed the Commissioner's decision declaring the aforementioned seats of William Robertson and Mario J. Drago to be vacant for failure to elect; and

It appearing that the State Board of Education on December 4, 1974, reversed the decision of the Commissioner with respect to the seat of Paul Ferguson and declared him to be duly elected, thus rendering moot the within Petition as regarding Paul Ferguson; and

It appearing that the Appellate Division of the New Jersey Superior Court on December 23, 1974 affirmed the decision of the State Board of Education; and

It appearing that oral argument relative to the within Petition was ordered by the Assistant Commissioner of Education, Division of Controversies and Disputes, to be conducted on December 16, 1974 at the State Department of Education, Trenton, and

It appearing that respective counsel declined to appear to participate in said oral argument; and

The Commissioner having considered the arguments of petitioner alleging that the appointment by the County Superintendent of those same individuals removed by order of the Commissioner constituted an arbitrary, capricious act, resulting from a gross abuse of discretion; and

The Commissioner having considered petitioner's further contention that, in keeping with the spirit and intent of the November 16, 1974 decision, only persons other than those who were not candidates in the election should have been appointed to fill the vacancies; and

The Commissioner having considered the arguments of the appointees that the County Superintendent was in no way precluded from appointing them to the aforesaid vacancies, since they were in no way tainted by the improper election practice; and

The Commissioner having carefully weighed and balanced the respective arguments of counsel and having determined that the controverted appointments of Mario J. Drago and William L. Robertson (that of Paul F. Ferguson being moot) were neither arbitrary, capricious, nor contrary to the spirit and intent of the Commissioner's decision of November 15, 1974 or the State Board of Education's decision of December 4, 1974; and

The Commissioner, having concluded that the interim appointments to the vacancies on the Board *until the next annual school election* was a sound exercise of discretion within the authority of the County Superintendent of Schools pursuant to *N.J.S.A. 18A:12-15*; see *Thomas v. Board of Education of Morris Township* 89 *N.J. Super. (App. Div. 1965)*; and

The Commissioner having determined that, absent a clear showing of statutory violation or other impropriety relative to the controverted appointments, there is no merit in the within Petition; therefore

It is ordered that the Petition of Appeal be dismissed.

Entered this 27th day of December, 1974.

COMMISSIONER OF EDUCATION

**In the Matter of the Special School Election Held in the  
School District of Ocean Township, Ocean County.**

COMMISSIONER OF EDUCATION

**DECISION**

For the Petitioner, Howard Butensky, Esq.

For the Respondent, Thomas Butz, Esq.

A special referendum was held on October 15, 1974 in the School District of the Township of Ocean, Ocean County, on a proposal to issue bonds for the construction of a new schoolhouse at a cost not to exceed \$1,425,000. The announced results of the ballots cast at this special election were as follows:

Question	At Polls	Absentee	Total
Yes	620	11	631
No	624	6	630

Pursuant to a letter request by thirteen resident voters of the Township of Ocean, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to conduct a recount of the ballots cast (*N.J.S.A. 18A:14-63.3*). The recount was conducted by an authorized representative of the Commissioner at the office of the Ocean County Superintendent of Schools, Toms River, on November 1, 1974.

As a result of the recount of the uncontested ballots, with 101 ballots referred to the Commissioner, the tally stood as follows:

Question	At Polls	Absentee	Total
Yes	558	11	569
No	591	6	597

Seven ballots had been voided for various reasons by the election board officers when the ballots were counted. Five of the seven voided ballots are included in the 101 ballots referred for the Commissioner's determination. Agreement was reached between the parties at the recount that two (C-1, C-2) of the seven voided ballots were properly not counted either for or against the proposition.

The judge of elections erroneously reported 696 ballots counted in District Number Two when, in fact, at the recount conducted on November 1, 1974, 697 ballots were counted and 697 voters had signed the poll list.

The Board Secretary erred in completing the Combined Statement of Result. In the upper left hand corner of that Statement the Board Secretary reported the following:

****	
"Number of Names on Poll Lists	<u>1258</u>
"Number of Ballots Counted	<u>1251</u>
"Number of Ballots Voided	<u>7</u>
****	

The correct figures, as determined by the Commissioner's representative at the recount, are as follows:

Number of Names on Poll Lists	<u>1252</u>
Number of Ballots Counted	<u>1245</u>
Number of Ballots Voided	<u>7</u>

The ballots referred for adjudication may be grouped into three categories as Exhibit A, Exhibit B, and Exhibit C.

Exhibit A, consisting of sixty-three ballots (C-3, C-4, C-5, C-6, C-7; M; P-1 through P-57), all reflect affirmative votes for the referendum. These ballots have been referred for determination on the question of whether the voters complied with the provisions of *N.J.S.A. 18A:14-55* which provides, in pertinent part, as follows:

"To vote \*\*\* upon any public question printed upon a paper ballot, the voter shall indicate his choice by making a cross (X) or plus (+) or check (✓) mark in black ink or black pencil in the square at the left of either the word 'Yes' or 'No' of such public question \*\*\*."

The statute provides that the mark to be made by the voter, be it a cross (X), plus (+), or check (✓), is to be in "black ink or black pencil." However, in

numerous instances in the past, the Commissioner has been guided by the provisions of R.S. 19:16-4 which states, *inter alia*:

“\*\*\* 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.\*\*\*”

See *In the Matter of the Annual School Election Held in the School District of Northern Burlington County Regional, Burlington County*, 1972 S.L.D. 77; *In the Matter of the School Election Held in the Penns Grove-Upper Penns Neck Regional School District, Salem County*, 1966 S.L.D. 69, affirmed State Board of Education 1966 S.L.D. 69.

Accordingly, the Commissioner's representative recommends that the one ballot (P-15) contained within Exhibit A, which is marked with what appears to be blue ball point pen ink, be counted as a vote for the proposition.

Exhibit A also contains a ballot (P-26) upon which the voter originally placed a cross (X) mark in the square to the left of “NO,” then obviously changed his mind, erased the mark and proceeded to place a cross (X) mark in the square to the left of “YES.” The erasure is clean and there is no indication on this ballot that the voter attempted to identify it. R.S. 19:16-4 provides in pertinent 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 \*\*\* 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.\*\*\*”

Accordingly, the affirmative vote registered on this ballot (P-26) is recommended to be counted as a vote for the referendum. See *In the Matter of the Annual School Election in the Consolidated School District of Long Beach Island, Ocean County*, 1972 S.L.D. 121.

Another ballot (P-2) in this Exhibit contains what at first glance appears to be a diagonal line which begins inside the square to the left of the word “YES” and extends outward beyond the square. Upon closer inspection, however, the lower left extremity of the line does contain a slight “bulb” which, in the representative's judgment, is a proper check (✓) mark and is sufficient to meet the test of “substantial” as set forth in R.S. 19:16-3g which requires, *inter alia*, that:

“If the mark made for any candidate or public question is substantially a cross X, plus + or check ✓ 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. \*\*\*”



See *In the Matter of the Annual School Election Held in the School District of the Township of Voorhees, Camden County*, 1971 S.L.D. 65; *Petition of Wade*, 39 N.J. Super. 520 (App. Div. 1956); *In re Keogh-Dwyer*, 45 N.J. 117 (1965).

The remaining sixty ballots in Exhibit A may be grouped into two categories. The first category consists of twelve ballots (P-5, P-6, P-7, P-10, P-11, P-16, P-21, P-37, P-38, P-41, P-43, P-47), all of which have the proper marks pursuant to N.J.S.A. 18A:14-55 registered in the squares to the left of the word "YES." These ballots have been referred for determination because of the check (✓) marks used on eight of the ballots (P-5, P-10, P-11, P-16, P-38, P-41, P-43, P-47) all extend beyond the configuration of the square, while the remaining ballots (P-6, P-7, P-21, P-37) have cross (X) marks all extending beyond the squares. In the judgment of the Commissioner's representative, these ballots all reflect valid and legal votes for the referendum and shall so be counted. N.J.S.A. 18A:14-55; *In re Keogh-Dwyer*, *supra*

The second category of the remaining fifty-seven ballots of Exhibit A consists of forty-five ballots (C-5, C-6, C-7, P-1, P-3, P-4, P-8, P-9, P-12, P-13, P-14, P-17, P-18, P-19, P-20, P-22, P-23, P-24, P-25, P-27, P-28, P-29, P-30, P-31, P-32, P-33, P-34, P-35, P-36, P-39, P-40, P-42, P-44, P-45, P-46, P-48, P-49, P-50, P-51, P-52, P-53, P-54, P-55, P-56, P-57), all of which reflect affirmative votes for the referendum. A review of these ballots shows that all the ballots have the proper marks. N.J.S.A. 18A:14-55 However, thirty-six of the ballots (C-3, C-4, C-6, M, P-1, P-3, P-4, P-8, P-9, P-12, P-13, P-14, P-17, P-18, P-20, P-31, P-32, P-33, P-34, P-35, P-36, P-39, P-40, P-42, P-44, P-45, P-46, P-48, P-49, P-50, P-51, P-53, P-54, P-55, P-56, P-57) have marks which are retraced, resulting in heavier or rougher marks than would normally appear. Marks such as these are not uncommon and are obviously the result of unskilled calligraphy, infirmity of hand, poor vision or visibility, rough writing surfaces or other similar cause, rather than an attempt to distinguish the ballots. In fact, one of the ballots (M) has a clearly defined cross (X) mark in the square to the left of the word "YES"; however, the voter then penciled in the entire area for emphasis. Each of the marks made is substantial and is substantially within the square. R.S. 19:16-3g In the representative's judgment, none of the marks was made for an improper purpose. Accordingly, this group of thirty-three ballots is recommended to be counted in favor of the referendum. *In the Matter of the Annual School Election in the Consolidated School District of Long Beach Island*, *supra*

The last group of ballots in Exhibit A consists of twelve ballots (C-5, C-7, P-19, P-22, P-23, P-24, P-25, P-27, P-28, P-29, P-30, P-52), all of which contain an affirmative vote for the referendum. Each of the marks made on these ballots reflects an unsteady hand or poor writing surface so that some ballots (C-5, C-7, P-22, P-23, P-24, P-25, P-28, P-29, P-30) have two lines comprising one arm of the cross (X) mark or two lines of the longer line of the check (✓) mark. One of the ballots (P-30) has a cross (X) mark in the square with a slight mark, which may be considered a "squiggle" to the left of the square. The remaining three ballots (P-19, P-27, P-52) have cross (X) marks made by voters who, while making the cross (X) marks, did not pick up the writing instrument from the ballot and thus form two separate and distinct opposite diagonal lines. The result is that one of the ends of the cross marks are joined together.

In all twelve ballots, the representative finds that the marks representing votes cast in favor of the referendum were properly made and, accordingly, should be counted as votes in favor of the referendum. *In the Matter of the Annual School Election in the Consolidated School District of Long Beach Island, supra*

Thus, in regard to Exhibit A, all sixty-three ballots referred for adjudication are recommended to be counted as votes in favor of the referendum.

Exhibit B consists of thirty-three ballots (B, C, D, E, F, G, H, J, K, S, V, W, R-1, R-2, R-3, R-4, R-5, R-6, R-7, R-8, R-9, R-10, R-11, R-12, R-13, R-14, R-15, R-16, R-17, R-18, R-19, R-21, R-22), all of which contain votes in opposition to the referendum.

On one ballot (R-8) the voter utilized a check (✓) mark to vote his opposition to the referendum. However, the check mark is made almost as a ✓ leaning to the right of the square. The representative finds that such a mark substantially meets the test as set forth in R.S. 19:16-3g and, accordingly, recommends that the vote be counted against the referendum. Another ballot (H) has a check (✓) mark which appears to be lying on its side. The vote against the referendum reflected in this ballot is recommended to be counted. Another ballot (R-13) has a cross (X) mark in which the voter apparently did not lift the writing instrument to make two opposite diagonal lines resulting in the upper left and lower left extremities of the mark being connected. This ballot is recommended to be counted as a vote against the referendum. A slight erasure appears on another ballot (R-14) immediately above the square in which a proper cross (X) mark is made. This ballot, too, is recommended to be counted as a vote against the referendum.

On another ballot (W) the voter, using a ball point pen, made an initial cross (X) mark to the right of the word "YES." The ballot reflects that the voter attempted to erase that mark and to vote properly. While an appropriate cross (X) mark appears in the square to the left of the word "NO," the cross mark still shows to the right of the word "YES." The representative determines that this voter simply attempted to vote his preference, made an error and tried to correct it. The vote cast on this ballot against the referendum is recommended to be counted.

The remaining twenty-eight ballots in Exhibit B may be grouped into two categories, with the first category consisting of seven ballots (E, F, G, J, K, S, V). One ballot (E) has a cross (X) mark in the square with a circle drawn around the mark; another ballot (G) has a cross (X) mark in the square with an incomplete plus (+) mark made to the left of the square; another ballot (J) has a cross (X) mark in the square with the word "NO" written below the square; another ballot (K) has a cross (X) mark in the square with a check (✓) mark to the right of the square; the fifth ballot (S) has a cross (X) mark in the square with a check (✓) mark to the left of the square; the sixth ballot (V) has a check (✓) mark in the square, with the square and the printed word "NO" underlined; and the last ballot (F) in this category has a clearly distinguishable

cross (X) mark subsequent to which the voter apparently penciled in the entire square.

The representative finds no reason to believe that the voters in each of the seven instances above made additional marks to identify or distinguish their ballots. Rather, it is reasonable to believe that the additional marks were intended by the voters to emphasize their positions on the referendum. Accordingly, these ballots are recommended to be counted as votes against the referendum.

The remaining twenty-one ballots (B, C, D, R-1, R-2, R-3, R-4, R-5, R-6, R-7, R-9, R-10, R-11, R-12, R-15, R-16, R-17, R-18, R-19, R-21, R-22) all have poorly made cross (X) marks which appear to have been retraced. The one exception is ballot R-12 which has a poorly made check (✓) mark. All of these ballots, however, are recommended to be counted as votes against the referendum since the test of "substantial" marks, in the representative's judgment, has been met. *N.J.S.A. 18A:14-55; R.S. 19:16-3g; In re Keogh-Dwyer, supra*

In summary, all thirty-three ballots in Exhibit B are recommended to be counted as votes against the referendum for the reasons set forth above.

Exhibit C consists of five ballots (Y, I, L, U, X) all of which will be considered *seriatim*.

One ballot (Y) contains a straight diagonal line, which has been traced over through the square to the left of the word "NO." There is no hook or bulb at either end of the line which could cause such a diagonal line to be considered a check (✓) mark. Another ballot (I) in this Exhibit contains no mark whatsoever in either square to the left of the word "YES" or "NO"; however, a cross (X) mark is drawn through the word "NO". An identical situation occurs on the ballot (U) in this Exhibit. On the next ballot (L) the voter penciled in the entire square to the left of the word "YES." However, there is no trace of a cross (X), check (✓) or plus (+). *N.J.S.A. 18A:14-55* The last ballot has a circle drawn in the square to the left of the word "NO" but with no cross (X), check (✓), or plus (+) mark included therein.

It has been consistently held by the Commissioner in numerous election decisions that a ballot cannot be counted when the statutory requirements that a cross (X), plus (+), or check (✓) mark must be made in the square to the left of the voters' choice has not been met. *In the Matter of the Annual School Election in Union Township, Union County, 1939-49 S.L.D. 92; In the Matter of the Annual School Election in the Borough of Stratford, Camden County, 1955-56 S.L.D. 119; In the Matter of the Annual School Election Held in the Township of Lower Alloways Creek, Salem County, 1968 S.L.D. 47* These ballots (Y, I, L, U, X) comprising Exhibit C are found to be void and are recommended not to be counted either for or against the referendum.

In summary, it is recommended that the 101 ballots be referred to the Commissioner for adjudication as follows:

63 "YES" in favor of the referendum  
33 "NO" in opposition to the referendum  
5 VOIDED - not counted for nor against the referendum  
101 Ballots referred

This concludes the report of the Commissioner's representative.

\* \* \* \*

The Commissioner has reviewed the record of this matter, including the report of his representative and the exceptions thereto filed by the complainants.

As a result of the recount of the uncontested ballots, with 101 referred to the Commissioner, the tally was as follows:

Question	At Polls	Absentee	Total
Yes	558	11	569
No	591	6	597

The Commissioner finds that the recapitulation of the votes cast, as reported by his representative, is accurate and need not be repeated at length here.

An examination of each of the sixty-three ballots grouped in Exhibit A (C-3, C-4, C-5, C-6, C-7; M; P-1 through P-57) discloses that the intent of the individual voters is clear, and ballots have not been marked for the purpose of identifying or distinguishing them. These ballots will accordingly be counted as affirmative votes on the question.

A careful review of each of the thirty-three ballots grouped in Exhibit B discloses that the voters' intentions are clear, and no distinguishing marks were made in order to permit identification of a particular ballot. These thirty-three ballots will therefore be counted as negative votes on the question.

Exhibit C contains a group of five ballots (Y, I, U, X, L). These five, consisting of one yes and four no votes, have been correctly analyzed and may not be counted, for the reasons stated in the report. Two additional ballots (C-1, C-2) were voided at the recount as mentioned, *ante*. An examination of both of these ballots discloses that the marks, which resemble a large asterisk on both the yes (C-1) and the no (C-2) ballot, are such that they may not be considered as properly voted ballots. These may not be counted.

Complainants state in their exceptions that no mention is made in the report of ballot (A), ballot (T), or ballot (R-20). An examination of each of the 101 contested ballots and a review of the disposition of each ballot as recommended in the report discloses that ballot (H) was incorrectly identified as ballot (X) in Exhibit C, *ante*. The ballot identified as ballot (Y), *ante*, is actually ballot (R-20). Ballot (H) is listed as one of the thirty-three ballots in Exhibit B, *ante*. Careful scrutiny of these ballots shows that this ballot is (A) which has

been incorrectly identified. The interpretation is accurate, however, and this ballot is counted as a vote in opposition to the question. Likewise, in Exhibit C the ballot identified as (I), *ante*, was marked as ballot (T) at the recount. This ballot is void since it contains no valid voter's mark.

In their exceptions complainants list the markings of all 101 ballots which were identified at the recount for the Commissioner's determination. Complainants' listing shows two ballots marked (K). The Commissioner's examination of the 101 ballots shows that complainants are in error. All 101 are properly accounted for and the disposition of each is correct. A recapitulation of the ballots cast, including the 101 referred to the Commissioner, is as follows:

Question	At Polls	Decided by Commissioner	Absentee	Total
Yes	558	63	11	632
No	591	33	6	630
Void	2	5		<u>7</u>
				1269

The total number of votes cast at the polls is 1252 and the addition of seventeen absentee votes brings the total votes cast to 1269. This correction was accurately made at the recount and is verified by the Commissioner.

Having carefully reviewed the report, exceptions and the 101 disputed ballots, the Commissioner determines that the results clearly show the referendum was approved by a majority of voters in the School District of Ocean Township, Ocean County, on October 15, 1974.

COMMISSIONER OF EDUCATION

December 31, 1974  
Pending before State Board of Education

**Teamsters Local 102, International Brotherhood of Teamsters et al.,  
as the exclusive negotiating agent for Emerick Zavatsky,**

*Petitioner,*

*v.*

**Board of Education of the City of Linden, Union County,**

*Respondent.*

COMMISSIONER OF EDUCATION

#### DECISION

For the Petitioner, Sipser, Weinstock, Harper & Dorn (Donald Klein, Esq.,  
of Counsel)

For the Respondent, Herbert Olarsch, Esq., and Bernard Reilly, Esq.

Emerick Zavatsky, hereinafter "petitioner," who was employed for one year as an assistant janitor by the Board of Education of the City of Linden, hereinafter "Board," alleges that he was illegally dismissed by the Board as of July 1, 1973. He seeks an order of the Commissioner of Education to reinstate him to his position with full pay retroactive to July 1, 1973.

The Board, while admitting that it did not reemploy petitioner at the end of one year of service, denies that its decision was in any way improper.

This matter is presented to the Commissioner on the pleadings, Briefs, and the Board's Motion to Dismiss the Petition of Appeal for failure to show a cause of action. Oral argument on the Motion was conducted on September 23, 1974 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner. No pertinent facts are in dispute, thus obviating the need for a plenary hearing. A review of those facts discloses the following:

The Board and petitioner entered into a written contract dated June 22, 1972, whereby he was employed by the Board as an assistant janitor. This contract provided, *inter alia*, the following:

\*\*\*\* [T]he Board \*\*\* does hereby engage and employ [petitioner] \*\*\*, under the control of the said Board of Education, from the 1st day of July, 1972 to the 30th day of June, 1973, at the salary of \$8503.00 to be paid in 24 equal semi-monthly installments\*\*\*\*.

\*\*\*\*

"It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other SIXTY days notice in writing of intention to terminate the same, but that in the absence of such notice, the contract shall run for the full term named above.\*\*\*\*"

(Exhibit A)

Petitioner was notified on June 8, 1973, that the Board would not reemploy him after June 30, 1973. Thereafter, Teamsters Local 102 invoked the grievance procedure of the negotiated agreement and the matter proceeded to the level of arbitration. The Board contended that the matter was not arbitrable and that the proper authority for settlement of the dispute was the Commissioner. The parties agreed to hold arbitration in abeyance and a Petition of Appeal was filed with the Commissioner on January 24, 1974.

Petitioner contends he was dismissed in violation of provisions contained within the 1972-73 negotiated agreement between the Board and Teamsters Local 102 which state that:

\*\*\*\* Any new employee shall hold his job for a period of 60 days on a trial basis,\*\*\*\*  
(Exhibit B, at p. 14)

And,

“The Board shall not discharge, discipline or suspend any employee without just cause, subsequent to the 60 day probation period described herein.\*\*\*”  
(Exhibit B, at p. 10)

And,

“The seniority of the maintenance personnel and custodial workers covered by this Agreement, shall be based on their original date of hiring.

And,

“An employee shall lose seniority if he quits or is absent from work for more than a week without notifying his superior, or is discharged for cause\*\*\*.”  
(Exhibit B, at pp. 2-3)

Petitioner asserts that the Board is not bound by any rule, policy, or important educational consideration to employ its janitors for fixed terms, nor is it compelled to do so by *N.J.S.A. 18A:17-3* which states:

“\*\*\* Every public school janitor \*\*\* shall, *unless he is appointed for a fixed term*, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed \*\*\* except for neglect, misbehavior or other offense and only in the manner prescribed by \*\*\* [*N.J.S.A. 18A:6-9 et seq.*]”  
(*Emphasis supplied.*)

Thus, petitioner argues that, absent rules and regulations permitted by *N.J.S.A. 18A:17-41* regarding the employment, discharge, and management of janitors, the Board is bound by its negotiated agreement not to discharge, discipline, nor suspend without just cause any janitor who has successfully completed the sixty day probationary period, *ante*. Petitioner contends that the duration of employment and termination of janitorial employees are terms and conditions of employment within the contemplation of *N.J.S.A. 34:13A-5.3* (New Jersey Employer-Employee Relations Act) so as to be permissible subjects of collective negotiations. *Board of Education of the City of Englewood v. Englewood Teachers Association*, 64 *N.J. 1* at 6-7, 311 *A. 2d* 729 at 731-732 (1973) Petitioner further contends that, where there is a negotiated agreement in effect, it is not subject to the terms of individual contracts of employment with members of the unit. In this respect it is argued that the agreement between an employer and a unit of employees not only enters into the individual contract, but circumscribes the rights of the employer and the members of the union with respect to individual contracts of employment. Petitioner maintains that the negotiated agreement makes no provision that the duration of employment may be limited by anything other than the agreement itself. He therefore concludes that he could only have been terminated by proof that just cause existed for his dismissal and that, absent such proof by the Board, he is entitled to reinstatement to his position. Finally, petitioner contends that the Commissioner does not have jurisdiction over the merits of this dispute and he should direct that the matter proceed to arbitration.

The Board, however, asserts that its nonrenewal of petitioner’s individual



contract was valid and that his 1972-73 contract expired by its own terms. In this regard the Board states:

“\*\*\* It is settled that when a janitorial employee is appointed for a definite term, his employment rights do not extend beyond that term, *Carmino Grannino v. Bd. of Ed. of City of Paterson*, 1968 S.L.D. 160; *Olley v. Bd. of Ed. of Southern Regional High School*, 1968 S.L.D. 20; *McLean v. Bd. of Ed. of Borough of Glen Ridge*, 1973 S.L.D. (March 29, 1973); *Gilliam v. Bd. of Ed. of Toms River Regional School District*, 1974 S.L.D. (May 14, 1974) \*\*\* The existence of the individual janitor’s contract defining the dates of his employment precludes any position that this fixed term contract does not govern this situation.” (Brief in Support of Notice of Motion to Dismiss Petition of Appeal, unp)

The Board also asserts that the agreement between Teamsters Local 102 and the Board does not negate or void the individual janitor’s contract. The Board of Education did not relinquish its Management rights (Article XI) or its right to continue its past practice of individual fixed term employment contracts. The Board argues that the individual fixed term contract is a valid instrument and the Board has a perfect right to not renew that contract at the end of the fixed term. The Board having thus stated its rationale moves that the Petition of Appeal be dismissed for failure to state a cause of action.

The Commissioner has reviewed the arguments of the respective parties. The appointment of janitorial staff members and the rules and practices pertinent thereto are clearly within the purview of the education laws and thus within the authority of the Commissioner of Education. *N.J.S.A. 18A:6-9*; *N.J.S.A. 18A:17-3*; *N.J.S.A. 18A:17-41*; *N.J.S.A. 18A:11-1*

A board of education is empowered by *N.J.S.A. 18A:11-1* to:

“\*\*\* Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board \*\*\* for the employment, regulation of conduct and discharge of its employees\*\*\*.”

Frequently, the rules and policy of a board of education governing its employment practices may be found in various places. Among these are a board’s statement of policy in its official minutes, its employment contracts, and its negotiated agreements. In the interests of a harmonious operation, each of these should be consistent and free of conflict with each other and the prevailing laws. Likewise, they should be plainly stated and free of ambiguity. The Commissioner reminds all local boards of education in this State that agreements reached with employees must be formally adopted as policies, because they are in effect policies under which the board operates. The present controversy arises from the ambiguity within that provision of the negotiated agreement which states:

\*\*\*

“The Board shall not discharge, discipline or suspend any employee without just cause, subsequent to the 60 day probation period described

herein.\*\*\*”

(Exhibit B, at p. 10)

The Board interprets this to be limited to the period of time specified in petitioner’s individual fixed term contract. Petitioner holds that it applies without limit of time once the sixty day probation period has been successfully completed.

Petitioner argues that the individual employment contract merely performs the function of notifying petitioner of his individual salary and that in all other matters the negotiated agreement must take precedence. (Exhibit B, at p. 12) Petitioner consistently makes reference to the individual contract as merely “a piece of paper.” (Tr. 9-12, 14)

The Commissioner cannot agree. Our society with its broad, free market has long relied upon contracts to set forth a record of offers legally made and accepted, following proper consideration. When the Legislature of New Jersey enacted *Chapter 303, P.L. 1968* providing for negotiations between public employers and employees of terms and conditions of employment, it did not repeal those provisions in the education laws which relate to rights of local boards of education and to individual contractual relationships. Rather, the Legislature provided in *N.J.S.A. 34:13A-8.1* specifically that:

“Nothing in this act shall be construed to annul, or modify, or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and any employee organization, *nor shall any provision hereof annul or modify any statute or statutes of this State.*”  
(*Emphasis supplied.*)

As was said by the Commissioner in *Margaret A. White v. Board of Education of the Borough of Collingswood, Camden County*, 1973 S.L.D. 261:

“\*\*\* [A] board may not adopt a rule or policy which would in effect either amend a statute or deny the board’s authority conferred by statute.\*\*\*”  
(at p. 263)

Similarly it was stated by the Commissioner in *Nancy Weller v. Board of Education of the Borough of Verona, Essex County*, 1973 S.L.D. 513 that:

“\*\*\* [B]oards of education must, of course, negotiate with their employees all of those salary and other benefits of direct or indirect compensation in return for their services or employment. However, such negotiations, which are required, cannot be held to abrogate those rights and duties given to local boards by the Education statutes. (*N.J.S.A. 18A*) The rights of employer and employee are mutually exclusive, and to view them accordingly is to view the body of statutory law contained in the Education statutes and in the New Jersey Employer-Employee Relations Act as a ‘unitary and harmonious whole.’ \*\*\*”  
(at p. 524)

and

“\*\*\* [T]he negotiation privilege may not intrude on clear statutory

authority or render it a nullity.\*\*\*”

(Id. at p. 523)

*N.J.S.A.* 18A:17-3 provides that a board may employ a janitor in one of two ways, with or without a fixed term of employment. The important consideration of tenure for janitors is thereby controlled. It was clearly the intent of the Legislature that a board should exercise its discretion in this significant consideration. Neither the Board nor Teamsters Local 102 was empowered to negotiate a provision in their agreement which would modify the provisions of *N.J.S.A.* 18A:17-3 to provide what would be tantamount to tenure for janitors who had successfully completed a sixty day probationary period. This procedure would create a tenure status arising from circumstances neither contemplated nor intended by the Legislature. Such an interpretation is unreasonable.

The offending provision of the agreement (Article XII-1, Exhibit B, at p. 10) would recreate the vice of local “just cause” hearings even if it were interpreted to apply only to the period of time specified in the individual contract. Such hearings where a board of education sits at once as accuser, prosecutor and judge were declared improper by Judge Carton, writing for the Court *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 93 *N.J. Super.* 404 (*App. Div.* 1967).

In a similar matter relative to the tenure of teachers, the Commissioner stated in *Henry R. Boney v. Board of Education of the City of Pleasantville and Robert F. Wendland, Superintendent of Schools, Atlantic County*, 1971 *S.L.D.* 579 that:

“\*\*\* The applicable statute, *N.J.S.A.* 18A:6-10, requires reasons or charges and a hearing only for teachers who have acquired a tenure status.\*\*\* *It is clear that teachers in a nontenure status do not possess such rights statutorily, and the Commissioner holds that they may not acquire them by indirection through grievance procedures or negotiated agreements.\*\*\** (Emphasis supplied.) (at pp. 585-586)

Nor has petitioner herein, having been hired as a janitor for a fixed term pursuant to *N.J.S.A.* 18A:17-3, been clothed with a tenure status by reason of having successfully served a sixty day probationary period. Had such been the intent of the Legislature, it would have so provided.

Article XII-1, *ante*, fraught as it is with ambiguity, and contrary as it is to statutory prescription, is *ultra vires*. The Commissioner so holds. He directs that it be rendered harmonious to the statutes in clear language as the result of future negotiations. *Charles Coniglio v. Board of Education of the Township of Teaneck, Bergen County*, 1973 *S.L.D.* 449; *Gladys S. Rawicz v. Board of Education of the Township of Piscataway, Middlesex County*, 1973 *S.L.D.* 305; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County*, 1973 *S.L.D.* 217; *John Gilliam v. Board of Education of the Toms River Regional School District, Ocean County*, 1974 *S.L.D.* 540 (May 14, 1974); *In The Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, 93 *N.J. Super.* 404 (*App. Div.* 1967)

The Commissioner is constrained to comment concerning the importance and necessity for individual contractual provisions in addition to a board's salary policies set forth in its minutes and its negotiated agreements. Such individual contracts provide important legal evidence of the signatory parties; the effective date and the time limits of any special requirements made on the parties by the terms of the contract; provisions for termination of the contract and salary considerations. Too frequently, it is the very absence of such precise written employment contracts that gives rise to unnecessary controversy and costly litigation.

In the instant matter, the Board has maintained a policy of employing janitors for fixed terms pursuant to statutory authority. Absent a showing of arbitrary, capricious, or illegal action or violation of petitioner's constitutional rights on the part of the Board, the Commissioner determines that the Board, within the parameters of its statutory discretion, chose not to reemploy petitioner following the expiration of his fixed term contract. Having thus determined, the Commissioner finds no cause of action arising from the Petition. Accordingly, the Motion to Dismiss the Petition is granted.

COMMISSIONER OF EDUCATION

December 31, 1974





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**Blanche Beisswenger, Ruth Hayford and Elizabeth Dale, individually  
and in behalf of others similarly situated as a class  
(Englewood Teachers Association),**

*Petitioners-Respondents,*

*v.*

**Board of Education, City of Englewood, Bergen County,**

*Respondent-Appellant.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education November 20, 1972

Reversed by the State Board of Education June 6, 1973

Argued May 7, 1974—Decided June 3, 1974

Before Judges Kolovsky, Fritz and Crane.

On appeal from New Jersey State Board of Education.

Mr. Walter T. Wittman argued the cause for appellant (Messrs. Wittman, Anzalone, Bernstein & Dunn, attorneys).

Mr. Theodore M. Simon argued the cause for petitioners-respondents (Messrs. Goldberg & Simon, attorneys).

A Statement in Lieu of Brief was filed on behalf of State Board of Education (Mr. William F. Hyland, Attorney General of New Jersey, attorney for the State Board; Mr. George F. Kugler, Jr., former Attorney General of New Jersey, and Mr. Gordon J. Golum, Deputy Attorney General, of counsel).

The opinion of the court was delivered by KOLOVSKY, P.J.A.D.

The Englewood Board of Education appeals from a decision of the State Board of Education (State Board) which reversed a decision of the State Commissioner of Education (Commissioner).

The controversy involves the interpretation of a "Teacher Salary Guide" embodied in an agreement entered into early in 1969 between the Englewood Board of Education and the Englewood Teachers Association to be effective for the two years from July 1, 1969 through June 30, 1971. The Commissioner ruled that a provision for a longevity increase of \$400 to teachers on the top step of the salary guide applied only to the school year 1969-70. The State Board's interpretation of the contract was to the contrary; it ruled that the longevity provision applied to both the years 1969-70 and 1970-71.

The "Teacher Salary Guide" consists of two tables followed by seven

numbered paragraphs. The first table lists the salary to be paid to teachers in various categories on each of 13 steps during the school year 1969-70. Then follows a similar table for the school year 1970-71, the salaries listed therein reflecting increases over the previous year on each of the 13 steps.

The first paragraph following the 1970-71 table reads as follows:

“1. All on present top step who do not go up a salary step to receive a longevity increase of \$400.00.”

The remaining six paragraphs provide for the establishment of a committee of administrators and teachers to study and implement a salary incentive program; for allocation of \$10,000 “in the 1969-70 year to accomplish incentive grants”; that “the agreement extends through the 1970-71 school year”; that at the end of the two year period the members of the association will vote to determine whether the incentive program should be continued; that during the 1970-71 school year \$60,000 will be budgeted for further implementation of the incentive program; and finally that

“7. Teachers who will be at the top salary step during the 1969-70 year who indicate in September 1969 that they will be retiring as of June 30, 1970, will receive a salary increment equal to the average of the difference between the top step of the salary guide upon which they are located for 1969-70 and 1970-71.”

These proceedings were initiated by a petition filed by teachers with the Commissioner who referred the matter to a hearing officer for the taking of testimony. Extensive and conflicting testimony was offered by the parties detailing the negotiations leading up to the execution of the agreement. Further, evidence was offered by the petitioners of statements appearing in issues of a publication distributed by the Board entitled “Focus on the Englewood Schools,” indicating that the longevity provision was to apply to both school years. The Board, in turn, offered evidence in purported support of its contention that the statements appearing in “Focus” were not authorized by it.

The report of the hearing officer, which is quoted in the Commissioner’s decision, made no findings as to the credibility or weight of the testimony he heard—this even though his report ended with a reference to “the sharply conflicting testimony of the litigants regarding the intent of the parties” and concluded:

“that a determination herein must be rendered not only on the basis of the written language contained in the salary policy but also on the implied intent of the parties which is now in dispute.”

Nor were any such findings made by the Commissioner who, after setting forth his analysis of why “it could not have been the intention of the Board” to make the longevity increase provision applicable to both school years, rested his decision that the provision applied only to the year 1969-70 on the use of the word “present” in quoted paragraph 1 and the dictionary definition of that word.

The petitioners appealed to the State Board which submitted the appeal for preliminary review by its Law Committee. *N.J.A.C.* 6:1-44; *cf. Winston v. Bd. Ed. So. Plainfield*, 125 *N. J. Super.* 131, 139 (App. Div. 1973), *aff'd* 64 *N. J.* 582 (1974)

By letter of May 18, 1973, the parties were advised that the Law Committee would recommend to the State Board, at a meeting to be held on June 6, 1973, "that the decision of the Commissioner of Education \*\*\* be reversed." The State Board followed that recommendation in its opinion and decision of June 6, 1973 in which it concluded:

"that the language in disagreement, ' \*\*\* all on the present top step \*\*\* ' must apply to both school years 1969-70 and 1970-71, since the language appears at the end of the two-year salary guide. Because the 1970-71 salary guide was intended to be read and applied in the future, the particular language in disagreement cannot now be separated to be read and applied to the 1969-70 salary guide only."

Appellant argues two points for reversal: (1) that the State Board's decision on the merits was erroneous; and (2) that the State Board violated the Administrative Procedure Act by "not affording the parties an opportunity to object to the report of its Law Committee before issuing its decision."

The second point, challenging the procedure adopted by the State Board, is meritorious. *Winston v. Bd. Ed. So. Plainfield, supra*. The parties "should have been afforded timely opportunity to examine \*\*\* the report of the Law Committee of the State Board" (64 *N. J.* 582, a slip opinion, p. 4), "the opportunity to address the report of the committee before it was transmitted to the State Board for final action." (125 *N. J. Super.* at 139) The letter of May 18, 1973, which did not include a copy of the Law Committee's report and merely advised that the committee would recommend a reversal of the Commissioner's decision, was insufficient. It did not give appellant the opportunity "to address the report of the committee."

Were it not for the considerations now to be mentioned, we would remand the matter to the State Board so that it might correct that procedural defect. However, a remand for that purpose alone would be of no value in view of the more serious objection stemming from the fact that neither the Commissioner nor the State Board made any findings with respect to the extensive evidence adduced at the hearing before the hearing officer to aid them in the interpretation of the language used.

An essential prerequisite to a final determination as to what the parties meant by what they expressed in their written agreement is a consideration and evaluation of the testimony adduced with respect to the circumstances leading up to and surrounding the execution of that writing, as well as of the evidence of what the parties themselves may have indicated with respect to the meaning of the contract.

As the court said in *Casriel v. King*, 2 *N. J.* 45, 50-51 (1949):

“The polestar of construction is the intention of the parties to the contract as disclosed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are to be regarded. Even when the contract on its face is free from ambiguity, evidence of the situation of the parties and the surrounding circumstances and conditions is admissible in aid of interpretation. The inquiry is the meaning of the words when assayed by the standard adopted by the law. On the theory that all language will bear some different meanings, evidence of the circumstances is always admissible in the construction of integrated agreements, but not for the purpose of giving effect to an intent at variance with any meaning that can be attached to the words. This is a primary rule of interpretation which has special application where the meaning of the instrument is not clearly apparent. \*\*\* In short, we are to consider what was written in the light of the circumstances under which it was written, and give to the language a rational meaning consistent with the expressed general purpose.”

Apposite, too, is what the court more recently said in *Ingannamorte v. Kings Super Markets, Inc.*, 55 N. J. 223, 230 (1970):

“The defendant asserts that the testimony as to the negotiations at the time of the assignment was inadmissible but we disagree. It clearly evidenced the intention of Kings and the Ingannamortes, when they entered into their acceptance and approval of the assignment, as well as their practical construction of the terms of the assigned lease. In recent years our courts have broadly admitted comparable evidence of intent and practical construction which fairly served to clarify the goals of the parties and the meaning of their language.”

Had the testimony in this case been given before the Commissioner himself, it would be appropriate to remand this matter to him in the first instance so that he might set forth, in appropriate findings of fact, his evaluation of the credibility and weight of the testimony of the witnesses who appeared before him. However, since the testimony was taken before a hearing officer, the Commissioner is in no better position than is the State Board or this Court to evaluate the testimony and the evidence appearing in the record.

We could, of course, remand this matter to the 12 member State Board with directions that it make findings in the exercise of its power to make independent findings of fact. *Winston, supra*, 125 N.J. Super. at 139. We conclude, however, that since the merits of the controversy have been fully argued before us, the interests of justice will be better served if instead of so remanding the matter to the State Board, we invoke our constitutional power “to exercise such original jurisdiction as may be necessary to the complete determination of any cause on review.” *N.J. Const.*, Art. VI, sec. 5, par. 3; *R. 2:10-5*.

We are satisfied from our study of the record that the interpretation adopted by the State Board was correct. The Commissioner’s emphasis on the

use of the word “present” is unwarranted since the contract, executed in the spring of 1969, was dealing with a period of two years all of which was not to begin until July 1, 1969.

We find significant, as did the State Board, the fact that paragraph 1 appears at the end of the separate tables listing salaries for the two school years to begin on a date some time subsequent to the execution of the agreement. Also significant is that in the case of other provisions of the paragraphs of the salary guide, when it was intended that the provision was to apply to only one of the two years, there is an express statement to that effect.

Further, the interpretation that the longevity provision was intended to apply to both years is supported by the evidence and testimony adduced before the hearing officer. There was substantial testimony offered by petitioners, although contradicted by defendant’s witnesses, that the negotiations contemplated that the longevity provision was to apply to both years. Since we did not hear and see the witnesses, we would not rest our findings solely on the testimony as to the negotiations.

What we do find of persuasive significance is that the interpretation contended for by petitioners is exactly that which appeared in two issues of the newsletter, “Focus on Englewood Schools,” issued and distributed in March and July 1969 “over the imprimatur” of defendant Board. We need but quote from the July 1969 issue in which appeared the following:

**“THE ADMINISTRATION SERVES CHILD**

**Through Personnel Services**

To attract and hold highly trained and dedicated teachers, the Board of Education has adopted a two-year salary schedule that ranks among the nation’s highest:

[salary lists omitted]

A person who does not move at the top step will receive an additional \$400 *each year* in longevity.” [Emphasis added ] .

The record is devoid of any evidence that the Board disclaimed or rejected those statements in the “Focus” when they appeared. In view thereof, we find unpersuasive the testimony offered by the Board at the hearing in an effort to show that the admissions embodied in the issues of the “Focus” were not authorized.

The decision of the State Board is affirmed.

**Richard Chabak and the Plainfield Education Association,**

*Plaintiffs-Appellants,*

*v.*

**Board of Education of the City of Plainfield and Carl L. Marburger,  
Commissioner of Education,**

*Defendants-Respondents.*

**Board of Education of the City of Plainfield,**

*Plaintiff-Respondent,*

*v.*

**Plainfield Education Association, Mary Ann Lozak, New Jersey Education  
Association, Ann M. Whitford and American Arbitration Association,**

*Defendants-Appellants.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued May 7, 1974; Decided July 29, 1974

Before Judges Kolovsky, Fritz and Crane

On appeal from Superior Court, Chancery Division, Union County.

Mr. Peter S. Valentine argued the cause on behalf of appellants (Mr. Mortimer Katz, attorney).

Mr. Victor E. D. King argued the cause on behalf of respondent Board of Education of the City of Plainfield (Messrs. King and King, attorneys).

Mr. Michael Bokar, Deputy Attorney General, argued the cause for respondent Marburger (Mr. William F. Hyland, Attorney General of New Jersey, attorney; Mr. Stephen Skillman, First Assistant Attorney General, of counsel; Messrs. Lewis M. Popper and Gordon J. Golum, Deputy Attorneys General, on the brief).

**PER CURIAM**

These are actions involving the arbitrability of disputes between teachers and a board of education. The actions have been consolidated for purposes of appeal by our order.

In the Chabak case, the grievances sought to be arbitrated are (1) that teachers at Plainfield High School are required to sign in and out each day giving the time and their full names whereas previously they had only been required to sign in (not out) by placing their initials on a sheet and (2) that the High School teachers are required to sign in only at the "new building" irrespective of whether they work there or in the "old building." The grievance in the case of



Board of Education of the City of Plainfield v. Plainfield Education Association, et als, is that physical education teachers at the Hubbard Middle School are required to supervise students in the playground during lunch hours.

We were informed at oral argument that the practice of assigning physical education teachers to supervise students during lunch periods has been abandoned by the Board of Education. The issues in the matter of Board of Education v. Plainfield Education Association are therefore moot and the appeal is dismissed.

In the Chabak matter the Chancery Division below entered an order (1) denying the Commissioner's motion to dismiss the complaint, vacating restraints which had previously been imposed upon the Commissioner and (2) restraining Chabak and the Teachers Association from taking any action on the arbitration of the three grievances of the high school teachers until the Commissioner 'has ruled on the arbitrability of the issues contained in the aforementioned grievances.' Plaintiffs have appealed.

The order was not a final one and was not appealable as of right. Plaintiffs have neglected to seek leave to appeal; nevertheless, on our own motion, we shall grant such leave *nunc pro tunc* in the interest of bringing this litigation to a close. See *Keppler v. Terhune*, 88 N.J. Super. 455, 461 (App. Div. 1965).

No argument on the merits is presented on behalf of the Commissioner. However, the Attorney General presents the argument, based upon his interpretation of *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, 64 N.J. 17 (1973), that the Commissioner of Education possesses primary jurisdiction to determine whether it is appropriate to submit a dispute between a board of education and a teachers' association to arbitration pursuant to the provisions of a collective negotiating agreement. We do not so interpret *Dunellen*. The very same argument was presented to the Supreme Court in *Dunellen*. At 64 N.J. 22 it was said:

The Commissioner's position was that he has primary jurisdiction to determine whether the controversy is one arising under the school laws within his exclusive jurisdiction and that arbitration should be stayed pending such administrative determination; \*\*\*.

The Court did not follow the suggestion of the Commissioner by remanding the matter for determination of the threshold question of arbitrability by the Commissioner. Instead it considered all the arguments and made a determination itself as to the arbitrability, concluding that the matter of consolidating chairmanships of departments was "predominately a matter of educational policy which had no effect, or at most only remote and incidental effect, on the 'terms and conditions of employment' contemplated by N.J.S.A. 34:13A-5.3." 64 N.J. at 29, and that the nature of the dispute was one which "should have been presented to the Commissioner of Education for his determination as a dispute arising under the school laws, \*\*\*." 64 N.J. at 31.

In our view we see nothing inappropriate in having the threshold issue of arbitrability decided by a court. Our view in this regard is buttressed by the

conclusion in *Bd. of Ed. Englewood v. Englewood Teachers*, 64 N.J. 1, 8 (1973) that a matter of extension of working hours was arbitrable and did not present any issue of substance requiring the expertise of the Commissioner. In neither *Dunellen* nor *Englewood* nor in *Burlington Cty. Col. Fac. Assoc. v. Bd. of Trustees*, 64 N.J. 10 (1973) is there any expression of opinion supporting the views urged here on behalf of the Commissioner with respect to the proper forum for determination of the question of arbitrability.

The matters of where teachers shall be required to sign in and whether they shall be required to write their full names or initials can hardly be characterized as matters of major educational policy. We do believe, however, that they fall into the category of managerial prerogatives which has been committed to the discretionary action of the local board of education under N.J.S.A. 18A:11-1 and N.J.S.A. 18A:27-4. Such requirements have at most a minimal effect upon the terms and conditions of employment. We perceive no legislative intention in N.J.S.A. 34:13A-1, et seq. to make them the subject of 440 (1970); *Aberdeen Ed. Assn. v. Aberdeen Bd. of Ed.*, S.D. , 215 N.W. 2d 837 (S.D. Sup. Ct. 1974); *State College Ed. Assn. v. Pennsylvania Labor Rel. Bd.*, 9 Pa. Cmwlt. 229, 306 A. 2d 404 (Cmwlt. Ct. Pa. 1973).

Accordingly we affirm the order restraining arbitration with the modification, however, that the restraint be made permanent. The appeal in the matter of Board of Education of the City of Plainfield v. Plainfield Education Association, et als, is, as has been stated above, dismissed.

**Greta Chappell, Individually and as Guardian of Muriel Chappell, an Infant,  
Lloyd S. Kelling and Helen T. Kelling, Individually, and as Guardians of  
Stephen Kelling, an Infant,  
Roger Mazzella, Individually, and as Guardian of Joyce Mazzella, an Infant,  
Jersey City Education Association, a Nonprofit Corporation of the State  
of New Jersey, Hillside Education Association, a Nonprofit Corporation of the  
State of New Jersey, and Plainfield Education Association, a Nonprofit  
Corporation of the State of New Jersey and Flory Naticchia,**

*Petitioners-Appellants,*

*v.*

**Commissioner of Education,**

*Respondent-Appellee.*

## **STATE BOARD OF EDUCATION**

### **DECISION**

Decided by the Commissioner of Education, November 2, 1973

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Emil Oxfeld,  
Esq., of Counsel)

For the Respondent-Appellee, George F. Kugler, Jr., Attorney General  
(Gordon J. Golum, Deputy Attorney General)

The decision of the Commissioner of Education is affirmed for the reasons  
expressed therein.

April 3, 1974

Pending before Superior Court of New Jersey

**Joseph J. Dignan,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the Rumson-Fair Haven Regional High School,  
Monmouth County,**

*Respondent-Appellee.*

#### STATE BOARD OF EDUCATION

#### DECISION

Decided by the Commissioner of Education, July 29, 1971

For the Petitioner-Appellant, Labrecque, Parsons & Bassler (William G.  
Bassler, Esq., of Counsel)

For the Respondent-Appellee, Abraham J. Zager, Esq.

The decision of the Commissioner of Education is affirmed. In arriving at  
this decision, the State Board of Education takes notice of *Mary C. Donaldson v.*  
*Board of Education of the City of North Wildwood, Cape May County*, 65 N.J.  
236 (1974). However, we hold that *Donaldson* does not apply in the instant  
matter. *Donaldson* was concerned with the non-retention of a nontenured  
teacher. Here, we are concerned with a tenured teacher and his non-reassignment  
to an extracurricular activity.

September 11, 1974

Mary C. Donaldson,

*Plaintiff-Appellant,*

v.

Board of Education of the City of North Wildwood, Cape May County,

*Defendant-Respondent.*

**SUPREME COURT OF NEW JERSEY**

Decided by the Commissioner, August 21, 1969

Decided by the State Board of Education, September 8, 1970.

Reargued February 20, 1974. Decided June 10, 1974

On certification to the Appellate Division.

*Mr. John F. Callinan* argued the cause for the appellant (*Messrs. Perskie & Callinan*, attorneys).

*Mr. Edwin W. Bradway* argued the cause for the respondent.

*Mr. Thomas P. Cook* argued the cause for the New Jersey School Boards Association, *amicus curiae*.

*Mr. Cassel R. Ruhlman, Jr.* argued the cause for the New Jersey Education Association, *amicus curiae*.

*Mr. Theodore A. Winard*, Assistant Attorney General, argued the cause *amicus curiae* (*Mr. William F. Hyland*, Attorney General, attorney; *Mr. Stephen L. Skillman*, Assistant Attorney General, of counsel; *Mr. Gordon J. Golum*, Deputy Attorney General, on the brief).

The opinion of the Court was delivered by JACOBS, J.

The Appellate Division affirmed the dismissal of the petition which the plaintiff had filed with the State Commissioner of Education. 115 *N.J. Super.* 228 (1971). We granted certification on the plaintiff's application (59 *N.J.* 272 (1971)) and the matter has been fully argued and reargued before us by counsel for the parties and the *amici curiae*.

The plaintiff Mary C. Donaldson was employed by the respondent Board of Education of the City of North Wildwood from January 1967 through June 1969 as a teacher at the Margaret Mace Elementary School. In January 1969 she was notified by the North Wildwood Superintendent of Schools that her contract would not be renewed for the 1969-70 school year. She was not told why and though she persistently sought the reason or reasons from the Superintendent, and from the board which confirmed his action, she has been unable to obtain any pertinent disclosure. Counsel for the board apparently advised it that the failure to renew the plaintiff's contract precluded her from obtaining tenure and that "on tenure matters it is best not to give reasons."

In due course the plaintiff filed a verified petition with the State

Commissioner of Education charging that the action of the Superintendent and the board was arbitrary, capricious and unreasonable, and seeking review by the Commissioner under *N.J.S.A.* 18A:6-9. The respondent moved to dismiss the petition, and argument centering largely on whether the plaintiff was entitled to a statement of the reason or reasons for the refusal to renew her contract, was heard by the Acting Assistant Commissioner in charge of the Division of Controversies and Disputes. He reported to the Commissioner who granted the motion to dismiss on the basis of his finding that the plaintiff "has no right to a statement of reasons for respondent's non-renewal of her contract." The State Board of Education affirmed on the basis of the Commissioner's opinion and the Appellate Division, in turn, affirmed the decision of the State Board. 115 *N.J. Super.* 228.

The plaintiff's petition for certification was expressly confined to the issue of "whether a non-tenure school teacher is entitled to a statement of reasons for her non-retention by a school board." We granted certification for the sole purpose of reexamining the validity of the Commissioner's administrative position that a board of education which refuses to renew the contract of a nontenured teacher is under no obligation whatever to honor the teacher's request for a statement of the reason or reasons for her nonretention. In his formal opinion the Commissioner relied almost entirely on *People v. City of Chicago*, 278 *Ill.* 318, 116 *N.E.* 158 (1917) and this Court's reference to that case in *Zimmerman v. Board of Education of Newark*, 38 *N.J.* 65, 70 (1962), *cert. denied*, 371 *U.S.* 956, 9 *L.Ed.2d* 502 (1963). But the Illinois case clearly has no current viability. There the Illinois Supreme Court sustained a board of education rule which prohibited membership by teachers in labor unions. In the course of its opinion it expressed the view that the board had an absolute right to decline to employ or reemploy any applicant for any reason whatever or for no reason at all and that "it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal." 116 *N.E.* at 160. We need hardly point out that the sweep of the quoted language is no longer law anywhere and that this was expressly recognized in *Zimmerman* (38 *N.J.* at 70-71) which, incidentally, did not pass on the issue of whether a nontenured teacher who is not rehired is entitled to have a simple request for a statement of reasons fairly honored. See Weintraub, C.J. concurring in *Zimmerman*, *supra*, 38 *N.J.* at 79-80; *cf. Katz v. Bd. of Trustees of Gloucester County Col.*, 118 *N.J. Super.* 398, 404 (*Ch.Div.* 1972).

It must be borne in mind that our Legislature has not at any time said that no reasons need be given when a nontenured teacher is not rehired. Bills bearing generally on the subject have been introduced periodically but thus far no pertinent legislation has been enacted; in the circumstances it is clear that no controlling inference as to intent may be drawn from the legislative silence. See *Boys Markets v. Retail Clerks Union*, 398 *U.S.* 235, 241-242, 26 *L.Ed.2d* 199, 205 (1970); *Girouard v. United States*, 328 *U.S.* 61, 69-70, 90 *L. Ed.* 1084, 1090-1091 (1946); *cf. J. C. Chap. Prop. Owner's &c. Assoc. v. City Council*, 55 *N.J.* 86, 95 (1969); *Schmoll v. Creecy*, 54 *N.J.* 194, 203 (1969); *Fraser v. Robin Dee Day Camp*, 44 *N.J.* 480, 486 (1965); *Walls v. Horbach*, 189 *Neb.* 479, 203

*N.W.2d* 490, 492 (1973); *State v. Gorham*, *Iowa*, 206 *N. W. 2d* 908, 913 (1973).<sup>\*</sup> The Legislature has established a tenure system which contemplates that the local board shall have broad discretionary authority in the granting of tenure and that once tenure is granted there shall be no dismissal except for inefficiency, incapacity, unbecoming conduct or "other just cause." *N.J.S.A.* 18A:28-5. The Board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board, having had the benefits of observation during the probationary period, may conclude that tenure should not be granted. See *Association of New Jersey State College Faculties v. Dungan*, 64 *N.J.* 338, 351-352 (1973); cf. *Cammarata v. Essex County Park Commission*, 26 *N.J.* 404, 412 (1958). Surely the tenure system would not be adversely affected or at all impaired if the board were called upon to respond to the teacher's inquiry as to why she was not reengaged for the forthcoming school year. See *Drown v. Portsmouth School District*, 435 *F.2d* 1182, 1185 (1<sup>st</sup> Cir. 1970), cert. denied, 402 *U.S.* 972, 29 *L.Ed.2d* 137 (1971); cf. *Monks v. N.J. State Parole Board*, 58 *N.J.* 238, 245-249 (1971); 73 *Colum.L.Rev.* 882, 886 (1973); 85 *Harv.L.Rev.* 1327, 1331 (1972); 1 *J. Law & Ed.* 469, 482 (1972). See also Note, 29 *Wash. & Lee L.Rev.* 100 (1972):

When the effects of a required statement of reasons are examined, it seems clear that little harm will be done to the system by this addition. The purpose of the scheme—the maintenance of a competent faculty—will not be affected, for the school board's freedom not to renew a teacher's contract will be unaffected. The only adverse effect is the slight administrative problem of processing the statement of reasons, and this is little different from the statement of notice that most systems currently

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<sup>\*</sup> The suggestion has been made that, although *L.* 1971, c. 436 (*N.J.S.A.* 18A:27-10 *et seq.*) is admittedly silent on the subject, its history is pertinent and is somehow controlling as to the intent of the Legislature. We find the suggestion to be based on misconception and to be insupportable. In the first place, the crucial time is not 1971 but is 1969 when Mrs. Donaldson was not reemployed and as this Court pointed out in *Fraser v. Robin Dee Day Camp*, 44 *N.J.* 480, 486 (1965), the introduction of a bill years later can shed little light on the "intent of the Legislature which enacted the original law." In the second place, although the Senate bill which culminated in *L.* 1971, c. 436 originally contained a requirement for reasons and hearing before the local board, the requirement was left out in the Senate without any recorded debate or discussion. It may be that the senators thought that the subject should be left for determination in this *Donaldson* case which had been decided by the State Commissioner of Education and was pending on appeal; or it may be that they were concerned with the intertwined requirement for hearing before the local board; or it may be that there were other motivations unrelated to the issue at hand. In any event the Senate was content to remain entirely silent and not act on the subject, and as this Court said in *Schmoll v. Creecy*, 54 *N.J.* 194, 203 (1969), its "inaction can mean only that the Legislature did not act." In the third place, the Legislature is not the Senate alone but is the Assembly coupled with the Senate. The Assembly, when it received the Senate bill, was not presented with any issue as to reasons and there is no basis for believing that it did not favor them; indeed when it was recently presented with a bill calling for reasons without any intertwined requirement for hearing before the local board the vote was 60 for and 15 against. See A1668 passed in the Assembly on May 16, 1974. All of the foregoing vividly illustrates the soundness of this Court's well settled position that no controlling inference may be drawn from legislative silence. See *J.C. Chap. Prop. Owner's &c. Assoc. v. City Council*, 55 *N.J.* 86, 95 (1969).

require. That a statement of reasons will not harm the tenure system is evidenced by those states which currently afford such a right to probationary employees, with no apparent adverse effect. 29 *Wash. & Lee L.Rev.* at 109.

The federal courts have, as a matter of federal law, placed various restraints on local boards in their dealings with nontenured as well as tenured teachers. Thus a local board may not refuse to rehire a teacher because of his membership in a labor union or his exercise of constitutional rights. See *Pickering v. Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811 (1968); *Perry v. Sindermann*, 408 U.S. 593, 598, 33 L.Ed.2d 570, 578 (1972); Van Alstyne, "The Constitutional Rights of Teachers and Professors," 1970 *Duke L. J.* 841, 847; cf. *Winston v. Board of Education*, 125 N.J. Super. 131, 144 (App.Div. 1973), aff'd, 64 N.J. 582 (1974). However, for present purposes we may assume (see *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (1972)) that if he is not a tenured teacher he ordinarily has no federal constitutional right to a statement of reasons, though it would seem that if he litigates on the ground that he was not reengaged because of his race or his participation in protest movements or on other constitutionally impermissible grounds he would, in the course of customary discovery proceedings, readily obtain the statement of reasons. Be that as it may, we need not pursue the federal aspects for, as in *Monks v. N.J. State Parole Board*, supra, 58 N.J. 238, the issue before us may be disposed of on grounds which are wholly State in nature. We have on many occasions insisted on procedural safeguards against arbitrary or unjust action though there may then have been no comparable safeguards in the federal sphere. See, e.g., *State v. Kunz*, 55 N.J. 128 (1969); *State v. Laws*, 51 N.J. 494, cert. denied, 393 U.S. 971, 21 L.Ed.2d 384 (1968); *State v. Cook*, 43 N.J. 560 (1965); cf. *Rodriguez v. Rosenblatt*, 58 N.J. 281, 294 (1971); *State v. De Bonis*, 58 N.J. 182, 188 (1971).

In *Monks* (58 N.J. 238) a prisoner sought a statement of reasons for denial of his parole application. The Legislature had remained silent on the subject but the parole board had adopted an administrative rule against giving reasons and courts had sustained it. In defending its rule before us the board urged that the prisoner had no right to parole and that a requirement that reasons be stated would impose administrative burdens and might impair the parole system. We of course recognized that the prisoner had no right to parole but held that as a matter of elemental fairness he was entitled to a statement of reasons; in the exercise of our sweeping constitutional authority to review administrative actions (*In re Senior Appeals Examiners*, 60 N.J. 356, 362-371 (1972)), we struck the parole board's rule as arbitrary and directed that it be replaced by a rule "designed generally towards affording statement of reasons on parole denials." 58 N.J. at 249.

In the course of our opinion in *Monks* we noted that when dealing with administrative agencies we had long pointed to the need for "suitable expression of the controlling findings or reasons" (58 N.J. at 244) and we quoted Professor Davis to the effect that "One of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." *Davis, Administrative Law* §



16.12, p. 585 1970 Supp.). We stressed that the need for fairness was “as urgent in the parole process as elsewhere in the law” and that “the furnishing of reasons for denial would be the much fairer course.” 58 *N.J.* at 246. We cited *White v. Parole Board of State of N.J.*, 17 *N.J. Super.* 580, 586 (*App.Div.* 1952), where Justice Brennan had suggested that procedural safeguards on classification issues were called for by “considerations of simple fairness” and then concluded with the following:

So here, fairness and rightness clearly dictate the granting of the prisoner’s request for a statement of reasons. That course as a general matter would serve the acknowledged interests of procedural fairness and would also serve as a suitable and significant discipline on the Board’s exercise of its wide powers. It would in nowise curb the Board’s discretion on the grant or denial of parole nor would it impair the scope and effect of its expertise. It is evident to us that such incidental administrative burdens as a result would not be undue. 58 *N.J.* at 249.

Everything said in *Monks* may equally be said in support of the teacher’s claim here; indeed the opinion in *Monks* itself placed reliance on *Drown v. Portsmouth School District*, *supra*, 435 *F.2d* 1182, where the Court of Appeals for the First Circuit sustained a nontenured teacher’s request for a statement of reasons for her nonretention though it found no constitutional ground for additional relief. In his opinion Circuit Judge Coffin noted that the refusal to give any reason for the nonretention “effectively forecloses her from attempting any self improvement, from correcting any false rumors and explaining any false impressions, from exposing any retributive effort infringing on her academic freedom, and from minimizing or otherwise overcoming the reason in her discussions with a potential future employer.” 435 *F.2d* at 1184. Further on in his opinion Judge Coffin pointed out that a requirement that reasons be stated would impose “no significant administrative burden” and would not “significantly inhibit the board in ridding itself of incompetent teachers.” In the ultimate he held for the court that, the interests of the nontenured teacher in knowing the basis for the nonretention were “so substantial” and the inconvenience and disadvantages to the board in supplying the information “so slight,” the requested statement of reasons should be honored under federal constitutional principles. But see *Board of Regents v. Roth*, *supra*, 408 *U.S.* 564, 33 *L.Ed.2d* 548.

It appears evident to us that on balance the arguments supporting the teacher’s request for a statement of reasons overwhelm any arguments to the contrary. The teacher is a professional who has spent years in the course of attaining the necessary education and training. When he is engaged as a teacher he is fully aware that he is serving a probationary period and may or may not ultimately attain tenure. If he is not reengaged and tenure is thus precluded he is surely interested in knowing why and every human consideration along with all thoughts of elemental fairness and justice suggest that, when he asks, he be told why. Perhaps the statement of reasons will disclose correctible deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the nonretention was due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teaching

employment; perhaps it will serve other purposes fairly helpful to him as suggested in *Drown* (435 F.2d at 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in *Monks* (58 N.J. at 249), serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.

The contrary arguments appear to us to be minimal in nature. There would of course be some administrative burdens but surely they would not be undue. And the tenure system would not be adversely affected for the requirement that reasons be stated would in nowise curb the breadth of the board's discretionary authority to decide whether any particular teacher should or should not be reengaged. All this is evident from the experiences in those states which have long had tenure systems coupled with requirements that reasons be given to nontenured teachers who are not reengaged. See *Drown, supra*, 435 F.2d at 1185; 29 Wash. & Lee L.Rev., *supra*, at 109; cf. *Tilton v. Southwest School Corporation, Ind. App.*, 281 N.E.2d 117 (1972). In *Monks* we explicitly rejected comparable arguments to the effect that the administrative burdens would be undue and that the breadth of the board's discretionary authority would be curbed. Experiences since *Monks* was handed down fully support our action and indeed serve to strengthen the suggestion that the very requirement that reasons be stated may serve as a significant discipline against arbitrary or abusive action. See *Beckworth, et al. v. N.J. State Parole Bd.*, 62 N.J. 348, 354 (1973).

The plaintiff does not urge before us that, in addition to a statement of reasons, she was entitled to a formal hearing before the board. For present purposes, we assume that no such hearing was required although we hasten to suggest that a timely request for informal appearance before the board should ordinarily be granted even though no formal hearing is undertaken. See *Drown, supra*, 435 F.2d 1182; cf. *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, 64 N.J. 17, 31-32 (1973). In the matter at hand the plaintiff had the undoubted right to appeal under N.J.S.A. 18A:6-9 to the State Commissioner and to urge that the board's refusal to grant her request for a statement of reasons was arbitrary and should be set aside. Though his rejection of her position on that issue was in conformity with his prior administrative practice, we now hold that his practice was unsound and that consequently the plaintiff was entitled to an order at his hands directing the respondent board to give the reasons for her nonretention. Although strictly we need go no further here we consider it not inappropriate to refer briefly to the nature of the hearing before the Commissioner where the nontenured teacher pursues the appeal after reasons for the nonretention have been furnished. On that issue reference may be made to the Commissioner's opinion in *Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County*, 1968 S.L.D. 7.

In *Ruch* a teacher failed to receive his fourth contract and consequently did not obtain tenure. During the course of his employment his department chairman had submitted reports which outlined weaknesses in his teaching methods and techniques and which stated that he failed to meet the standards of the school district. He appeared before the board and was permitted to speak but was not reengaged. He appealed to the Commissioner and though he

acknowledged that he had duly received a report adequately setting forth the reasons for dissatisfaction with his teaching, he contended that the reasons "were arbitrary, capricious and discriminatory and were based on his teaching of a subject for which he was not certificated." The board moved to dismiss his appeal and its motion was granted in an opinion by the Commissioner which set forth substantive and procedural principles which appear to have been well designed towards protecting the teacher's legitimate interests without impairing the board's discretionary authority and without unduly encumbering the administrative appellate process.

The Commissioner first noted that the board's discretionary authority was not unlimited and that its action could be set aside if it was "arbitrary, unreasonable, capricious or otherwise improper." He then pointed out that the board could not resort to "statutorily proscribed discriminatory practices, *i.e.*, race, religion, color, etc., in hiring or dismissing staff" nor could it adopt employment practices "based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served." 1968 S.L.D. at 10. He held that, procedurally, the burden of sustaining the appeal was on the teacher and that the teacher's "bare allegation" of arbitrariness was "insufficient to establish grounds for action." He declined to enter into a reevaluation of the teacher's classroom performance and teaching competence, pointing out that the matter involved the supervisor's professional judgment which was highly subjective and which was not charged to have been made in bad faith. With respect to the teacher's assertion that he was assigned to teach economics without certification the Commissioner found that, even if true, it was immaterial to the central issue before him. Finding no affirmative showing of "unlawful, arbitrary or capricious motivation" and finding no requirement for a plenary hearing before the board, the Commissioner dismissed the petition; his action was sustained by the State Board of Education and further review was not pursued.

The handling of *Ruch* at all levels indicates how negligible are the fears of tenure impairment and undue burden expressed by those who have thus far insisted on the withholding of reasons. Many boards by collective contracts under *N.J.S.A. 34:13A-1 et seq.* have already agreed to furnish reasons and those

which have not will, under this opinion, hereafter be obliged to do so. We are convinced that in the process, the tenure system will have been strengthened rather than impaired and that the controlling values of fairness and justice will have been satisfied rather than ignored. In the light of the views hereinbefore expressed the Commissioner should not have dismissed the petition; in sustaining the dismissal the Appellate Division erred and its judgment is accordingly:

Reversed.

MOUNTAIN, J., dissenting.

Whether a nontenured member of a teaching staff should be given reasons for nonrenewal of his or her contract is a question that has received contradictory answers from legislatures and courts throughout the nation.<sup>1</sup> Cogent and persuasive arguments can readily be marshalled in support of either position.

My dissent in this case does not rest upon a belief that the result reached by the majority is wrong as a matter of policy, but rather upon the conclusion I have reached that a controlling legislative enactment governs the issue now before the Court, and that this being so, there is no room for judicial intervention. The opinion of the majority expressly states that its conclusion is not based upon federal constitutional law, and it certainly does not rest upon state constitutional grounds.<sup>2</sup> This being so, if an applicable statute has been enacted—as is here the case—and the legislative intent can be discerned, either from the words of the statute itself or from the history of its passage through the Legislature, the function of the judiciary is confined to giving effect to that intent.

In 1969, at the time plaintiff's contract was not renewed, there was no

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<sup>1</sup> Several state legislatures have enacted provisions relating to nontenured teachers which parallel *N.J.S.A.* 18A:27-10, *et seq.*, and omit any requirement of a statement of reasons for nonrenewal. *See, e.g., Ala. Code* Title 52, sec. 361(2) (1960); *Colo. Rev. Stat. Ann.* sec. 123-18-10 (Supp. 1967); *Mich. Comp. Laws Ann.* sec. 38.83 (1967); *N.H. Rev. Stat. Ann.* sec. 189:14-a (1964); *Ohio Rev. Code Ann.* sec. 3319.11 (Supp. 1972). Other state legislatures have enacted provisions specifically requiring a statement of reasons. *See, e.g., Alaska Stat.* sec. 14.20.175(a) (1971); *Ariz. Rev. Stat. Ann.* sec. 15-259 (1956); *Cal. Educ. Code* sec. 13443 (Deering 1969); *Conn. Gen. Stat. Ann.* sec. 10-151 (Supp. 1972); *Del. Code Ann.* Title 14 sec. 1410 (Cum. Supp. 1970); *Ill. Ann. Stat.* ch. 122, sec. 24-11 (Smith-Hurd 1962).

State courts have generally determined the question as to whether a statement of reasons is required for nonrenewal of the contracts of nontenured teachers by reference to state legislative enactments. Where the relevant legislation does not require a statement of reasons, courts have concluded no such statement is mandatory. *See, e.g., Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *Munro v. Elk Rapids Schools*, 383 Mich. 661, 178 N.W. 2d 450 (1970); *Williams v. School District of Springfield*, 447 S.W. 2d 256 (Mo. Sup. Ct. 1969); *Central School Dist. No. 1 v. Three Village Teachers Ass'n*, 39 A.D. 2d 466, 336 N.Y.S. 2d 656 (App. Div. 1972). Where the relevant legislation has mandated a statement of reasons, courts have acquiesced in the legislative decision. *See Walter v. Board of Ed. of Century Com. U. Sch. Dist. #100*, 13 Ill. App. 3d 1056, 302 N.E. 2d 190 (App. Ct. of Ill. 1973). *See generally, Fleming v. Concordia Parish School*, 275 So. 2d 795 (Ct. of App. of La. 1973).

Federal courts, prior to the Supreme Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Court. 2701 (1972), also disagreed as to the need for providing reasons for nonrenewal of nontenured teachers' contracts. *Compare Orr v. Trinter*, 444 F. 2d 128 (6 Cir. 1971) with *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1 Cir. 1970).

<sup>2</sup> The authorities cited by the majority clearly indicate that the state constitution does not form the basis for the majority opinion. *See State v. Kunz*, 55 N.J. 128, 14 (1969); *State v. Laws*, 51 N.J. 494, 514 (1968); *State v. Cook*, 43 N.J. 560, 569 (1965).

relevant statute with respect to the reemployment of probationary (*i.e.*, nontenured) teachers. This is no longer the case. *L. 1971, c. 436*, now *N.J.S.A. 18A:27-10, et seq.*, became effective September 1, 1972.<sup>3</sup> Under this statute, in the event of nonrenewal, a probationary teacher need only be given written notice that further employment will not be offered; nothing is mentioned about giving reasons therefor. The board of education is neither explicitly required to give reasons nor is it expressly authorized to refrain from doing so. Had the statute, in plain words, adopted one or the other of these positions, I take it that further argument would have been precluded. Similarly, if the history of the legislation clearly and unequivocally reveals the legislative intent as to providing or not providing reasons for nonrenewal, further judicial review should similarly be foreclosed.

Here the legislative history of the statute is enlightening. The bill which eventually became *L. 1971, c. 436* was introduced in the Senate January 29, 1970 as *Senate Bill 470*.<sup>4</sup> *N.J. Sen. Jour.* (1970) 196. As so introduced, the bill

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<sup>3</sup> This statute, in its present form, provides:

18A:27-10. Nontenure teaching staff member; offer of employment for next succeeding year or notice of termination before April 30

On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

b. A written notice that such employment will not be offered.

18A:27-11. Failure to give timely notice of termination as offer of employment for next succeeding year

Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.

18A:27-12. Notice of acceptance; deadline

If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.

18A:27-13. Inapplicability of act to teaching staff employees of county colleges

Notwithstanding the provisions of N.J.S. 18A:64A-13 the provisions of this act shall not apply to teaching staff employees of county colleges.

<sup>4</sup> The bill as originally introduced provided:

An Act concerning education and providing for continued employment of nontenure teaching staff members and supplementing Title 18A of the New Jersey Statutes.

Be It Enacted by the Senate and General Assembly of the State of New Jersey:

provided not only for the giving of reasons, upon request, but also for a hearing before the board of education. Amendments to the bill, however, deleting all reference to the giving of reasons and the holding of hearings, were introduced in the Senate on March 23, 1970. *N.J. Sen. Jour.* (1970) 536-37. These amendments were adopted by voice vote on the same day. *Id.* As so amended, with all reference to the giving of reasons having been expressly deleted, the bill passed the Senate on April 2, 1970 by a roll call vote of 31 - 0. *Id.* at 563-64. With further slight changes not germane to the issue here, the bill took its further legislative course and eventually was enacted into law as *L. 1971, c. 436 (N.J.S.A. 18A:27-10, et seq.)*.

The manner of the adoption of this law, as set forth above, makes the legislative intent entirely manifest. On March 23, 1970 the Senate formally acted to excise from the bill all reference to the giving of reasons. This cannot be described as legislative inaction; it was positive action. Such legislative action on proposed amendments to a bill is a well-recognized guide in the interpretation of a statute.

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1. Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated at least twice in each school year, to be followed by a conference between that teaching staff member and his or her superior or superiors for the purpose of identifying any deficiencies, extending assistance for their correction and improving instruction.

2. On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either

a. A written offer of a contract for employment for the next succeeding year, providing for at least the same terms and conditions of employment but with such increase in salary as may be required by law or policies of the board of education, or

b. A written notice that such employment will not be offered.

3. Any teaching staff member who receives a notice of nonemployment pursuant to section 2 of this article, may within 5 days thereafter, in writing, request a statement of the reasons for such nonemployment, which statement shall be given to the teaching staff member in writing within 5 days after receipt of such request.

4. Any teaching staff member who has received such notice of nonemployment and statement of reasons and who has been employed, or if said employment were continued to April 30 would be employed, in the district for the equivalent of more than 1 academic year shall be entitled to a hearing before the board of education, provided a written request therefor is received in the office of the secretary of the board of education within 5 days after receipt by the teaching staff member of the statement of reasons.

5. The hearing provided for in section 4 of this article shall be conducted by the board of education in accordance with rules of procedures established by the State Board of Education and a determination as to the employment or nonemployment of said teaching staff member for the next succeeding year shall be made and a copy thereof served upon the teaching staff member on or before May 31. The determination of the board of education made and served within said time shall be conclusive.

6. Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered and upon request by the teaching staff member, a statement of reasons and a hearing, and in the event of such hearing



One of the most readily available extrinsic aids to the interpretation of statutes is the action of the legislature on amendments which are proposed to be made to a bill during the course of its consideration in the legislature. Both the state and federal courts will refer to proposed changes in a bill in order to interpret the statute into which it was finally enacted.

\* \* \* \*

Adoption of an amendment is evidence that the legislature intends to change the provisions of the original bill. [2A *Sutherland, Statutes and Statutory Construction* (4th ed. 1973) sec. 48.18, p. 224]<sup>5</sup>

As stated above, the majority opinion does not base its conclusion that reasons must be given for nonrenewal upon any federal constitutional ground. Any such reliance would clearly be untenable in the light of *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Rather it adopts the view, in which I concur, that "... the issue before us may be disposed of on grounds which are wholly State in nature." It then enters upon a fairly extensive discussion of the case of *Monks v. State Parole Board*, 58 N.J. 238 (1971) where this Court held that prisoners were entitled to be given reasons for the denial of parole applications. It concludes the discussion by observing that "[e]verything said in *Monks* may equally be said in support of the teachers claim here ..."

shall fail to make and serve a copy of the determination, all within the time and in the manner provided by this article, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.

7. If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.

8. Any nontenure teaching staff member who receives a notice that his employment will be terminated pursuant to a provision contained in said contract shall be entitled to a statement of reasons and a hearing as provided for in sections 3, 4 and 5 of this article, except that a determination of the board of education shall be made and served before the expiration of the notice period provided for in said contract. Should the board of education fail to comply therewith, then said notice of termination shall be invalid and of no force and effect and the employment of the teaching staff member shall continue as if such notice had not been given.

9. This act shall take effect September 1, 1970.

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<sup>5</sup> Other authorities supporting the view that amendments adopted during the course of legislative enactment are appropriate materials for use in the interpretation of the statute as finally adopted, include: *Bindczyck v. Finucane*, 342 U.S. 76, 83, 96 L. Ed. 100, 105, 72 S. Ct. 130, 134 (1951); *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 463-64, 81 L. Ed. 736, 744, 57 S. Ct. 556, 562 (1937); *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154-55, 77 L. Ed. 223, 230, 53 S. Ct. 28, 32 (1932); *United States v. Pfirsch*, 256 U.S. 547, 550-52, 65 L. Ed. 1084, 1086, 41 S. Ct. 569, 570 (1921); *United States v. St. Paul M. & M. Ry. Co.*, 247 U.S. 310, 318, 62 L. Ed. 1130, 1134, 38 S. Ct. 525, 528 (1918). See also, *Ablondi v. Board of Review*, 8 N.J. Super. 71, 77-78 (App. Div. 1950); Note, "Extrinsic Aids to Statutory Interpretation—The New Jersey View," 8 *Rutgers L. Rev.* 486, 490-91 (1954).



There is, however, one completely distinguishing difference between this case and *Monks*, of which the majority take only passing note. Referring to the central issue in *Monks*—whether a prisoner should be given reasons for a denial of a parole application—the majority opinion says, “[t]he Legislature had remained silent on the subject.” That is not the case here. Our Legislature has expressed its point of view affirmatively, clearly and without reservation or ambiguity. In *Monks* this Court was entirely free to adopt a rule that reasons be given prisoners denied parole. It was a matter as to which the Legislature—which clearly has the last word—had not spoken. The contrary is true here. We know, from an examination of legislative history, that this statute was enacted into law only after the Senate had specifically and affirmatively expressed itself as opposed to the requirement that reasons be given.

I would hold that the decision in this case should be governed by the controlling statute, *N.J.S.A. 18A:27-10, et seq.*<sup>6</sup> Examination of the legislative history of this enactment reveals an unequivocal repudiation by the upper branch of the Legislature of the requirement that reasons be given to a nontenure teaching staff member upon the nonrenewal of his or her contract. This Court should defer to this clear expression of legislative intent and accept it as binding.

I would affirm the decision of the Appellate Division for the reasons set forth above.

Clifford, J. joins in this dissent.

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<sup>6</sup> The majority observe, with complete accuracy, that at the time Mrs. Donaldson’s contract expired, the pertinent statute, *N.J.S.A. 18A:27-10, et seq.*, had not yet been adopted, and hence, as of that date, could not be deemed controlling. It is, however, somewhat disingenuous of the majority to labor this point inasmuch as its holding is intended to operate as an ongoing rule which boards of education will “hereafter be obliged” to follow. The rule here adopted by the majority is certainly not intended to be limited in its effect to the present plaintiff or to the period prior to the enactment of *N.J.S.A. 18A:27-10, et seq.*

As to the plaintiff in this case, I would hold that she is not entitled to a statement of reasons for nonrenewal of her contract. There was no practice of giving reasons at the time plaintiff’s contract was not renewed, there was no constitutional requirement, either then or now, for giving reasons, and the Legislature has since impressed its *imprimatur* upon the administrative practice.

**Board of Education of the City of East Orange,**

*Petitioner-Appellee,*

*v.*

**Mayor and Council of the City of East Orange, Essex County,**

*Respondent-Appellant.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, March 21, 1973.

For the Petitioner-Appellee, Edward Stanton, Esq.

For the Respondent-Appellant, Julius Fielo, Esq.

Respondent-Appellant appealed to the State Board of Education, from the decision of the Commissioner of Education, by Notice of Appeal filed April 24, 1973. However, no further action having been taken by Respondent-Appellant, the Appeal is dismissed for lack of prosecution.

February 6, 1974

**Reisha Epstein, individually and as parent and natural guardian of**

**Judy Epstein, Robert Epstein, Michael Epstein;**

**Jane Franck, individually and as parent and natural guardian of**

**Stephen Franck, Matthew Franck, David Franck;**

**Daniel Capone, individually and as parent and natural guardian of**

**Jeffrey Capone, Karen Capone, Daniel Capone;**

**Donald Johnson, individually and as parent and natural guardian of**

**Melissa Johnson, D. Keith Johnson;**

**Noel Sanchez, individually and as parent and natural guardian of**

**Michael Sanchez, Dawn Sanchez, Jonathan Sanchez,**

*Petitioners,*

*v.*

**Board of Education of the City of Plainfield and Russell Carpenter,**

**Superintendent of Schools, Union County,**

*Respondents.*

**STATE BOARD OF EDUCATION**

**DECISION**

For the Petitioners, Ruvoldt & Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondents, King & King (Victor E.D. King, Esq., of Counsel)

For the Applicants for Intervention, McCarter & English (John J. McGoldrick, Esq., of Counsel) and Norman J. Chachkin, Esq.

Decision on Motion to Intervene by the Commissioner of Education,  
December 27, 1973

This matter involves a controversy pending before the Commissioner of Education in which Petitioner Reisha Epstein, a parent who claims to have a child or children in the public schools of Plainfield, contends that a plan (commonly known and referred to as "Plan 14") advanced by Respondent Board in an effort to eliminate racial imbalance in the district's schools deprives her and her children of their United States and New Jersey constitutional rights for various reasons.

During the pendency of the proceedings before the Commissioner, application was made by Floyd H. Brown and other persons claiming to be residents of Plainfield, and having children in its public schools, seeking to intervene in the action and alleging opposition to the contentions of petitioners. They claim to have an interest in the controversy that cannot be adequately and fully represented by respondent. The application was denied by the Commissioner on December 27, 1973. Applicants have appealed that determination and in addition move before us for a Stay of proceedings before the Commissioner.

The affidavits supporting intervention are similar and allege in conclusory fashion and without specific factual data that the affiants have an interest in the controversy and may be affected by the outcome. There is no showing that their interests cannot be adequately and fully represented by the respondents, nor that they have a special interest otherwise justifying the grant of leave to intervene. Should it develop in subsequent stages of this proceeding that the factual picture might justify an application to intervene, such an application can then be made.

The decision of the Commissioner of Education dated December 27, 1973, denying leave to intervene is affirmed for the reasons expressed in his decision and those expressed herein.

The Motion for Stay of proceedings before the Commissioner pending this appeal is denied.

May 1, 1974

**Evan Goldman, and others similarly situated, and the  
Bergenfield Education Association,**

*Petitioners-Appellants,*

*v.*

**Board of Education of the Borough of Bergenfield, Bergen County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, August 8, 1973

For the Petitioners-Appellants, Rothbard, Harris & Oxfeld (Abraham L. Friedman, Esq., of Counsel)

For the Respondent-Appellee, Major and Major (James A. Major, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

February 6, 1974

**Evan Goldman, and other similarly situated, and  
the Bergenfield Education Association, a non-profit corporation of  
the State of New Jersey,**

*Appellants,*

*v.*

**New Jersey Board of Education and Board of Education of the Borough of  
Bergenfield, Bergen County,**

*Respondents.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued November 12, 1974—Decided November 22, 1974

Before Judges Kolovsky, Lynch and Allcorn.

On appeal from the New Jersey State Board of Education.

Mr. Emil Oxfeld argued the cause for appellants (Messrs. Rothbard, Harris & Oxfeld, attorneys).

Mr. James A. Major, II, argued the cause for respondent Board of Education of the Borough of Bergenfield (Messrs. Major & Major, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, filed a Statement in Lieu of Brief on behalf of respondent State Board of Education (Ms. Jane Sommer, Deputy Attorney General, of counsel and on the brief).

#### PER CURIAM

The decision of the State Board of Education is affirmed substantially for the reasons set forth in the decision of the Commissioner of Education.

Pending before Supreme Court of New Jersey

**In the Matter of the Tenure Hearing of Paula M. Grossman, a/k/a  
Paul M. Grossman, School District of the Township of Bernards,  
Somerset County.**

#### SUPERIOR COURT OF NEW JERSEY

#### APPELLATE DIVISION

Decided by the Commissioner of Education, April 10, 1972

Decided by the State Board of Education, February 7, 1973

Argued January 15, 1974—Decided February 20, 1974

Before Judges Carton, Seidman and Demos.

On appeal from State Board of Education.

Mr. Richard J. Schachter argued the cause for appellant and cross-respondent Paula M. Grossman (Messrs. Halpern, Schachter & Wohl, attorneys; Mr. Lee Trucker, on the brief).

Mr. Gordon A. Millspaugh, Jr., argued the cause for respondent and cross-appellant Bernards Township Board of Education (Messrs. Young, Rose & Millspaugh, attorneys; Mr. Theodore Margolis, on the brief).

Ms. Erminie L. Conley, Deputy Attorney General, argued the cause for the State Board of Education (Mr. George F. Kugler, Jr., Attorney General of New Jersey, attorney; Mr. Stephen Skillman, First Assistant Attorney General, of counsel).

The opinion of the Court was delivered by SEIDMAN, J.A.D.

The principal issue of this novel case is whether a male tenured teacher who underwent sex-reassignment surgery to change his external anatomy to that of a female can be dismissed from a public school system on the sole ground that his retention would result in potential emotional harm to the students.

Paul Monroe Grossman, now 54 years of age, married, and the father of three children, was engaged as a teacher by the Bernards Township Board of Education in 1957 and received tenure in 1960. He taught vocal music in one of the elementary schools primarily to fourth, fifth and sixth grade children between the ages of 10 and 12.

For many years Grossman had had a gender identity problem which worsened with the passage of time until, shortly after his fiftieth birthday, he sought medical advice, commenced a course of treatment, and, in March 1971, had sex-reassignment surgery performed. He had been diagnosed as a transsexual; that is, one who anatomically is born with the genitalia of one sex but who believes himself (or herself) to be a member of the other sex.

Although Grossman had notified his superiors of his impending absence for surgery, he did not disclose its nature until his return in late April or May of 1971, when he informed the township superintendent of schools and made known his intention of remaining in the school system as a female. After completing the academic year in male attire, he assumed the name of Paula Miriam Grossman and began to live openly as a woman.

During the summer of that year, the matter was under active and continuous consideration by the board, looking toward a satisfactory resolution of the problem. A series of meetings took place between it and Mrs. Grossman (it seems appropriate to use the female gender henceforth), arrangements were made for her to be examined by board selected psychiatrists, and finally a proposal was submitted by the board to engage her on a one-year contract at the same pay to teach the same courses, but only on an elective basis in the high school, provided she would resign, thus relinquishing her tenure, and obtain a new teaching certificate in her female name. The offer was rejected.

On August 19, 1971, the board filed written charges against Mrs. Grossman and suspended her without pay. The charges, in substance, were: (1) her presence as a teacher had created and would continue to create a degree of sensation and notoriety within the system and the community which would severely impair the board's ability to conduct an efficient and orderly school system; (2) under the circumstances of the case, including the failure to disclose the condition and anticipated surgery, Mrs. Grossman had exhibited conduct unbecoming a teacher; (3) as a result of the sex-reassignment surgery, Mrs. Grossman underwent a fundamental and complete change in her role and identification, thereby rendering herself incapable of continuing to function as Paul Monroe Grossman, the person who had been engaged as a teacher by the board; (4) Mrs. Grossman exhibited conduct and behavior deviant from the acceptable standards of the community; and (5) she exhibited abnormality. Each of these changes, it was asserted, constituted just cause for dismissing her from the school system.

Pursuant to *N.J.S.A. 18A:6-10 et seq.* the charges were forwarded to the State Commissioner of Education. After a lengthy hearing before Assistant Commissioner William A. Shine, the third charge, on Dr. Shine's own motion and without objection, was amended to reflect an issue tried and argued but not

specified in the statement of charges, as follows:

Paul Monroe Grossman knowingly and voluntarily underwent a sex-reassignment from male to female. By doing so, he underwent a fundamental and complete change in his role and identification in society, *thereby rendering himself incapable to teach children in Bernards Township because of the potential her (Grossman's) presence in the classroom presents for psychological harm to the students of Bernards Township. Therefore, Paula a/k/a Paul Monroe Grossman should be dismissed from the system by reason of just cause due to incapacity.*

[Emphasis supplied.]

The Commissioner found that the first charge was not supported by the evidence, noting, among other things, that despite evidence offered by the board of widespread newspaper and television publicity, threats of legal action by parents, and adverse reaction to Mrs. Grossman among the teachers and other personnel in the system, there was an absence of public protest at open board meetings during the summer of 1971, and, particularly, the board had offered to continue her employment on a limited basis in the high school. He deemed this inconsistent with the contention that disruption would occur if Mrs. Grossman should be retained in the school system.

He found that the charge of conduct unbecoming a teacher had also not been substantiated. Although, in his opinion, it would have been better had Mrs. Grossman taken the administration into her confidence, he concluded that the evidence did not support the charge that her behavior was a deliberate attempt to mislead her colleagues and the administration.

The Commissioner rejected as well the charges alleging deviant conduct and abnormality as not having been established by the weight of the evidence. He stressed the findings of three psychiatrists with unchallenged qualifications who had examined Mrs. Grossman at the request of the board (which now attacks their reports for "gross insufficiency") and who concluded virtually unanimously that there was no evidence of physical or mental abnormality which would render Mrs. Grossman unable to pursue her profession as a teacher. As for the conduct allegedly "deviant from the accepted standards of the community," the Commissioner, recognizing that "conventional standards are seriously affected in the instant matter," nevertheless refused to substitute his judgment for that of the experts who had examined Mrs. Grossman and found no abnormality serious enough to prevent her from teaching.

He concluded, however, that the amended third charge, which we shall discuss in more detail later, had been proved and that Mrs. Grossman was incapacitated to teach children because of potential psychological harm to the students. He directed that she be dismissed as a teacher in the Bernards Township school system "for reason of just cause due to incapacity."

Taking into account the unusual nature of the case and finding no moral turpitude, the Commissioner further directed the board to apply to the Teachers' Pension and Annuity Fund for a disability pension in behalf of Mrs.



Grossman, pursuant to *N.J.S.A.* 18A:66-39 *et seq.* He also ordered the payment of her back pay based upon his interpretation of *L.* 1971, *c.* 435 (amending *N.J.S.A.* 18A:6-14).

Both sides appealed. The State Board of Education affirmed that portion of the decision ordering the dismissal of Mrs. Grossman (one member, however, being of the view that the evidence sustained the fourth and fifth charges) and also the direction for the application to the Teachers' Pension and Annuity Fund. With four members dissenting, the order to pay Mrs. Grossman's back salary was reversed.

Mrs. Grossman now appeals to this court from the order of dismissal and the denial of back pay. The local board cross-appeals from the rejection of the other four charges.

# I

The scope of our review is clear with respect to the Commissioner's disposition of the five charges. The governing standard is, of course, whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, with due regard to the opportunity of the one who heard the witnesses to judge of their credibility. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 598-599 (1965). If the factual findings are supported by competent evidence they will be upheld. *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962); *Clover Hill Swimming Club v. Goldsboro*, 47 *N.J.* 25, 36 (1966); *Szumski v. Dale Boat Yards, Inc.*, 48 *N.J.* 401, 410 (1967). It is not ordinarily our function to weigh the evidence, to determine the credibility of witnesses, to draw inferences and conclusions from the evidence, and to resolve conflicts therein. *Mead Johnson and Co., v. South Plainfield*, 95 *N.J. Super.* 455, 466 (App. Div. 1967). We have, though, the responsibility of determining whether pertinent principles of law were properly interpreted and applied to the facts as found by the trier thereof. See *Jantusch v. Borough of Verona*, 41 *N.J. Super.* 89, 96-97 (Law Div. 1956), *aff'd* 24 *N.J.* 326 (1957).

Mrs. Grossman argues that (1) it was error to hold that a tenured teacher may be dismissed for just cause due to incapacity solely upon evidence that the presence of the teacher in the classroom presented a possibility of emotional harm to some students, (2) the evidence adduced was insufficient to establish such emotional harm, and (3) hypothetical psychiatric testimony of such harm was not a sufficient ground for her removal. On its cross-appeal, the board maintains that the other charges should have been sustained on the evidence presented.

Applying the above-mentioned standard of review to the board's contention that the first, second, fourth and fifth charges should not have been dismissed, we cannot say, after a thorough canvass of the record, that the Commissioner's findings as to them are so lacking in evidentiary support as to require modification or reversal. We are satisfied from the proofs in the case that there was a rational basis for the conclusions reached.

As for the amended third charge, the Commissioner found from the

evidence that Mrs. Grossman was “incapacitated to teach children in the situation described herein because of the potential her presence in the classroom presented for psychological harm to the students of Bernards Township.” His decision must be measured by the same standard; that is, whether it was supported by sufficient credible evidence considering the entire record.

The testimony on that issue was in sharp conflict. Dr. Charles W. Socarides, a psychiatrist and psychoanalyst with extensive qualifications and experience in the treatment of sexual disorders, appeared in behalf of the board, as did Dr. Harvey Martin Hammer, a psychiatrist specializing in the treatment of children. Dr. Charles L. Ihlenfeld, a physician who described himself as board eligible but not certified in the field of internal medicine, appeared for Mrs. Grossman; and Dr. Robert W. Laidlaw, a well-qualified psychiatrist, testified in her behalf by deposition. Although much of what they said dealt with the nature and treatment of transsexualism as well as the propriety of sex reassignment surgery, we are primarily concerned here with their views on the impact upon students of a teacher who has undergone such surgery.

Dr. Socarides, who considered transsexualism to be a psychiatric syndrome characterized by an overriding wish to be a person of the opposite sex, expressed the view that the presence in the school system of a transsexual teacher who had been sexually reassigned could create “some anxieties among those [young children] already predisposed due to their own inter-emotional conflicts over their castration fears and so forth.” He said, further, that “since sexual gender role is of paramount significance in life, and its formation and helping it and its growth is so important, as I mentioned before, that such things could cause disturbance.” The problems, he added, would be difficult to identify and measure by school authorities since some of the changes might be long-term ones. On the subject of the relationship between a teacher and young children, Dr. Socarides said:

\*\*\* [L]ooking at it from another point of view is that there is another side to this story and that is that the teacher’s function as objects for identification and one of the major things in teaching is that we learn through identification with the teacher and very often we learn out of love for the teacher. And, boys not only learn their lessons in school but they learn how to be men from their teachers and they learn how to be men of certain types of character or personality or aspirations or they learn in a negative fashion. That’s why the teacher is, perhaps, the highest profession \*\*\* and it’s this process of identification to young minds which—the whole liking for learning develops out of love for the teacher and identity with the teacher. \*\*\* and I think it—if such sexual change were known, I think it would be very disruptive of that process, if that were known.

Dr. Hammer said that sexual identity problems, varying in severity, were commonplace in children. With respect to the impact of a sexually reassigned transsexual teacher whose former sexual identity was known to the children, it was his impression “that such an individual would have a very negative effect on the mental health of the children in the classroom.” He cited, as an example, the

case of a 14 year old boy in the Bernards Township school system who had had a severe self-image problem and who suffered a set-back after learning of what had happened to Mrs. Grossman. He said, further, that a child's relationship with the teacher was a significant factor in the learning process and that when a teacher does not have psychological control over the children in the classroom potential learning aspects are diminished. It was his opinion that "it would be disadvantageous to the mental health of the children in the Bernards Township school system to have Mrs. Grossman reappear in her new gender as a teacher in that school system."

A contrary position was taken by Dr. Ihlenfeld, who testified that there would be no adverse effect on children who knew of Mrs. Grossman's sex change because their own sense of gender identity had been formed and fixed long before they reached her classroom. He said further that "if a child should be so upset by the thought that Mrs. Grossman had surgery, then this may be the child who has a potential for developing a problem and should have counselling anyway."

Dr. Laidlaw was also of the opinion that Mrs. Grossman would have no significant effect on children aged 10 and 12 years who had known her as a man. While there might be initial "snickering or gossiping or wise-cracking," this, he said, would be transitory and would not detract from Mrs. Grossman's "effectiveness as a teacher on the children."

The Commissioner, acknowledging the conflicting evidence on the issue, found that the testimony of the experts was predicated on their differing concepts of the role of the teacher, with Dr. Socarides and Dr. Hammer both viewing the teacher as a "paradigmatic" person whose very presence in the classroom is instructive, whereas, to Dr. Ihlenfeld, a teacher in the classroom was

merely another person from the outside world. He chose to accept Dr. Socarides's description of the role of a teacher, and he relied heavily on the testimony of Dr. Hammer in reaching his conclusion that Mrs. Grossman's presence in the classroom could potentially result in psychological harm to the students.

Mrs. Grossman argues that there was a lack of substantial evidence to support the Commissioner's conclusion and that the proofs did not warrant the removal of a teacher otherwise "found to be capable, efficient, and physically able to perform her duties." It is urged that there is little or no empirical data or evidence to indicate that psychological or emotional harm would result to the students of Bernards Township if Mrs. Grossman were allowed to teach in the school system.

It is not within our competency to balance the persuasiveness of the evidence on one side as against the other. The choice of accepting or rejecting the testimony of the witnesses rests with the administrative agency subject to our oversight of whether there was substantial, legal evidence to support the conclusions reached. *Hornauer v. Div. of Alcoholic Beverage Control*, 40 *N.J. Super.* 501, 506 (App. Div. 1956); *Middletown Tp. v. Murdoch*, 73

*N.J.Super.* 511, 515 (App. Div. 1962). The issue was thoroughly presented and argued by both sides. The Commissioner resolved the conflicting medical evidence in favor of the board. Understandably, in a case of this nature, most of the supporting evidence was in the form of opinions given by medical experts, as, indeed, was the opposing evidence. We do not believe that those opinions were based on conjecture or speculation. We are convinced that the evidence adduced sustained as reasonably probable the board's hypothesis that there would be emotional harm to the students if Mrs. Grossman were retained in the school system. See *Ciuba v. Irvington Varnish & Insulation Co.*, 27 *N.J.* 127, 139-140 (1958). Consequently, we will not disturb the Commissioner's finding.

## II

Having reached the above conclusion, we must now determine whether the finding that Mrs. Grossman's retention as a teacher in Bernards Township schools would have an adverse emotional effect upon her students justifies her dismissal "for reason of just cause due to incapacity." Central to this issue is *N.J.S.A.* 18A:6-10, which provides in pertinent part that no person under tenure shall be dismissed "during good behavior and efficiency" except "for inefficiency, incapacity, unbecoming conduct, or other just cause." In the context of this case, the focal point among these grounds is "incapacity."

Mrs. Grossman's counsel argues that the word "incapacity", as used in the tenure statute, relates to the teacher's inability to teach in the classroom and not to his or her purported impact upon the "psyche" of the students as individuals. He further argues that since Mrs. Grossman did not lack the ability, professionally, physically or mentally, to continue to function as a teacher, and since no illegal, immoral or deviant act or conduct had been established, she cannot be dismissed under the statute notwithstanding the finding that her presence in the classroom would have an adverse effect on the students. We think counsel's view of the statute is too narrow.

The term "incapacity", within the purview of the statute, has not received either precise definition or specific standards in this jurisdiction. However, in construing it, we should not confine our attention to the term itself. We must examine it in the light of the statutory surroundings and objectives. See *Ward v. Scott*, 11 *N.J.* 117, 123 (1952). It should receive a reasonable and sensible interpretation, and should, moreover, be considered in conjunction with the words "just cause."

In *Berardi v. Rutter*, 42 *N.J.Super.* 39, 47 (App. Div. 1956), *aff'd sub nom. In re Berardi*, 23 *N.J.* 485 (1957), the court said:

\*\*\* [T]here are a considerable number of statutes throughout the country authorizing the removal of an officer or employee for "cause," and that under them "cause" is generally held to mean "just cause" or such cause as is "plainly sufficient under the law and sound public policy" (*Haight v. Love*, 39 *N.J.L.* 14, 22 (Sup. Ct. 1876), affirmed at 39 *N.J.L.* 476 (E.&A.1877); *Ayers v. Newark*, 49 *N.J.L.* 170, 171, 172 (Sup. Ct. 1886); *Brokaw v. Burk*, 89 *N.J.L.* 132, 135 (Sup.Ct. 1916); *Russo v. Meyner*, 22

*N.J.* 156, 179, 181 (1956) (Heher, J. in a dissenting opinion)), excluding therefore arbitrary or capricious action. *Moreover, the term there is generally held to have reference to the office or employment or to its administration. Russo v. Meyner, supra, 22 N.J., at page 179; and many other cases in accord, some of which are cited in 43 Am. Jur. 47; 67 C.J.S. 248, Officers, § 60, p. 248; 46 C.J. 986, 4 McQuillin, Municipal Corporations (3rd ed.), 256, 257. \*\*\* As thus defined, the term "cause" resembles in some respects the standard of "good character, competency and integrity" now under consideration.* [Emphasis supplied.]

Dismissal of teachers for "inefficiency, incapacity, conduct unbecoming a teacher or other just cause," as found in *N.J.S.A. 18A:6-10*, has been held to provide a sufficient standard which, "though general in terms but measured by common understanding \*\*\* fairly and adequately conveys its meaning to all concerned." *Laba v. Newark Board of Education, 23 N.J. 364, 384 (1957)*. It is clear from a reading of that case that the touchstone is fitness to discharge the duties and functions of one's office or position.

It is true that Mrs. Grossman's proficiency as a teacher is not in question and, as noted previously, she had been found physically and mentally competent to teach. It is also true that misconduct on her part has not been established. Although dictum in *School Dist. Wildwood v. State Board of Education, 116 N.J.L. 572 (Sup. Ct. 1936)*, suggests that dismissals should be limited to proof of some form of dereliction on the part of the teacher, there is neither case nor statutory law so restricting the power of the Commissioner under *N.J.S.A. 18A:6-10*.

The problem to be resolved is whether "incapacity" of a teacher, as that term is used in the statute, can be established solely by a finding that the teacher will have an adverse effect upon the students in the classroom.

"Incompetency," a term closely allied to "incapacity," was defined in *Horosko v. Mt. Pleasant School District, 335 Pa. 369, 6 A. 2d 866, 869-870 (Sup. Ct. 1939), cert. den. 308 U.S. 553, 60 S.Ct. 101, 84 L.Ed. 465 (1939)*:

The term "incompetency" has a "common and approved usage." The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage give a much wider meaning. For example, in 31 C.J., with reference to a number of supporting decisions, it is defined: "A relative term without technical meaning. It may be employed as meaning disqualification; inability; *incapacity*; lack of ability, legal qualifications, or *fitness to discharge* the required duty." In Black's Law Dictionary, 3rd edition, page 945, and in 1 Bouv. Law Dict., Rawle's Third Revision, p. 1528, it is defined as "*Lack of ability or fitness to discharge the required duty.*" \*\*\* Webster's New International Dictionary defines it as "want of physical, intellectual, or moral ability; insufficiency; inadequacy; specif., want of legal qualifications or *fitness*." Funk & Wagnall Standard Dictionary defines it as "General lack of *capacity of fitness*, or lack of the special qualities required for a particular purpose." [Emphasis supplied.]

Thus, "incapacity," like "incompetency," is directly related to fitness to teach, a factor recognized as relevant in *Laba v. Newark Board of Education*, *supra*, at 385-388. See also *Board of Public Education School Dist. v. Beilan*, 386 Pa. 82, 125 A. 2d 327 (Sup. Ct. 1956), *aff'd sub nom. Beilan v. Board of Education, School Dist. of Phila.*, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed. 2d 1414 (1958). But fitness to teach is not based exclusively on a teacher's classroom proficiency or the absence of misconduct. It depends upon a broad range of factors. *Beilan v. Board of Education, School Dist. of Phila.*, *supra*, 78 S.Ct. at 1322. One of those factors, we have no doubt, must be the teacher's impact and effect upon his or her students, for as was said in *Adler v. Board of Education of*

\*\*\* A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.

A like concern has been voiced by our own courts. It has been held that an "inefficient and incapable principal may do great injury to both pupils and teachers." *Redcay v. State Board of Education*, 130 N.J.L. 369, 370 (Sup.Ct.1943). In another context, when dealing with the proper penalty to be imposed upon a teacher charged with unbecoming conduct, we enjoined the Commissioner to "take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." *In re Fulcomer*, 93 N.J.Super. 404, 422 (App. Div. 1967). And in *Kochman v. Keansburg Bd. of Ed.*, 124 N.J.Super 203, 212 (Ch. Div. 1973), involving a section of the education law which required board of education employees to undergo physical examinations at least once a year, the court observed that the Legislature "is concerned with protecting school children from the influence of unfit teachers."

A recent group of California cases has emphasized the importance of the question of fitness in the relationship between teacher and student, with particular reference to the impact the former makes on the latter.

In *Morrison v. State Board of Education*, 82 Cal. Rptr. 175, 461 P. 2d 375 (Sup.Ct. 1969), the issue was whether a teacher who had been involved in an isolated, noncriminal, homosexual relationship was subject to disciplinary action under a California statute authorizing revocation of a teacher's life diploma for immoral conduct. The Supreme Court of that state concluded that the school board could not abstractly characterize the conduct in the case as "immoral," "unprofessional," or "involving moral turpitude" unless that conduct indicated unfitness to teach. The court went on to delineate standards by which unfitness to teach may be determined:

In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in



time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blame-worthiness of the motives resulting in the conduct, \*\*\* These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach, *i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards.* [82 Cal. Rptr. at 186-187; emphasis supplied] .

The court concluded:

\*\*\* Thus *an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher* \*\*\*

[*Id.* at 191; emphasis supplied.]

In *Board of Trustees of Compton Jr. Col. Dist. v. Stubblefield*, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318, 321 (Ct. App. 1971), the court said:

\*\*\* [T]he calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment. \*\*\* His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his official utterances, his associations, all are involved. *His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention.* [Emphasis supplied.]

See also *Watson v. State Board of Education*, 22 Cal. App. 3d 559, 99 Cal. Rptr. 302 (Ct. App. 1972); *Comings v. State Board of Education*, 23 Cal. App. 3d 94, 100 Cal. Rptr. 73 (Ct. App. 1972).

We think it would be wrong to measure a teacher's fitness solely by his or her ability to perform the teaching function and to ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency. We are convinced that where, as has been found in this case, a teacher's presence in the classroom would create a potential for psychological harm to the students, the teacher is unable properly to fulfill his or her role and his or her incapacity has been established within the purview of the statute. In fairness to Mrs. Grossman, we emphasize that the Commissioner's conclusions relate only to her fitness to continue teaching in the Bernards Township school system. We express no opinion with respect to her fitness to teach elsewhere and under circumstances different from those revealed in the present case.

### III

It is contended further that since the Commissioner raised the possibility of Mrs. Grossman's being disabled within the meaning of the teachers' pension



law, *N.J.S.A. 18A:66-1 et seq.*, he should first have referred the matter to the Board of Trustees of the pension fund. The fear is voiced that the Commissioner's decision to order Mrs. Grossman's dismissal and at the same time, to direct the board to submit a disability retirement application in her behalf, presents an irreconcilable inconsistency. We do not agree.

The Board of Trustees of the pension fund and the Commissioner of Education constitute separate administrative agencies, each with a mutually exclusive area of expertise and authority. See *Bd. of Trustees of Teachers' Pension, etc. v. La Tronica*, 81 *N.J.Super.* 461, 468 (App. Div. 1963), cert. den. 41 *N.J.* 587 (1964). Moreover, the subject matters within each sphere of jurisdiction, *i.e.*, dismissal and retirement, are distinct. Cf. *Jacobs v. N.J. State Highway Authority*, 54 *N.J.* 393, 397 (1969). Thus, in arriving at their respective administrative determinations, each agency might employ different factors bearing upon the claimed incapacity or disability of a teacher. Cf. *Russo v. Teachers' Pension and Annuity Fund*, 62 *N.J.* 142, 146 (1973). For example, while the Commissioner deemed Mrs. Grossman unfit to teach in the Bernards Township school system within the context of dismissal, the Board of Trustees might consider, within the retirement context, whether she is incapable of teaching in any capacity in any school district. Moreover, the determination by the Board of Trustees might be based upon whether the teacher is, in fact, mentally or physically unfit to perform the required duties, and not upon whether the teacher is unfit to perform in the context of the teacher-student relationship.

#### IV

We perceive no merit in the argument that Mrs. Grossman's "constitutional rights to equal protection of the laws have been violated by the application of standards resulting in her dismissal where the same standards are not applied to other teachers in the same school system." It has not been demonstrated that the standard of unfitness based upon a teacher's adverse emotional effect upon students would not be applied to other teachers if the facts warranted such result.

The contention that the board violated Mrs. Grossman's rights to equal protection by not seeking a declaration of disability is specious.

#### V

The last issue to be decided is whether Mrs. Grossman was entitled to back pay pursuant to *L. 1971, c. 435*, which became effective February 10, 1972, subsequent to her suspension but prior to the Commissioner's decision on April 10, 1972. It will be recalled that the Commissioner held that she was and that the State Board of Education reached a contrary conclusion.

Mrs. Grossman was suspended without pay by the local board on August 19, 1971, pursuant to the authority granted by *N.J.S.A. 18A:6-14*, which at that time provided as follows:

Upon certification of any charge to the commissioner, the board

may suspend the person against whom such charge is made, with or without pay, pending final determination of the same, and if the charge is dismissed, the person shall be reinstated immediately with full pay as of the time of such suspension.

The amendatory statute (*L. 1971, c. 435*) added a new section, designated as *N.J.S.A. 18A:6-8.3*, providing, in pertinent part, that:

Any employee or officer of a board of education \*\*\* who is suspended \*\*\* pending any \*\*\* hearing or trial or any appeal therefrom, shall receive his full pay or salary during such suspension, except that in the event of charges \*\*\* brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary xxx

It also amended *N.J.S.A. 18A:6-14* by providing, to the extent pertinent here, that in case the board, upon certification of any charge to the commissioner, suspends the person against whom the charge is made:

\*\*\* [I]f the determination of the charge is not made within 120 calendar days after certification of the charges \*\*\* then the full salary (except for said 120 days) \*\*\* shall be paid \*\*\* until such determination is made. \*\*\* Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. \*\*\* Should the charge be sustained on the original hearing or an appeal therefrom, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension."

The question is whether, as Mrs. Grossman contends and the Commissioner decided, the amendatory statute is to be given retroactive effect, or whether, as is implicit in the reversal by the State Board of Education, it is applicable only to those suspended after its effective date.

Generally, statutes relating to substantive rights are construed to operate prospectively, in the absence of a clear expression of opposite intent, whereas statutes relating to procedure and remedy are applicable to pending proceedings where vested rights would not be disturbed or obligations of contracts impaired. *Neel v. Ball*, 6 *N.J.* 546, 551 (1951); 2 *Sutherland, Statutory Construction* (3 Ed. 1943), § 2210, pp. 129-130. In our view, the amendment involved in this case, which has the effect of limiting the period of time during which a teacher (or other board employee) can be suspended without pay, is procedural and remedial, and not, as the board contends, substantive. The cases on which it relies, such as *Nichols v. Board of Education of Jersey City*, 9 *N.J.* 241 (1952), and *Kopczynski v. County of Camden*, 2 *N.J.* 419 (1949), are inapposite.

We see no sound reason for not applying the amendment to cases pending on its effective date. It seems clear that in enacting it the Legislature must have had in mind the economic hardship endured by teachers and other board of

education employees suspended without pay pending the outcome of charges filed against them and certified for hearing to the Commissioner of Education. We are certain, moreover, of the Legislature's awareness that in many instances, because of the volume of matters awaiting hearing, a prompt disposition of charges is not feasible. Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight of those affected by providing for the payment of their full salary (less sums received from other employment during suspension) from the 121st day following the certification of charges until the determination thereof by the Commissioner, or in the case of an appeal by a board from a decision adverse to it, until the determination of the appeal.

No vested rights or contractual obligations would be jeopardized by a retroactive application of the amendment to cases such as the one now before us. Furthermore, "[t]here is sound authority \*\*\* for the proposition that when a statute is ameliorative, as this one can be considered to be, it may be applied retroactively. *People v. Oliver*, 1 N.Y. 2d 152, 151 N.Y.S. 2d 367, 134 N.E. 2d 197 (Ct.App. 1956)." *In re Smigelski*, 30 N.J. 513, 527 (1959).

Permitting Mrs. Grossman to have her back pay to the extent permitted by the amendment would be fair and just and consistent with the clear objective of the law.

## VI

That part of the decision of the State Board setting aside the Commissioner's direction for payment of Mrs. Grossman's back salary is reversed. The matter is remanded to the Commissioner for a determination of the amount of salary due Mrs. Grossman from the 121st day following the certification of charges to April 10, 1972, less any sums by way of pay or salary received by Mrs. Grossman from substituted employment assumed during her period of suspension.

In all other respects, the determination of the State Board is affirmed.

**In the Matter of the Tenure Hearing of Paula M. Grossman, a/k/a  
Paul M. Grossman, School District of the Township of Bernards,  
Somerset County.**

*(Young, Rose and Millspaugh, Esqs.)*

**SUPREME COURT OF NEW JERSEY**

On certification to the Appellate Division:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 29th day of May, 1974.

**Board of Education of the Borough of Haledon,**

*Petitioner-Appellee,*

*v.*

**Mayor and Council of the Borough of Haledon, Passaic County,**

*Respondent-Appellant.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, March 14, 1973

For the Petitioner-Appellee, Dominic Cavaliere, Esq.

For the Respondent-Appellant, James V. Segreto, Esq.

This matter is remanded to the Commissioner of Education for clarification of his findings.

February 6, 1974

**Board of Education of the Borough of Haledon,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Haledon, Passaic County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION ON REMAND**

For the Petitioner, Dominic Cavaliere, Esq.

For the Respondent, James V. Segreto, Esq.

This matter comes before the Commissioner of Education on remand from the State Board of Education, subsequent to an appeal thereto by the Haledon Mayor and Council from the Commissioner's initial decision in this dispute on March 14, 1973. On February 6, 1974, the State Board determined to remand the matter to the Commissioner for clarification of his determinations therein within the guidelines set forth by the New Jersey Supreme Court in *Board of Education of the Township of East Brunswick v. Township Council of the Township of East Brunswick*, 48 N.J. 94.

The Commissioner notices that this budget dispute between the named parties is for the school year 1972-73; that the financial records of the Board for that year have been reconciled and closed; that the Board caused an annual audit for that school year to be completed and filed with it by a public school accountant firm, Elmo G. Valle and Company, Certified Public Accountants, pursuant to *N.J.S.A.* 18A:23-1; that the 1973-74 school budget is presently in controversy between the same named parties as herein; that the 1974-75 school budget was approved by the electorate at the annual school election held February 13, 1974; and, finally, the Commissioner notices that the local tax rate for the School District of the Borough of Haledon for the 1972-73 school year may not now be changed or altered in any fashion for any reason.

Accordingly, for the reasons set forth herein, the Commission finds and determines that the matter of *Board of Education of the Borough of Haledon v. Mayor and Council of the Borough of Haledon*, 1973 S.L.D. 146 (decided March 14, 1973) has been rendered moot by the passage of time.

**COMMISSIONER OF EDUCATION**

June 6, 1974

**Board of Education of the Township of Hillside, in the County of  
Union, a New Jersey corporation,**

*Plaintiff-Respondent,*

*v.*

**Hillside Education Association, a New Jersey corporation,**

*Defendant-Appellant.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued June 11, 1974 – Decided July 29, 1974.

Before Judges Kolovsky, Fritz, and Crane.

On appeal from Superior Court of New Jersey, Chancery Division, Union County.

Mr. Emil Oxfeld argued the cause for appellant (Messrs. Rothbard, Harris & Oxfeld, attorneys; Mr. Abraham L. Friedman, of counsel).

Mr. Thomas P. Cook argued the cause for respondent (Messrs. Smith, Cook, Lambert, Knipe & Miller, attorneys).

**PER CURIAM**

This is an appeal by the Hillside Educational Association from a permanent injunction against arbitration respecting four grievances. These grievances have to do with: (1) the establishment of “quiet study” duty; (2) a reduction in “resource aid” personnel available in each department to assist teachers; (3) a change in the method of assigning home room duty; and (4) a change in the method of weighting proportionately teaching and nonteaching duties.

At the onset we point out that we do not undertake in any sense to determine the merits of the contractual issues presented by these grievances except for the issue of their arbitrability.

Labor problems between teachers and boards of education have reached the courts with remarkably increasing frequency. This accelerated rate has been matched by the myriad nature of the problems presented. Recent Supreme Court cases referred to below emphasize the necessity for case-by-case decision, pending further definitive legislation, in view of the obscurity of statutory lines.

In the meantime, guidelines are emerging. We know, for instance, that management has certain “educational responsibilities” which cannot be abdicated, and therefore cannot legally be made a matter for arbitration. *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, 64 N.J. 17, 25 (1973). We know also that “employment terms and conditions” are generally negotiable and therefore

arbitrable (assuming an arbitration clause in the contract) unless they affect "major educational policies," *Bd. of Ed. Englewood v. Englewood Teachers*, 64 N.J. 1 (1973), but if "'educational policies' bearing too substantially upon too many and important nonteacher interests" are involved, binding arbitration is legally precluded. *Burlington Cty. Col. Fac. Assoc. v. Bd. of Trustees*, 64 N.J. 10 (1973), *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, *supra*, *Bd. of Ed. Englewood v. Englewood Teachers*, *supra*. Lastly, play is wisely left in the joints of the machine: where terms and conditions of the employment are involved and no "major educational policies" appear, whereby it might otherwise be anticipated that arbitration would be mandated, but the requirements of the employer have only a minimal effect on the working terms and conditions, a separate category of managerial prerogative evolves, beyond the scope of appeal to either the arbitrator or the Commissioner. *Aberdeen Ed. Assn. v. Aberdeen Bd. of Ed.*, *Ind. Sch. D.*, 215 N.W. 2d 837 (S.D.Sup.Ct. 1974). See *Lullo v. Intern. Assoc. of Fire Fighters*, 55 N.J. 409, 440 (1970). Cf. N.J.S.A. 18A:11-1 and 18A:27-4. In addition to the absence of questions of major educational policy, an intimate and direct affect on the work and welfare of the employee is required before arbitration may be reached. *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, *supra*, 64 N.J. at 25. No one would question, for instance, the nonarbitrable power of management to order the last teacher out at night to lock the door.

We have measured the four grievances set forth above on this scale. We are satisfied that the trial court anticipated in large measure the Supreme Court cases cited above which had not then been determined, and was correct in his determination that the issues here made the subject of grievance are not arbitrable.

Affirmed.

**In the Matter of the Annual School Elections Held in the School District  
of the City of Lambertville and in the South Hunterdon Regional  
High School District, Hunterdon County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, June 29, 1973

This matter came on for consideration by the full board on March 6, 1974, the complete file having been forwarded to the Board by the Acting Commissioner. Certain irregularities were alleged in the conduct of the annual school elections held on February 6, 1973 in the South Hunterdon Regional High School District and on February 13, 1973 in the City of Lambertville School District.

The complainants prayed that:



“\*\*\*1. The Commissioner finds that it is improper to take challenger lists out of the polling place and that any such lists should be destroyed;

“2. That the February 13, 1973, election be declared null and void, if in fact their allegations are true;

“3. That the Commissioner order the postponement of taking office by any of the candidates at the February 13, 1973, election until the result of this inquiry is announced;

“4. That the Commissioner order all school boards in the State to give instructions to their election workers which will insure that these alleged irregularities will not be repeated in the future.\*\*\*” (Commissioner’s decision of June 29, 1973)

The hearing examiner reported that “\*\*\* Absent any proof, whatsoever, by complainants, and finding no violations by the accused as the result of his inquiry, the hearing examiner concludes that the allegations cannot be supported and recommends that they be dismissed.\*\*\*”

The Commissioner, after reviewing the report of the hearing examiner, concurred with the findings therein. The Commissioner then went on to hold, “\*\*\* Although reasoning and logic lead the Commissioner to the conclusion that if the official poll list, compiled pursuant to statute, must be sealed and kept secret, then no copies or compilations of lists of voters’ names which are tantamount to poll lists, may be kept or used after the close of the polls.\*\*\*”

He then went on to decide that “ \*\*\* Although a logical extension of the *Shanahan* decision might at first seem to require banning the use of what is essentially a duplicate of the official poll list as compiled by a challenger, the Commissioner finds in this short time since the *Watchung* decision, that such a directive is unenforceable.\*\*\*”

This Board agrees with the result reached by the Commissioner, but not for the reason stated in his decision.

Copies of the Registry Lists of any election district may be furnished to any voter by the County Clerk for a fee of \$0.25 per copy, pursuant to *N.J.S.A.* 19:31-18.1. This statute does not preclude an official challenger, who may have purchased such a list, from checking off the names of the voters who have voted and then removing the list from the polling place. This system is used by all political parties legally and has not been challenged. By the same token, we hold that an official challenger has the right to make his own list of persons voting and use it and retain it in the same manner, as though he had purchased a Registry List from the County Clerk.

We distinguish between the use and retention of the challenger’s list and the sealing and the retention of the poll list by the county superintendent pursuant to *N.J.S.A.* 18A:14-62. This statute implicitly bars a public inspection of the official poll list; but, does not govern the use or retention of the

challenger's list.

The Commissioner's decision in dismissing the Petition is affirmed for the foregoing reasons.

March 6, 1974

Pending before Superior Court of New Jersey

**Board of Education of the Township of Little Egg Harbor,**

*Petitioner-Appellant,*

v.

**Boards of Education of the Township of Galloway, City of Atlantic City,  
Township of Marlboro, Freehold Regional High School District and  
the Bureau of Children's Services, Department of Institutions and Agencies,  
State of New Jersey,**

*Respondents-Appellees.*

## **STATE BOARD OF EDUCATION**

### **DECISION**

Decided by the Commissioner of Education, June 12, 1973

For the Petitioner-Appellant, James L. Wilson, Esq.

For the Respondent-Appellee, Board of Education of the Township of Galloway, Walter S. Jeffries, Esq.

For the Respondent-Appellee, Board of Education of the City of Atlantic City, Lawrence Milton Freed, Esq.

For the Respondent-Appellee, Board of Education of the Township of Marlboro, DeMaio and Yacker (Vincent C. DeMaio, Esq., of Counsel)

For the Respondent-Appellee, Board of Education of the Freehold Regional High School District, Cerrato and O'Connor (Dominick A. Cerrato, Esq., of Counsel)

For the Respondent-Appellee, Bureau of Children's services, George F. Kugler, Jr., Attorney General (Joan W. Murphy, Deputy Attorney General, of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 5, 1974

Pending before Superior Court of New Jersey

**Luther McLean,**

*Petitioner-Appellee,*

*v.*

**Board of Education of the Borough of Glen Ridge et al., Essex County,**

*Respondents-Appellants.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, March 29, 1973

For the Petitioner-Appellee, Clinton Lyons, Esq.

For the Respondents-Appellants, Victor A. DeFilippo, Esq.

For the New Jersey Education Association, *Amicus Curiae*, Ruhlman and Butrym (Joel Selikoff, Esq., of Counsel)

For the Public Employment Relations Commission, *Amicus Curiae*, David A. Wallace, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

March 6, 1974

**Adam W. Martin,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the City of South Amboy, Middlesex County,**

*Respondent-Appellant.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, October 12, 1973

For the Petitioner-Appellant, George G. Gussis, Esq.

For the Respondent-Appellant, Hutt and Berkow (George J. Otlowski, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

February 6, 1974

**In the Matter of the Tenure Hearing of Dale Miller,  
School District of the Borough of Manville, Somerset County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, July 30, 1973

For the Respondent-Appellant, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Complainant-Appellee, Raymond R. Trombadore, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

May 1, 1974

**Frank Monaco,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the Hanover Park Regional High School District et al.,  
Morris County,**

*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, May 11, 1973

For the Petitioner-Appellant, Frank Monaco, *Pro Se*

For the Respondent-Appellee, Jacob Green, Esq.

Petitioner-Appellant appealed to the State Board of Education, from the decision of the Commissioner of Education, by letter dated May 29, 1973; however, no further action was taken by Petitioner-Appellant. Dismissal warning letters were sent June 11, 1973, and October 9, 1973.

We find the Appeal has not been perfected and is out of time.

Dismissed.

January 9, 1974

**In the Matter of the Annual School Election Held in the School District  
of the Township of Monroe, Gloucester County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, March 27, 1973

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

January 9, 1974

**James Mosselle,**

*Petitioner-Appellee,*

*v.*

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

*Respondent-Appellant.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, March 27, 1973

For the Petitioner-Appellee, John Cervase, Esq.

For the Respondent-Appellant, Victor A. DeFilippo, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

January 9, 1974

**Board of Education of the City of New Brunswick,**

*Petitioner-Appellee,*

*v.*

**Board of Education of the Township of North Brunswick, Middlesex County,**

*Respondent-Appellant.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decision on Motion by the Commissioner of Education, November 30, 1973

Interim Decision on Motion for Stay, letter decision of the Commissioner of Education, January 11, 1974

For the Petitioner-Appellee, Board of Education of the City of New Brunswick, Terrill M. Brenner, Esq.

For the Petitioner-Appellee, City of New Brunswick, Franklin F. Feld, Esq.

For the Respondent-Appellant, Board of Education of the Township of

North Brunswick, Borrus, Goldin, & Foley (Jack Borrus, Esq., of Counsel)

For the Respondent-Appellant, Township of North Brunswick, Mayo, Lefkowitz & Shihar (Ralph Mayo, Esq., of Counsel)

For the Respondent-Appellant, Borough of Milltown, Russell Fleming, Jr., Esq.

For the Concerned Citizens Action Group, Mrs. S. J. Bocchieri and Mrs. Peter Previte, Co-Chairmen

The request for a Stay of the Interim Decision of the Commissioner of Education is granted.

March 6, 1974

**Board of Education of the Township of North Bergen,**  
*Petitioner-Appellant,*

*v.*

**Board of Education of the Town of Guttenberg, Hudson County,**  
*Respondent-Appellee.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, January 12, 1973

For the Petitioner-Appellant, Joseph V. Cullum, Esq.

For the Respondent-Appellee, John Tomasin, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

March 6, 1974



Arthur L. Page,

*Petitioner-Appellant,*

v.

Board of Education of the City of Trenton and Pasquale A. Maffei,  
Mercer County,

*Respondents-Appellants.*

## STATE BOARD OF EDUCATION

### DECISION

Decision on Motion by the Commissioner of Education, December 27, 1973

For the Petitioner-Appellant, Ruvoldt and Ruvoldt (Harold J. Ruvoldt, Jr., Esq., of Counsel)

For the Respondents-Appellants, McLaughlin, Abbotts & Cooper (James J. McLaughlin, Esq., of Counsel)

In a decision dated December 27, 1973, the Commissioner of Education of New Jersey held that the attempted "elimination" of petitioner's position as an administrator in respondent's district was invalid and directed the restoration of petitioner "\*\*\* to a position which embraces administrative duties of the kind previously performed by him \*\*\*." Respondent appealed the determination. Petitioner cross-appealed from what he claims to be so much of the determination as held that petitioner was not a "tenured administrator" in respondent's district.

We affirm the decision of the Commissioner for the reasons expressed in his decision. We note from that decision and the record, that the Commissioner's determination was made on petitioner's motion for

"\*\*\* summary judgment on the petition in his favor and/or to grant preliminary relief pending final judgment to restrain the defendants from continuing to and threatening to violate the contract between the petitioner and the respondent."

The position which respondent attempted to "eliminate" and from which petitioner was removed was that of "Assistant to the Assistant Superintendent in Charge of Personnel." Documentary evidence introduced on the motion indicated that petitioner was certified as a principal in August of 1969, and as a "school administrator" in February of 1973. As far as the record before us shows, no evidence was introduced as to the job description or actual duties performed by petitioner in the position. Documentary evidence showed that petitioner commenced the employment in the position of Assistant to the Assistant Superintendent in Charge of Personnel on January 4, 1971. The board's attempt to eliminate the position was by resolution dated August 14,

1973. The provisions of *N.J.S.A.* 18A:28-4 and -5 raise question as to whether in fact petitioner had tenure in the position, and if not, in what position did he have tenure. The meager factual showing on the motion which gave rise to this appeal, in our judgment, was not sufficient to permit a determination by the Commissioner of the tenure question raised. Nor do we read the Commissioner's opinion as denying the tenure claim, but on the contrary, as holding that the only tenure which he could determine under the evidence before him was that of a teacher. Further, it appears clear to us that the Commissioner limited his determination to

“\*\*\* whether or not the Board's action of August 14, 1973, to abolish the position of petitioner, was a legally correct and proper action.\*\*\*”

Accordingly, we remand the matter to the Commissioner for a full hearing solely on the question of whether petitioner had acquired tenure in any position other than that of teacher, and if so, what position.

May 1, 1974

**Board of Education of the City of Passaic,**

**v.**

**Municipal Council of the City of Passaic, Passaic County.**

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, November 20, 1972

Decided April 1, 1974

Before Judges Conford, Handler and Meanor.

On appeal from the Commissioner of Education.

This matter having been duly presented to the Court, it is hereby ordered that the Motion to Vacate Dismissal is granted.

**In the Matter of the Passaic County Regional High School District No. 1,  
Little Falls, Passaic County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, March 30, 1973

For the Appellant, Township of Little Falls, Joseph D. Donato, Esq.

For the Appellant, Borough of Totowa, Amos C. Saunders, Esq.

For the Appellant, Borough of West Paterson, Leopizzi and Mizzone  
(Philip H. Mizzone, Esq., of Counsel)

For the Respondent, Board of Education, Andrew Hackes, Board  
Secretary-School Business Administrator

The decision of the Commissioner of Education is affirmed.

January 9, 1974

**Kathleen M. Pietrunti,**

*Respondent-Appellant,*

*v.*

**Board of Education of Brick Township,**

*Petitioner-Appellee.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Decided by the Commissioner of Education, July 19, 1972

Decided by the State Board of Education, April 4, 1973

Argued January 29, 1974 – Decided April 23, 1974

Before Judges Halpern, Matthews and Bischoff.

On appeal from determination of the New Jersey State Board of  
Education.

Mr. Emil Oxfeld argued the cause for appellant (Messrs. Rothbard, Harris  
& Oxfeld, attorneys).

Mr. Martin B. Anton argued the cause for appellee (Messrs. Anton and  
Ward, attorneys; Mr. Donald H. Ward, on the brief).

Mr. Gordon J. Golum, Deputy Attorney General argued the cause for the  
State Board of Education (Mr. William F. Hyland, Attorney General of  
New Jersey, attorney; Mr. George F. Kugler, Jr., former Attorney General  
of New Jersey, and Mr. Stephen Skillman, First Assistant Attorney  
General, of counsel).

Mr. Thomas P. Cook argued the cause for New Jersey School Boards

Association and New Jersey Association of School Administrators, *amici curiae* (Messrs. Cook and Knipe, attorneys).

#### PER CURIAM

This is an appeal from a decision of the Commissioner of Education, affirmed by the State Board of Education, dismissing appellant, a tenured teacher, from her employment with the Brick Township Board of Education, effective on the date of her suspension by the local Board of Education on September 8, 1971. Appellant also appealed from the determination of the State Board of Education which reversed the decision of the Commissioner which had granted to her compensation at her regular salary retroactively to the date of her suspension, under the provisions of *N.J.S.A.* 18A:6-14, as amended by *L.* 1971, c. 435, § 2, effective February 10, 1972.

Appellant became a member of the faculty in the Brick Township School District as a business education teacher in the high school in 1966. Her career was uneventful until 1970, when she became a member of the grievance committee of the Brick Township Education Association. During that period she apparently had some difficulties in her relationships with the superintendent of schools. Appellant became president of the Education Association in April of 1971. The record shows that as of that date, the local Board of Education had been dilatory in obligations to bargain collectively with the association and had refused to meet with the association for a period of 83 days. Efforts were then ongoing to negotiate a new bargaining agreement since the current agreement expired on June 30, 1971. Negotiations subsequently resumed, however, and a new agreement was successfully negotiated prior to the opening of the new school term in September 1971.

During the latter part of August 1971, appellant was invited by the school district administration, as the president of the Brick Township Education Association, to be one of the speakers at an orientation meeting to be held on September 1, 1971. A speech was given, and that speech, as delivered, generated the principal charges made against appellant by the local Board of Education. The undisputed evidence discloses that appellant used the occasion of the orientation meeting to speak against the school administration in general and against the superintendent of schools in particular. Rather than insert excerpts from the speech throughout this opinion, we have attached hereto, as an appendix, the speech delivered in its entirety.

As a result of the speech, appellant was charged in ten written charges with conduct unbecoming a teacher, insubordination, and conduct subversive of the discipline and morale of the school system. Her references to the dismissal of two non-tenured teachers (Charge 1), the suspension of a fellow teacher (Charge 2), the removal of three books from the English curriculum (Charge 4), the lack of black teachers, and the characterization of the superintendent of schools as a villain (Charge 5) were alleged by the local Board as conduct unbecoming a teacher. Her reference to the dismissal of the two non-tenured teachers (Charge 1) was alleged as an instance of insubordination to the office of superintendent of schools. Her references to the suspension of the fellow teacher (Charge 2), the

claimed involvement of the superintendent of schools in local politics (Charge 3), the removal of books, and the dearth of black faculty (Charge 4), her description of the school system as a “snakepit for young teachers” (Charge 6), her suggestion to non-tenure teachers to refrain from any criticism until they have tenure (Charge 7), and her description of the district’s hiring practices as a “callous economic gesture” (Charge 8) were alleged as instances of conduct subversive of the discipline and morale of the school system.

As a result of these charges, appellant was suspended from her teaching duties on September 7, 1971, effective September 8, 1971. On the same date, she gave a public apology for her orientation meeting speech of September 1, distributing copies of the speech to all who were present to hear her apology. After her suspension, 10 additional charges were preferred. In these charges, appellant’s actions as a tenured teacher and president of the Brick Township Education Association were alleged to represent an attitude of insubordination which foments disrespect for the office of superintendent and usurpation of administrative functions. A direction claimed to have been issued by appellant to the faculty urging them to refuse to comply with an administrative request to file letters with respect to individual teacher’s intentions for the succeeding year; her public expression of concern that administrative vacancies existed; her suggestion that the faculty file letters of intent in language suggested by her; her letter questioning the dismissal of a non-tenured teacher, authorship of a bulletin regarding this teacher and a letter directed to parents of students on the subject; and an association directive dealing with teachers’ duties, were all cited for bases for this charge. (Charge 9 was found by the hearing officer to constitute a legal summation rather than a charge, thus requiring no defense.) The release of a news bulletin calling for arbitration of the non-renewal of the contracts of two non-tenured teachers (Charge 11), the purported misrepresentation of the presence of the President of the Board of Education at a meeting between the superintendent and association representatives (Charge 12), the purported misrepresentation of the cancellation of a meeting requested by the New Jersey Education Association with the administration (Charge 13), and the reference to the superintendent of schools as “Carmen” rather than “Stephen” (Charge 14), were alleged in support of claimed insubordinate and vindictive conduct subversive of the discipline and morale of the school system. A disagreement over the insufficiency of a lesson plan, and a reply of “shove it” to an observation by the subject supervisor that she was late for class (Charge 15) were alleged as instances of insubordination, refusal to accept administrative authority, and conduct unbecoming a teacher. The claimed insincere apology for the September 1 speech made on September 7, 1971 (Charge 16), an alleged statement of purpose to rid the school system of the superintendent (Charge 17) were alleged as indicia of a philosophy incompatible with the school system. The uttering of various “unladylike and unfeminine” remarks in places of public accommodation, such as, “elementary teachers have elementary minds,” “*C. Serpent Raciti*,” (referring to the superintendent, C. Stephen Raciti), “This paper is so poor it is not good enough to wipe my ass,” “You son-of-a bitch, you did that on purpose,” “Ding Dong Bell,” “bald headed mental midget” and “baldheaded bastard,” the latter three statements referring to Board President, William Bell, were alleged as subversive of the discipline and morale of the school

district (Charge 18). A bulletin critical of another teacher which was claimed to have been "enforced and/or condoned" by appellant was alleged as subversive and unbecoming conduct (Charge 19). Finally, a remark to another teacher in the course of a reprimand was alleged as an instance of interference with supervisory duties. (Charge 20).

Hearings before a hearing officer designated by the Commissioner of Education began on January 17, 1972 and concluded on April 12, 1972. There was no dispute in the testimony adduced over the fact that the language complained of in the first eight charges was uttered by appellant. The hearing officer determined the question of fact to be whether the statements uttered and complained of were true in fact, and whether the orientation meeting was the proper forum for these remarks.

The hearing officer filed a detailed report with the Commissioner. For the purposes of this opinion, we find it necessary to give a brief summary of his conclusions. As to charge one, he found that there was no basis for appellant's statement that the two teachers were "fired," although this may be the common understanding and the practical effect of the action of the Board of Education on persons who may not be versed in the technical ramifications of school law. As to charge two, he made no specific findings of fact with respect to the core of the charge per se, finding solely that the subject of the incident was inappropriately raised by appellant. In reaching this conclusion, the hearing officer makes the suggestion that the local Board of Education may have been culpable itself in handling the subject matter which was referred to by appellant. Charge three, which related to alleged local political activity by the superintendent, was left by the hearing officer to the Commissioner's judgment as to whether the minor instances of political encounter found to have been indulged in by the superintendent were such as to be deleterious to his role as educational leader. He also left for the determination of the Commissioner whether appellant's inclusion of such allegations represented conduct unbecoming a teacher in the public schools.

The hearing officer saw fit to break charge four down into three subcharges: the first, that appellant attempted to usurp the authority of the Board when she charged that they arbitrarily yanked books from the English curriculum; the second, the innuendo raised by appellant that the administration had a racist hiring policy; and the third, that the superintendent violated confidences of the grievance procedure. The first subcharge was found to be without merit, and the hearing officer found that no evidence was presented at the hearing which confirmed even an inferred premise of racial discrimination by the Board. As to the third subcharge, the hearing officer left the determination as to whether or not the orientation day ceremony was a proper forum for its expression, suggesting also that the Commissioner determine whether the pertinent part of appellant's speech was factually based in truth or in her belief. The hearing officer concluded that the assumptions and inference drawn by the local Board in charge five were unwarranted, and that it was unjustifiable to conclude that appellant's use of the word "villain" was to be given its full Shakespearian connotation. Charge six was sustained, leaving to the Commissioner the question of the propriety of the words used as a part of the

speech. Charge seven, which dealt with advice to nontenured teachers, was found by the hearing officer not to require a finding of fact but a value judgment by the Commissioner. The hearing officer found little factual support for charge eight which charged the respondent with seriously interfering with the administration of the school system, pointing out that there was no concrete evidence of any kind that the orientation day speech ever served as an "interference" per se to the school administration, or that new teachers resigned their positions because of it.

The hearing officer also reviewed the additional charges served on appellant subsequent to her suspension. He found that the activities of appellant were in fact as alleged in charge 10, but the effect on the school district was left to the judgment of the Commissioner. Charge 11 was withdrawn by the Board. The hearing officer found that in fact the president of the local Board was an intruder in a meeting between the superintendent and the association and, therefore, recommended a dismissal of charge 12.

The claim that the Superintendent of Schools dozed in court during proceedings, and the reference to him in a letter as "Carmen" were found to be of such minor consequence that they need not be considered by the Commissioner as substantial evidence against appellant. Charge 15 which related to her relations with her subject supervisor were ordered dismissed by the award of an arbitrator after the hearings, and the hearing officer's report thereon. The fact of the arbitrator's award and its contents were forwarded to the State Board of Education before it reviewed the Commissioner's determination. Because of the award, the State Board eliminated charge 15 from consideration of the charges against appellant. We have not considered this charge in our review.

Charge 16 which alleged that the apology for the orientation day speech was insincere, was recommended to be dismissed. The hearing officer found in Charge 17 that appellant probably did say words to the effect that the superintendent has "got to go" in private conversation with the assistant superintendent of schools. He recommended, however, that all other inferences and facets of this charge be dismissed. In charge 18, the hearing officer properly made no finding that the words attributed to appellant were "unfeminine" or "unladylike." He did find that appellant used the expressions "son-of-a bitch" and "bald headed mental midget." Charge 19, which related to criticism of a fellow teacher, was recommended as dismissed for want of real evidence. The final charge which dealt with the interference with the performance of a teacher's duty, was found to be undisputed since the supervisor involved admitted he had no authority to direct the teacher involved to perform the task assigned. The hearing officer left any final conclusion with the Commissioner.

The Commissioner, for the greater part, accepted the hearing officer's report. He found that the evidence sustained several charges against appellant which were of a sufficiently serious nature so as to warrant her dismissal. With certain specific exceptions, which he noted in his decision, he sustained the charges of the local Board relating to the orientation day speech. He also upheld, with certain exceptions, the charge that the speech contained untruths and distortions, and found that it constituted a derogatory personal indictment of



the Superintendent of Schools which had been presented in the wrong forum and was patently unfair to him.

Certain of the charges unrelated to the orientation day subject were also sustained by the Commissioner. In this group of charges he determined charges 10A, 10C, and 18D to be the most serious. The first of these charged that appellant, as President of the Education Association, had directed tenured teachers not to sign letters of intent which sought information as to whether those teachers plan to return to the school district for the fall semester. Charge 10C was related to charge 10A since it charged that the letter in question interfered with the administrative rights and duties of the Superintendent of Schools. In sustaining these two charges the Commissioner found that appellant was guilty of insubordination and that her action, if followed by a majority of the tenured teachers, could have crippled the effective operation of the school district. Charge 18D involved the incident in which appellant called another teacher a son-of-a bitch in the presence of students. The Commissioner reviewed a claim of provocation and found this incident to be evidence of conduct unbecoming a teacher.

It was the Commissioner's conclusion that the orientation day speech, standing alone, warranted appellant's dismissal from the Brick Township School District. It was the Commissioner's opinion that the constitutional obligation of local boards of education to provide a thorough and sufficient system of public education could not be carried out in an atmosphere of turmoil and conflict between school officials and employees. He stated:

When such an atmosphere clearly exists, as herein, and when the atmosphere was created by a teacher acting in a premeditated and calculated manner (the speech, p-1) the Commissioner believes that the tenure rights of the teacher are forfeit to the needs of the district as a whole for a cooperative effort in the education of children. It is this effort of local boards of education, the representatives of the people through the electoral process, and of school administrators, entrusted by the boards with duties of school management, which, in the Commissioner's judgment, must be supported.

The Commissioner determined that the appellant should be dismissed from her employment with the Brick Township School System, effective on her date of suspension by the Board of Education on September 8, 1971.

Following the Commissioner's determination, an appeal was filed with the State Board of Education and on April 4, 1973 that body affirmed the Commissioner's decision dismissing appellant. The decision of the State Board of Education also reversed that portion of the Commissioner's decision which granted appellant full pay retroactive to the 121st day after her suspension, as noted above.

Before discussing the substantive matters before us on this appeal, a procedural point must be dealt with. Appellant claims that the Commissioner violated provisions of the Administrative Procedure Act, *N.J.S.A. 52:14B-1*, et

*seq.*, by not affording the parties an opportunity to object to the report of the hearing officer before he issued his decision. (See *N.J.S.A.* 52:14B-10(c)). Unquestionably, the failure to provide this opportunity was erroneous and not in accordance with the provisions of the Administrative Procedure Act. *Winston v. Bd. Ed. So. Plainfield*, 125 *N.J. Super.* 131, 138 (App. Div. 1973). The right to object to a hearing officer's report made by one for the use of another who was entrusted with final decision making, who must rely in part, at least, upon that report, has long been embedded in our jurisprudence. See *Mazza v. Cavicchia*, 15 *N.J.* 498, 523-524 (1954). We have recently held in *Winston*, above, that this axiom of administrative due process is applicable before the Commissioner of Education. In answering this argument, the Attorney General informs us that after our decision in *Winston* was handed down, he advised appellant, through counsel, that his office would be agreeable to a remand of these proceedings to the Commissioner for the purposes of allowing the parties to file exceptions to the hearing officer's report. This offer was declined by counsel for appellant. The Attorney General now contends that the refusal constitutes a waiver of the objection to the procedure employed by the Commissioner in this case. Under the circumstances existing, *i.e.* the lengthy hearings and the period of time elapsing between the filing of charges and the action of the State Board of Education, we see no point in becoming involved in a procedural predicament. We have elected to consider the arguments raised by appellant and the other parties on appeal as objections to the hearing officer's report, and have undertaken to review the entire record and that report in light of the arguments raised. We adopt this procedure in this case because of the public nature of the question involved and the desire of all parties to bring an early termination to these proceedings. We trust that in the future the Commissioner will observe the provisions of *N.J.S.A.* 52:14B-1 *et seq.*

It is our conclusion that the fact of delivery of the orientation day speech by appellant, considering its content, was sufficient in itself to warrant her dismissal from employment by the school district of Brick Township. And while we affirm the decision of the State Board of Education insofar as it affirmed the allegations of the Commissioner, we find that the sustaining of the additional charges by the Commissioner and the State Board serve to strengthen the basic conclusion that appellant's irresponsible conduct on September 1, 1971 rendered her unfit to continue as a faculty member of the Brick Township School System.

Throughout appellant's arguments for reversal, two basic misconceptions exist. The first, that the local Board of Education could not prove that any action by her had any significant effect on the school system in that not a single teacher gave up teaching as a result of any action taken by her, not a single person was induced not to apply for a teaching position in the system as a result of any action taken by her, and not a single student was in any way influenced by any action taken by her. The second is that the conduct complained of must be considered in the context of a struggle by her seeking adjustment of the conduct of "Boards of Education, Superintendents of Schools and other administrative personnel" to the role which the collective bargaining agents of their teachers have by law been authorized and obligated to assume. We believe both of these basic assumptions exhibit a misconception of the role of a teacher

in a school district and the role of a teacher as a negotiator for collective bargaining rights for school district employees. In any event, the issue before us is the conduct of appellant as an individual employee of the Brick Township School District.

Appellant's first main argument is that the Commissioner overlooked the relationship between Brick Township Board of Education and the Brick Township Education Association of which appellant was president prior to the orientation day exercises. She contends that the speech which she delivered at those exercises was nothing more than a "culmination of frustration and provocation caused by the failure of the Board and Superintendent to live up to their legal responsibilities." Examples of this failure are said to be demonstrated by the administration permitting 83 days to elapse without any attempts at collective bargaining with the Education Association. Assuming for the sake of argument, that these allegations are true, and we observe that the evidence does point to a certain amount of truculence to negotiate on the part of the Board, we cannot conclude that the situation gave the right to appellant to resort to abusive rhetoric contained in the orientation day speech. We cannot conceive of any legitimate excuse for such unprofessional conduct. Appellant's attempt to cloud the issue by urging that she was legally bound as president of the association to represent its "rank and file" vigorously and with good faith is a non sequitur. Labor negotiations are not the subject matter of these proceedings.

The fact that appellant was the president of the education association did not give her leave or power to resort to the remarks which she did. *Puentes v. Bd. of Education of Union Free School District No. 21 of Town of Bethpage*, 302 N.Y.S. 2d 824, 826, 250 N.E. 2d 232, motion for reargument dismissed 305 N.Y.S. 2d 148, 252 N.E. 2d 628 (Ct. of Appeals 1969). Indeed, it should be fairly apparent that efficient leadership would eschew a public attack such as that contained in the complained of speech. If in fact the administration of the school district improperly conducted its relationships with the teachers' association in the area of collective bargaining, that fact in itself cannot be held to justify improper conduct by the teachers or their representatives. A civilized society expects one who believes himself wronged to resort to legal channels in seeking redress and not to resort to trial by battle. It is in this connection that we should also observe that the question of the truth or falsity of the claims made in the speech by appellant are not in reality the issue before us; rather, we are concerned with the timing and the reckless, intemperate nature of the deliverance.

One final observation should be made with respect to the orientation speech and the charges arising out of it. The hearing examiner found that charge 16 was unproven and, therefore, required no defense. That charge related to the apology purportedly made by appellant on September 7, 1971 for her orientation speech. The Board charged that the apology was insincere, basing its claim on subsequent remarks of appellant, as well as the fact that she caused to have copies of the speech distributed at the time her apology was delivered. While the Commissioner never explicitly indicated that he accepted the recommendation of the hearing officer that charge 16 be dismissed, we deem this to be irrelevant in review of our conclusion that the speech as composed

should never have been delivered at the orientation meeting or in public at any other time. It is our opinion that any apology under the circumstances could not have served to rectify the situation created solely by appellant by her exercise of poor judgment in making the speech in the first place.

Appellant's next argument is that she never usurped any essential function of the Board of Education. This argument relates to the matters described in charges 10A and 10C. It will be recalled that the Superintendent of Schools had circulated a questionnaire to the tenured faculty seeking to learn their individual intentions with respect to returning to employment in the ensuing year. Appellant sent a notice to those faculty members urging them not to comply with the superintendent's request because the faculty should not do anything that would make the Board's job any easier. The Commissioner found this act of appellant's to have been potentially disruptive of the school district. Appellant now argues in effect that it was beyond the power of the Commissioner to sustain these charges since the superintendent is nowhere given "legal warrant" for the action which he took in soliciting information with respect to teacher return. It is argued that there is no specific statutory authority for this sort of procedure. The argument is clearly frivolous. As a matter of common sense and prudence, a superintendent would take such action to find out just how many teachers he would have in the coming year and how many new teachers he would have to seek to fill vacancies that will be created. The authority to circulate such a questionnaire is implicit in the duties of the office of superintendent. On the other hand, appellant had absolutely no right as an individual teacher, or as a self-styled labor leader, to adopt the obstructionist attitude that she did in encouraging the faculty not to respond. We agree with the Commissioner that her irresponsible act was potentially dangerous to the entire school district. That nothing came of her attempts is irrelevant; although we find it significant that the faculty evidenced their maturity by ignoring appellant's suggestion.

Appellant also contends that the Commissioner by his determinations invalidly thrusts upon her a duty and burden for which there is no basis in law. This argument arises out of the Commissioner's conclusion in which he states:

\*\*\* The proofs herein provide little reason to believe that respondent has, in the past, or could in the future, be seriously interested in aiding the Brick Township Board to provide the "thorough and efficient" school system required by Constitutional prescription.

This conclusion is questioned principally because, it is argued, the Commissioner gives no authority, either statutory or case law, for this requirement. It is claimed that the Commissioner has concocted some kind of duty which is new and novel and which would raise grave constitutional questions if upheld. We see no constitutional difficulty with the Commissioner's conclusion, which, incidentally, appellant argues out of context. The answer is pure and simple: A teacher is something more than a classroom automaton. A teacher is a professional who has by education and training obviously dedicated himself or herself to the education of youth. A teacher is expected to exhibit loyalty to the district in which he or she is employed and to cooperate with the administration

in seeking the educational goal. Appellant would relegate a teacher to a “rank and file” member of an organization who seeks some communal goal of self-aggrandizement. It is the individuality that each teacher brings to the educational scheme that contributes to educational success; that individuality, however, must be sublimated to the educational goal. A teacher is expected to show a reasonable respect for the authority of his or her employer and to maintain a civility commensurate with his or her professional status. All of this we find to be implicit in the Commissioner’s quoted conclusion. Appellant’s resort to billingsgate, and other questionable conduct found by the Commissioner, tends to show that she has failed to meet even the minimum professional standards expected of her. We do not suggest that any teacher may not legally or constitutionally believe that a board of education or a superintendent of schools is not carrying out their functions properly, and may not speak out publicly with respect to such belief, or resort to political activities to defeat the members of such a board of education. These are rights which need not be emphasized since they are inherent in our democratic process. Indeed the failure to exercise such rights, on proper occasion, might well constitute unprofessional conduct. What we do suggest is that the exercise of these rights be accomplished professionally.

Appellant’s final argument dealing with the Commissioner’s findings is that they deprive her of her constitutional rights and liberties. The argument is premised on the observation that “it is commonplace that teachers do not forfeit their constitutional rights merely because they are teachers.” We agree. But we observe at the outset of this discussion that neither the constitutional right of a teacher to speak freely on public issues nor the statutory right of school employees to bargain collectively for their own welfare, will override the basic obligation of an employee to the employer. Free speech and collective bargaining rights do not endow a teacher as a school district employee, with a license to vilify superiors publicly. The employer-employee relationship restrains the right of the employee to the extent reasonably necessary to retain that harmony and loyalty which is necessary to the efficient and successful operation of the educational system. *Breen v. Larson College*, 137 Conn. 152, 75 A.2d 39 (1950); cf. *Marchitto v. Central R. Co. of N.J.*, 9 N.J. 456 (1952).

In advancing her constitutional argument, appellant relies chiefly on *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, the teacher had written a letter to the editor of a local newspaper criticizing the manner in which his board of education and superintendent of schools had handled past proposals to raise new revenue from the public for defendant school system. Essentially, the letter complained that too much money was being sought for the athletic program, and not enough money for teachers’ salaries. The letter also charged the superintendent of schools with attempting to prevent teachers in the district from imposing or criticizing the proposed bond issue. The teacher also charged that the board of education was “trying to push tax supported athletics down our throats,” and that certain actions of the superintendent created a climate of “totalitarianism” in which teachers lived at the high school.

The Supreme Court held that the letter did not justify the teacher’s dismissal, and that its contents and publication were protected by the First

Amendment. The court observed:

At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

In concluding that the balance there rested on the side of the teacher, the court noted, among other things, that the issues discussed in the letter were matters of public importance and concern; and that the public interest in having free debate on such matters permitted the teacher to make statements thereon—even if false, so long as the false statements were not made knowingly or recklessly (see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), or the matters were so within the teacher's presumed knowledge of school affairs that his statements would produce a harmful impact on the public. In reaching its determination, the court also made another significant observation:

The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among co-workers is presented here. [391 U.S., at 569-570]

*Pickering* is clearly distinguishable from the instant controversy. There, the letter confined itself to public issues and did not contain insulting and vituperative language, or an attack on the character of superiors. Unquestionably, as we have noted before, appellant had the right to speak out publicly on such matters of public interest as the policy of the Board of Education with respect to textbooks, the hiring practices with respect to black teachers and the lack of due process accorded to non-tenured teachers. We find, however, that appellant chose to ignore those issues as a matter of public concern and distorted them into a vehicle to bring scorn and abuse on the school administration in general and the superintendent of schools in particular. In doing so, she forfeited her claim to First Amendment protection. See *Duke v. North Texas State University*, 469 F.2d 829 (5 Cir. 1972), cert. den. 412 U.S. 932 (1973).

We also reject appellant's argument that our affirmance of the determination of the Commissioner and the decision of the State Board of Education with respect to the charges made against her will serve to "chill" the association rights of teachers as well as the rights of teachers freely to speak and assemble. An aggressive, contentious and, perhaps, controversial teacher working within the structure of a school district as a faculty member and/or as an education association representative may confidently look to the First Amendment as a protective shield for his or her activities; however, an intemperate, venomous employee, be he or she a teacher or otherwise, cannot



claim constitutional protection when he or she attacks his or her superiors in public in brawling terms for no purpose discernible other than to satisfy some personal need.

Our review of the entire record satisfies us that the findings of fact made by the hearing officer and adopted by the Commissioner of Education are supported by substantial evidence. We also find that the conclusion drawn by the Commissioner, based on the record and the hearing officer's report find substantial support in that record.

Appellant was suspended from her employment effective on September 8, 1971. On February 10, 1972, Chapter 435, Sec. 2 of the Laws of 1971 became effective. That statute, now embodied in *N.J.S.A. 18A:6-14* provides that if the determination of charges pending against any employee of a board of education is not made by the Commissioner within 120 calendar days after certification of the charges, then such person shall be paid beginning on the 121st day until such determination is made.

The Commissioner determined that *N.J.S.A. 18A:6-14*, as amended, applied retroactively and ordered that appellant be paid her full salary from the 121st day following her suspension until the date of his determination. The State Board of Education reversed in a five to four vote, concluding that the statute should not be given retroactive effect. We agree that the Commissioner's determination was correct and reverse the finding of the State Board in this respect. See the recent opinion of this court in *In the Matter of the Tenure Hearing of Paula M. Grossman, A/K/A Paul M. Grossman, School District of the Township of Bernards, Somerset County*, 127 *N.J. Super.* 13 (App. Div. 1974).

We affirm the decision of the State Board of Education, filed April 4, 1973, insofar as it affirms the decision of the Commissioner of Education of July 19, 1972, dismissing appellant from her employment with the Brick Township School System. The decision of the State Board insofar as it reverses the decision of the Commissioner to grant appellant compensation at her regular salary pursuant to the provisions of *N.J.S.A. 18A:6-14*, as amended, and directing that appellant be paid at her full salary, in accordance with the statute, by the Brick Township Board of Education from a date commencing 121 days after her suspension until July 19, 1972, the date of the decision of the Commissioner of Education, is reversed.



**Kathleen M. Pietrunti,**

*Respondent-Petitioner,*

*vs.*

**Board of Education of Brick Township,**

*Petitioner-Respondent.*

**SUPREME COURT OF NEW JERSEY**

On certification to the Appellate Division.

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 22nd day of July, 1974.

**Board of Education of the City of Plainfield,**

*Appellant,*

*v.*

**Boards of Education of the Borough of Dunellen, Township of Edison,  
Township of Piscataway, Borough of South Plainfield, Middlesex County;  
Boards of Education of the Borough of North Plainfield,  
Borough of Watchung, Township of Green Brook, Somerset County;  
Board of Education of Scotch Plains-Fanwood, Union County,**

*Cross-Appellants.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, May 12, 1972 and March 28, 1973

For the Appellant, King and King, Esqs. (Victor E.D. King, Esq., of Counsel)

For the Cross-Appellant, Dunellen, Johnson and Johnson (Edward J. Johnson, Jr., Esq., of Counsel)

For the Cross-Appellant, Edison, R. Joseph Ferenczi, Esq.

For the Cross-Appellant, South Plainfield, Wilentz, Goldman & Spitzer

(Robert J. Cirafesi, Esq., of Counsel)

For the Cross-Appellant, Piscataway, Rubin and Lerner, Esqs. (Frank J. Rubin, Esq., of Counsel)

For the Cross-Appellant, North Plainfield, Reid and Vogel (Charles A. Reid, Jr., Esq., of Counsel)

For the Cross-Appellant, Watchung, Buttermore and Mooney (Robert J.T. Mooney, Esq., of Counsel)

For the Cross-Appellant, Green Brook, Harman R. Clark, Jr., Esq.

For the Cross-Appellant, Scotch Plains-Fanwood, Johnstone & O'Dwyer, Esqs. (Jeremiah D. O'Dwyer, Esq., of Counsel)

The State Board of Education adopts the Report and Recommendation of the Law Committee and holds that a decision on the Motions to Dismiss be denied without prejudice until after the pre-trial conference.

January 9, 1974

**In the Matter of the Tenure Hearing of Ronald Puorro,  
School District of the Township of Hillside, Union County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, August 20, 1974

For the Complainant Board of Education, Goldhor, Meskin & Ziegler (Sanford A. Meskin, Esq., of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

The application for stay of the decision of the Commissioner of Education is denied.

November 6, 1974

**In the Matter of Duncan Raymond and the Board of Education  
of the Township of Montgomery, Somerset County.**

**SUPREME COURT OF NEW JERSEY**

Decided by the Commissioner of Education, April 22, 1971

Decided by the State Board of Education, April 12, 1972

Decided by New Jersey Superior Court, March 29, 1973

On certification to the Appellate Division.

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 16th day of January, 1974.

**Joan Sherman,**

*Petitioner-Appellant,*

*v.*

**Malcolm Conner, individually and as Acting Superintendent of Schools  
of the Borough of Spotswood, and Board of Education  
of the Borough of Spotswood, Middlesex County,**

*Respondents-Appellees.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, January 26, 1973

For the Petitioner-Appellant, Mandel, Wysoker, Sherman, Glassner,  
Weingartner & Feingold (Jack Wysoker, Esq., of Counsel)

For the Respondent-Appellee Borough of Spotswood Board of Education,  
Golden and Shore (Philip H. Shore, Esq., of Counsel)

For the Respondent-Appellee Malcolm Conner, Zager, Fuchs, Leckstein &  
Kauff (Abraham J. Zager, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons  
expressed therein.

March 6, 1974

Pending before Superior Court of New Jersey

**In the Matter of the Application of the Board of Education  
of the Borough of South River for the Termination of the  
Sending-Receiving Relationship with the School District  
of Spotswood, Middlesex County.**

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DECISION**

Decided by the Commissioner of Education, December 14, 1970

Remanded by the State Board of Education, September 8, 1971

Decision on Remand by the Commissioner of Education, June 1, 1972

Decided by the State Board of Education, November 1, 1972

Argued January 21, 1974 — Decided January 21, 1974

Before Judge Leonard.

This matter having been duly presented to the court on the court's own motion, it is hereby ordered that the Motion to Dismiss Appeal is granted.

**Board of Education of the Toms River Regional School District and  
Township of Dover,**

*Petitioners-Appellants,*

*v.*

**Board of Education of the Borough of Lavallette and the Borough of  
Lavallette, Ocean County,**

*Respondents-Appellees.*

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, December 7, 1973

For the Petitioners-Appellants, Toms River Board, Hering, Grasso, Gelzer  
& Kelaher (Milton H. Gelzer, Esq., of Counsel)

For the Petitioners-Appellants, Dover Township, Laurence Hecker, Esq.

For the Respondents-Appellees, Lavallette Board, William Miller, Esq.

For the Respondents-Appellees, Lavallette Borough, Sim, Sinn, Gunning,  
Serpentelli & Fitzsimmons (Eugene D. Serpentelli, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons  
expressed therein.

June 5, 1974

**In the Matter of the Annual School Election Held in the  
School District of the Borough of Watchung and in the  
Watchung Hills Regional High School District, Somerset County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, June 29, 1973

For the Petitioner-Appellant, Robert J. Cornell, *Pro Se*

For the Respondent-Appellee, Buttermore and Mooney, (Robert J. T. Mooney, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons set forth in the State Board of Education's decision *In the Matter of the Annual School Elections Held in the School District of the City of Lambertville and in the South Hunterdon Regional High School District, Hunterdon County*, decided by the Commissioner of Education June 29, 1973.

March 6, 1974

Pending before Superior Court of New Jersey

Nancy Weller,

*Petitioner-Appellant,*

v.

Board of Education of the Borough of Verona, Essex County,

*Respondent-Appellee.*

#### STATE BOARD OF EDUCATION

#### DECISION

Decided by the Commissioner of Education, October 31, 1973

For the Petitioner-Appellant, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent-Appellee, Booth, Buermann & Bate (George H. Buermann, Esq., of Counsel)

The appeal from the decision of the Commissioner of Education is dismissed for lack of jurisdiction. The primary issue, herein, does not properly lie within the jurisdiction of the Commissioner of Education, nor the State Board of Education. The nature of this dispute is not one which calls for the educational expertise of the Commissioner for his determination of a dispute arising under the school laws. The matter is an arbitrable matter, clearly related to the terms and conditions of employment within the contemplation of the New Jersey Employer-Employee Relations Act.

November 6, 1974

**Westwood Education Association,**

*Plaintiff-Appellant,*

*v.*

**Board of Education of the Westwood Regional School District,  
a body corporate and politic of the State of New Jersey,**

*Defendant-Respondent.*

**SUPERIOR COURT OF NEW JERSEY**

**APPELLATE DIVISION**

Argued June 10, 1974 – Decided June 21, 1974

Before Judges Leonard, Allcorn and Crahay.

On appeal from Superior Court, Chancery Division, Bergen County.

Mr. Theodore M. Simon argued the cause for appellant (Messrs. Goldberg & Simon, attorneys).

Mr. John H. Jobes argued the cause for respondent (Mr. John J. Sullivan, attorney).

**PER CURIAM**

Essentially for the reasons stated by the trial judge in his oral opinion, we affirm his determination that a local board of education, pursuant to *N.J.S.A.* 18A:29-14, has sole discretion to withhold a member's salary increment for inefficiency or other good cause and that this right is not negotiable under the provisions of *N.J.S.A.* 34:13A-5.3 See *Assoc. of N.J. State Col. Fac. v. Dungan*, 64 *N.J.* 333 (1974).

Appellant, relying upon previous decisions of the Commissioner of Education, contends that *N.J.S.A.* 18A:29-14 has no application to salary schedules in excess of statutory minima, unless the local board first adopts a salary policy pertaining to such increments. We find no basis, statutory or otherwise, for the Commissioner's limiting construction and hold this contention to be without merit. *cf. Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (*App. Div.* 1960).

Finally we call attention to the views expressed in *Dunellen Bd. of Education v. Dunellen Education Association*, 64 *N.J.* 17, 31-32 (1973) and reiterated in *Dungan, supra*, at 356 that some "timely voluntary discussions" of the subject matter herein involved between the parties is desirable.

Affirmed.



**In the Matter of the Tenure Hearing of Sally Williams,  
School District of Union Township, Union County.**

**STATE BOARD OF EDUCATION**

**DECISION**

Decided by the Commissioner of Education, October 10, 1973

For the Complainant-Appellee Board of Education, Simone and Schwartz  
(Howard Schwartz, Esq., of Counsel)

For the Respondent-Appellant, Rothbard, Harris & Oxfeld (Emil Oxfeld,  
Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons  
expressed therein.

Mr. Calvin J. Hurd took no part in the decision of this case.

February 6, 1974

Pending before Superior Court of New Jersey

**Marilyn Winston and South Plainfield Education Association,**

*Plaintiffs-Respondents,*

*v.*

**Board of Education of the Borough of South Plainfield,**

*Defendant-Appellant,*

**and State Board of Education,**

*Appellant.*

**SUPREME COURT OF NEW JERSEY**

Decided by the Commissioner of Education, June 15, 1972

Decided by the State Board of Education, November 1, 1972

Decided by the New Jersey Superior Court, August 9, 1973

Argued February 20, 1974. Decided May 7, 1974

On appeal from the Appellate Division.

*Mr. Robert J. Cirafesi* argued the cause for the appellant Board of  
Education to the Borough of South Plainfield.

*Mr. Theodore A. Winard*, Assistant Attorney General, argued the cause for  
the appellant State Board of Education (*Mr. William F. Hyland*, Attorney

General, attorney; *Mr. Stephen L. Skillman*, Assistant Attorney General, of counsel; *Mrs. Virginia Long Annich*, Deputy Attorney General, on the brief).

*Mr. Abraham L. Friedman* argued the cause for the respondents (*Messrs. Rothbard, Harris & Oxfeld*, attorneys; *Mr. Emil Oxfeld*, of counsel).

PER CURIAM:

The Appellate Division, in a comprehensive opinion reported at 125 *N.J. Super.* 131 (1973), reversed and remanded to the Commissioner of Education for further proceedings. We agree that the matter should go back to the Commissioner for a plenary hearing and therefore affirm.

The plaintiff Marilyn Winston was a South Plainfield schoolteacher who failed to receive her fourth annual contract and was thereby denied tenure. She unsuccessfully pursued the internal grievance procedures available to her under the collective agreement between the plaintiff Education Association and the respondent Board of Education and ultimately filed a petition with the State Commissioner of Education under *N.J.S.A.* 18A:6-9. The Education Association joined her as a petitioner and they alleged that the determination not to renew her contract was made in retaliation for her exercise of the right to free speech and was therefore constitutionally impermissible. See *Pickering v. Board of Education*, 391 U.S. 563, 20 *L.Ed.2d* 811 (1968); *Perry v. Sindermann*, 408 U.S. 593, 33 *L. Ed.2d* 570 (1972); Van Alstyne, "The Constitutional Rights of Teachers and Professors," 1970 *Duke L.J.* 841.

The petition, which was duly verified, set forth specifics in support of her assertion that she was denied her rights under the federal constitution. Thus, as the Appellate Division summarized it (125 *N.J. Super.* at 144), she set forth instances and details indicating that she had "questioned policy decisions, made suggestions and recommendations, sought information or reasons for certain administrative decisions, expressed criticisms among teachers concerning certain administrative directives, and the like." She also set forth certain remarks which appeared in her supervisor's evaluation of her in support of her position that she was not retained because of public remarks by her which she asserts were constitutionally protected.

The Board of Education moved before the Commissioner for a dismissal of the petition. The motion was heard by a hearing examiner who submitted his report to the Commissioner. Thereafter the Commissioner handed down his decision which dismissed the petition. He expressed the view that the Association had no standing but recognized that Mrs. Winston did have standing. He further recognized that it would be constitutionally impermissible to refuse to reengage a nontenured teacher in retaliation for the exercise of her right to free speech but pointed out that a petition so grounded must contain more than mere "naked allegations" to withstand a motion to dismiss, citing his earlier decision in *Ruch v. Board of Education of Greater Egg Harbor Regional High School District, Atlantic County*, 1968 S.L.D. 7.

The Commissioner's dismissal of the petition was appealed to the State

Board of Education which, after receiving the report of its Law Committee, affirmed the Commissioner's decision on the basis of his opinion. On the plaintiffs' appeal to the Appellate Division they advanced various contentions which were dealt with fully in its opinion under three points. We agree with its holding under the first point that the plaintiffs should have been afforded timely opportunity to examine not only the report of the Commissioner's hearing examiner but also the report of the Law Committee of the State Board. 125 *N.J. Super.* at 137-140; *In re Masiello*, 25 *N.J.* 590, 605 (1958); *Quinlan v. Bd. of Ed. of North Bergen Tp.*, 73 *N.J. Super.* 40, 53 (*App. Div.* 1962); cf. *Fifth St. Pier Corp. v. Hoboken*, 22 *N.J.* 326, 337-339 (1956).

We also agree with the Appellate Division's holding under the second point that, in view of the special circumstances presented, the Education Association should have been permitted to continue as a copetitioner along with Mrs. Winston. 125 *N.J. Super.* at 140-142. Practically the matter is of little moment since Mrs. Winston and the Education Association have at all times been represented by the same attorney who has properly confined his contentions to those fully available to Mrs. Winston. The Attorney General in his brief on behalf of the State Board seems concerned that the Appellate Division's holding on the standing issue might be construed to permit the Education Association to go beyond the issues available to Mrs. Winston. We find no basis for his concern.

The third and final point dealt with by the Appellate Division related to the Commissioner's position that the petition contained nothing more than "naked allegations" and was therefore subject to dismissal on its face. The Appellate Division found much beyond "bare assertions" in the verified petition and enough to call for the taking of testimony before the Commissioner. 125 *N.J. Super.* at 144-145. We agree and consider the Appellate Division's approach to have been compatible with settled procedural philosophies in the treatment of motions for dismissal and summary judgment. See *Ridgefield Park v. Bergen Co. Bd. of Taxation*, 31 *N.J.* 420, 432 (1960); *Ruvolo v. American Cas. Co.*, 39 *N.J.* 490, 499 (1963).

On the remand to the Commissioner the Board of Education seeks guidelines beyond those found in the opinion of the Appellate Division. However, we consider that binding expressions should not be made on the meagre record before us but should await a record embodying oral testimony which may include not only the words spoken by the teacher but also descriptions of the accompanying colorations, the circumstances and the other pertinent factors. In the meantime the Commissioner will of course have the full benefit of opinions in the federal cases which are being handed down with increased frequency. See, e.g., *Pickering v. Board of Education*, *supra*, 391 *U.S.* 563, 20 *L.Ed.2d* 811; *Perry v. Sindermann*, *supra*, 408 *U.S.* 593, 33 *L.Ed.2d* 570; *Smith v. Losee*, 485 *F.2d* 334 (10 *Cir.* 1973), petition for *certiorari* pending; *Gieringer v. Center School District*, 477 *F.2d* 1164 (8 *Cir.*), *cert. denied*, *U.S.* , 38 *L.Ed.2d* 66 (1973); *Hetrick v. Martin*, 480 *F.2d* 705 (6 *Cir.*), *cert. denied*, *U.S.* , 38 *L.Ed.2d* 482 (1973); *Clark v. Holmes*, 474 *F.2d* 928 (7 *Cir.* 1972), *cert. denied*, 411 *U.S.* 972, 36 *L.Ed.2d* 695 (1973); *Chitwood v. Feaster*, 468 *F.2d* 359 (4 *Cir.* 1972); *Fluker v. Alabama State Board of Education*, 441 *F.2d* 201 (5 *Cir.* 1971); *Jones v. Battles*, 315 *F.Supp.* 601

(*D.Conn.* 1970); cf. *Arnette v. Kennedy*, *U.S.* , *L.Ed.2d* (42 *U.S.L.W.* 4513 (*U.S.* April 16, 1974)).

In *Pickering*, *supra*, a teacher was dismissed because he wrote a letter to a local newspaper criticizing the manner in which the school superintendent had handled past proposals to raise school revenues; the Supreme Court held that, in the absence of proof of false statements knowingly and recklessly made, the teacher's exercise of his right to speak on issues of public importance may not furnish the basis for dismissal. 391 *U.S.* at 574-575, 20 *L.Ed.2d* at 821. In *Perry*, *supra*, a nontenured teacher alleged that his contract was not renewed because he testified before the Legislature in support of a change opposed by the Regents. The Supreme Court reversed a summary judgment against him, holding that if he proved his allegation he would be entitled to be rehired. 408 *U.S.* at 598, 33 *L. Ed.2d* at 578. The holdings in *Pickering* and *Perry* have in some instances been applied to protect teachers' expressions though made not to the general public but at meetings of faculty, school administrators, etc. See *Smith v. Losee*, *supra*, 485 *F.2d* 334; *Gieringer v. Center School District*, *supra*, 477 *F.2d* 1164.

*Pickering* and *Perry* expressly recognize, as do all of the other cited federal decisions, that the teacher's right to speak is not an absolute one but may be limited for the protection of the State's legitimate interests. As the Court put it in *Pickering*, the problem is to arrive at a proper balance between the teacher's interests in speaking freely and the State's interests in promoting the efficiency of its educational system or other public service. 391 *U.S.* at 568, 20 *L.Ed.2d* at 817. In *Clark v. Holmes*, *supra*, 474 *F.2d* 928 the court noted that while academic freedom is undoubtedly a safeguarded right it is not a license for uncontrolled expressions which are internally destructive of the proper functioning of the institution. It noted further that *Pickering* itself suggested that "certain legitimate interests of the State may limit a teacher's right to say what he pleases: for example, (1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence." 474 *F.2d* at 931.

In *Chitwood v. Feaster*, *supra*, the contracts of several nontenured college teachers were not renewed. They filed a complaint alleging, *inter alia*, that their contracts were not renewed in retaliation for their participation in protest movements and their public statements critical of the college and its officials. On the basis of the affidavits before it, the federal district court entered summary judgment against the teachers but this was vacated by the Court of Appeals which remanded the matter for trial. Its opinion contained the following paragraph which may perhaps be of some aid to the Commissioner in his administrative efforts to achieve a proper balance between the acknowledged interests of academic freedom and the needs of institutional efficiency:

Some of the affidavits refer to what seems to be bickering and running disputes with the department heads. We do not intend to suggest that that

kind of speech is protected by the First Amendment in the sense that it may not be considered in connection with the termination of the employment relationship. A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized. 468 *F.2d* at 360-361.

The judgment of the Appellate Division is Affirmed.

Stipulation of dismissal with prejudice agreed to by parties, November 1, 1974.

**Frank W. Zimmermann et al.,**

*Petitioner-Appellant,*

*v.*

**Board of Education of the Southern Regional High School District,  
Ocean County,**

*Respondent-Appellee.*

#### **STATE BOARD OF EDUCATION**

#### **DECISION**

Decided by the Commissioner of Education, December 28, 1973

For the Petitioner-Appellant, Frank W. Zimmermann, *Pro Se*

For the Respondent-Appellee, Berry, Summerill, Rinck & Berry (Jane Rinck, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

June 26, 1974

Pending before Superior Court of New Jersey

State of New Jersey  
Department of Education  
225 West State Street  
Trenton, N.J. 08625